

**Index to compilation of speeches delivered by  
the Hon. J J Spigelman, AC, Chief Justice of NSW in 2007**

<b>Date speech delivered</b>	<b>Description</b>	<b>Page number reference within pdf compilation</b>
14 December 2007	Address on the Retirement of the Honourable Justice G F K Santow AO	Page 2 of 175
14 November 2007	Lions in Conflict: Ellesmere, Bacon And Coke Treason and Unity	Page 9 of 175
24 October 2007	The Significance of the Integrity System	Page 41 of 175
9 October 2007	Commercial Litigation and Arbitration: New Challenges	Page 48 of 175
5 October 2007	A Guide to Sentencing	Page 56 of 175
31 August 2007	Judicial Appointments and Judicial Independence	Page 59 of 175
10 August 2007	International Commercial Arbitration Conference address	Page 64 of 175
5 July 2007	Address to the Australian Association Of Crown Prosecutors	Page 69 of 175
7 June 2007	International Commercial Litigation: An Asian Perspective	Page 73 of 175
26 May 2007	The Foundation of Western Shanghai	Page 92 of 175
30 April 2007	Judicial Independence: Purposes and Threats	Page 111 of 175
24 March 2007	Access to Justice and Access to Lawyers	Page 122 of 175
21 March 2007	From Text to Context: Contemporary Contractual Interpretation	Page 133 of 175
16 March 2007	Address to the Conference Celebrating 80 Years of the Australian Law Journal	Page 151 of 175
28 February 2007	Address on the Occasion of the Retirement of the Honourable Justice John Bryson	Page 160 of 175
29 January 2007	Opening of Law Term Dinner, 2007	Page 163 of 175
2007	Foreward to R Annable, A Setting for Justice: Building for the Supreme Court of New South Wales, Sydney, UNSW Press, 2007	Page 169 of 175
2007	Foreward to Statutory Interpretation: Principles And Pragmatism For A New Age, (Monograph), Sydney, Judicial Commission Of New South Wales, 2007	Page 171 of 175
2007	Foreward to Philip Ayres, Owen Dixon, Carlton, The Miegunyah Press, 2007	Page 174 of 175

**ADDRESS ON THE RETIREMENT  
OF THE HONOURABLE JUSTICE G F K SANTOW AO  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
BANCO COURT  
SYDNEY 14 DECEMBER 2007**

We commemorate today over 14 years of service as a judge of this Court by the Honourable Kim Santow AO, more than eight years as a judge of the Equity Division and six years as a judge of the Court of Appeal. You were only the second solicitor appointed as a judge of this Court and swiftly overcame the lingering prejudices of your new former barrister colleagues by reason of the depth of your legal learning, your personal charm and your capacity for hard work.

As a trial judge, and perhaps even more so as an appeal judge, your Honour has dealt efficiently and fairly with the full range of this Court's jurisdiction. Your judgments have made significant contributions to the development of the law. Your extra curricular writings on legal matters have made significant contributions to the development of public policy and to the law. This has occurred over a broad field.

It is appropriate, nevertheless, to emphasise one contribution which your Honour has made of a character which simply could not have been made by any other person. You brought to the realm of commercial disputation a breadth and depth of knowledge of the world of commerce that few judges of this Court have ever had. Over decades as one of the most accomplished commercial solicitors in Sydney you acquired an understanding of the interface between law and commerce, especially of its creative potential, which was rarely if ever available to barristers, whose primary source of knowledge in these respects is cleaning up after a disaster.

From the time that your Honour assumed responsibility for the management of corporations law cases, this Court established itself as a pre-eminent Court in the corporate field. Supported by other judges, your Honour brought a unique combination of talent and experience to ensuring that the Court resolves disputes in corporations law at the highest quality of decision-making and with a full recognition of the commercial realities underlying the disputes, both in terms of the need for speed and the determination of the result. It is, accordingly, appropriate to highlight the special contribution your Honour has made to the development of corporations law as a judge.

For many years, you were the author of more judgments reported in the Australian Corporations and Securities Reports than any other judge in Australia. Your judgments covered the full range of corporations law including statutory demands, preferences, the Court's remedial powers, selective capital reductions, valuation of minority interests, schemes of arrangement, including such high profile cases as Advance Bank, the NRMA and James Hardie. Your Honour's judgments are, and will remain, the leading judgments in many areas of corporate law, e.g. on the prohibition of collateral benefits in takeover bids, in which I was the unsuccessful counsel, and on the imposition of civil penalty and disqualification orders upon defaulting directors. Your judgments are, and will remain, frequently cited throughout Australia.

Many of these judgments called for the exercise of discretions and an understanding of the need to reconcile different interests in a practical and positive way, perhaps most notably in schemes of arrangement. In this regard your background as a commercial solicitor made you more likely to look for solutions to problems, rather than to act only as the umpire of a fight.

Your behaviour in Court, as both a trial and an appellate judge, was characterised by your patience with counsel and unrepresented

litigants and your determination that all parties should have their opportunity to state their case fully. Your judgments manifest careful attention to detail, no matter how complex the issue, and a dedication to answering all points that were raised in the case. On no occasion did your Honour sidestep or evade a difficult point. Throughout your career as a judge you appeared to relish the intellectual challenge of the law and managed always to muster that enthusiasm for some arcane technical point that only those who love the law can manage, like a mother who alone can see beauty in an ugly baby.

Throughout your career on the bench your Honour continued to serve the community in numerous capacities, particularly in education and the arts. Perhaps your most distinguished contribution was your period of over five years as the Chancellor of the University of Sydney. All of us on the Court came to admire your extraordinary capacity to continue with the full burden of an appellate judge as well as discharging the office of Chancellor, which itself came close to being a full time job. This was only achievable by redirecting your entitlement to leave in the Court to the tasks of the University. The physical and mental determination and capacity that you displayed throughout this period was a wonder to behold.

Of particular significance to that great institution of learning was the way in which you acted as a peacemaker after some years of fractious conflict on the Senate. Your personality, together with the extraordinary breadth of your intellectual interests, as well as your interpersonal and commercial skills, were put to full use in setting the University on a more stable and successful path.

Throughout this period your Honour continued to make contributions to the law and to this Court. You served on the Appeal Panel of the Takeover Tribunal, an institution, whose role has now happily been declared to be constitutionally valid, the very existence of which owed much to your advocacy of corporate law reform over the decades. Your work on the Tribunal laid down important practical principles for the swift resolution of disputes in a commercial context which requires pragmatism and expedition.

In this Court you served for five years on the Rules Committee and an overlapping five years on the Legal Practitioners Admission Board, both of which are of critical significance to the effective operation of the Court and of the profession.

You also served, almost throughout your period as a judge, on the Education Committee of the Court, to the activities of which you brought the breadth of your general knowledge and interests, together with the depth of your understanding of social, economic and political issues and of the arts. This contribution was invaluable, not least by introducing to the Court a wide range of international contacts, particularly in the law but not limited to the law, many of whom at your invitation came to address the Annual Conference of the Court to the delight and education of all of your colleagues. This included a number of the most senior judges from England but extended to a wide range of others, including Pierre Rykmans, Australia's pre-eminent Sinologist and Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts and her husband, the legally literate New York Times columnist, Anthony Lewis. They and others were introduced to us as your friends.

The intellectual curiosity, energy and sophistication of yourself and of your wife Lee, will be missed by us all. Together you have expanded all of our horizons. We will also miss the numerous personal kindnesses which your and Lee's generosity of spirit have provided to each of us over the years.

I cannot do justice, on an occasion such as this, to the numerous judgments, speeches and articles you have published over the years as a member of this Court, to which must be added your enormous output as Chancellor of the University of Sydney. Their breadth and depth stand as a testament to your intellectual powers.

I draw on one speech, which you gave shortly after your appointment as a judge, on the subject of “Transition to the Bench”. This speech, one of many subsequently published in the Australian Law Journal, was delivered to the Orientation Programme for judges from throughout Australia held in Sydney each year. You concluded a witty and learned address with the following: “May it be said of us, as of Lord Atkin: ‘Compassion and freedom from narrow prejudice was a quality which animated our work’.”

I have no doubt that the legal profession of this State, and your colleagues on the bench, are unanimous in joining with me to acknowledge that your work was indeed animated by compassion and that you never once manifested anything capable of description as narrow prejudice. On behalf of all of the members of the Court I thank you for your contribution to the law and to this Court and for enriching all of our lives.



**LIONS IN CONFLICT: ELLESMERE, BACON AND COKE**  
**TREASON AND UNITY**  
**SECOND ADDRESS TO THE ST THOMAS MORE SOCIETY**  
**BY THE HONOURABLE JAMES SPIGELMAN AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**SYDNEY, 14 NOVEMBER 2007**

When the seminary priest William Watson joined the long list of apprehensive Englishmen who travelled north to the Scottish court to inquire about King James' intentions if he became King of England, he received the same general blandishments of goodwill as other Catholic interlocutors. A leader of the Appellant faction that sought accommodation with the government of England, which actively encouraged the split in the Catholic community, Watson was one of the most vituperative critics of the Jesuits. Despite the fact that he had been imprisoned under Elizabeth five times – escaping three times – the Jesuits treated him as a collaborator.

Robert Persons, first commander of the Jesuit mission to England, who escaped when Edmund Campion was captured, returning to Rome, where he had great influence on the Vatican's policy towards England, deployed the same poisonous rhetoric as Watson in their debates. For example, referring to Watson's exaggerated squint, Persons wrote that he was "so wrong shapen and of so bad and blinking aspect that he looketh nine ways at once"<sup>1</sup>.

Supremely convinced of his own abilities, the arrogant Watson heard what he wanted to hear from the King of Scotland. James, he proclaimed on his return, would establish a new regime of religious tolerance. Many others were to suffer from such self-delusion. However James had firm, well-informed views about religion, developed over many years of study and of interaction with the fractious Scottish Kirk. He had set out his policy for Catholic priests in his secret correspondence with Robert Cecil, Elizabeth's key executive, before his accession:

"I [would not] wish to have their heads divided from their bodies, but ... I would be glad to have both their heads and bodies separate from this whole land, and safely transported beyond seas, where they may freely glut themselves upon their imagined gods".<sup>2</sup>

Of course he was telling Cecil what he wanted to hear too.

Elizabeth's religious legislation had imposed obligatory attendance at a Church of England parish and absence, known as recusancy, was punished by fines of, at first, a shilling but increased by later Acts to the crippling level of 20 pounds per month. James vacillated over enforcing the laws – i.e. defy Parliament – an assertion of executive power that would prove particularly controversial for the Stuart kings.

In 1608, when the religious confrontation had escalated, Rome would reveal that in 1599 James had written a letter to the Pope, signed in his own hand, indicating that conversion was a possibility. At that time James had feared that the Pope would excommunicate him in order to promote the claims of Isabella, the Infanta of Spain, to succeed Elizabeth. That plan, as James well knew, had been actively promoted by Jesuit leaders, notably Robert Persons, who wrote a book on Isabella's claim to the throne, a tract which, like other contemporary Jesuit tracts – including those found when the Jesuit seminary in Paris was raided after a deranged pupil had attempted to assassinate Henri IV of France – had the temerity to question the doctrine of the divine right of kings.

When revealed in 1608, James' 1599 letter was a great embarrassment. His Scottish secretary of 1599, by then enobled and living off the English purse like all the former members of the Scottish court, at first asserted that the letter had been sent on James' instructions but, eventually, accepted that it had been a frolic of his own. He had put the letter before James in a pile of correspondence which the King signed without reading. Suddenly, James recalled that precise occasion - he was anxious to go hunting - a feat of memory which James himself accurately characterised as a "miracle".<sup>3</sup>

James made his real opinions clear immediately after his accession was assured: "We'll not need the papists now", he proclaimed.<sup>4</sup>

In 1603 James had an ambitious agenda for which he would need the support of the anti-Catholic House of Commons. He was committed to making peace with Spain which, after detailed negotiations led by Cecil, was achieved in mid 1604. He was determined to resolve theological disputes between Anglicans and Puritans within the English church and presided over, indeed dominated and directed, the Hampton Court conference of January 1604 – "No bishop, no King" he twice told the Puritans, dismissively.<sup>5</sup> James, who had genuine intellectual interests, also instituted a new translation of the Bible, the most important cultural contribution ever made by a British monarch. He was also determined to formally unite the kingdoms of England and Scotland into a single polity under a single sovereign.

Perhaps most important of all, he needed the Commons to provide the finances for his spendthrift court, to the demands of which, in its hothouse, homosexually charged atmosphere, he almost invariably capitulated.

The headstrong Watson, who had widely disseminated his own misinterpretation of James's intentions, chose to express his frustration and humiliation by organising a ludicrous, bordering on the imbecilic, conspiracy to kidnap the new King and imprison him until he declared toleration of Catholic religious practice. Tipped off by the Jesuit John Gerard and by George Blackwell, the Jesuit-aligned Archpriest – a unique office created, in the absence of a bishop, as the nominal head of the underground English Catholic church – the authorities quickly arrested the group of amateurish malcontents, including George Brooke, younger brother of Lord Cobham, one of the richest men in England.

This family link would prove disastrous, not only for Cobham, but also for his acquaintance, the now eclipsed Elizabethan favourite Sir Walter Raleigh. The spinmeisters of the day would label the Watson led conspiracy with the dismissive title: “the Bye Plot”. The almost certainly concocted, treasonous conspiracy involving Raleigh was labelled: “the Main Plot”.

## **RALEIGH**

James had good reason to dislike Raleigh. For a start he hated tobacco, which Raleigh had introduced to England. James had denounced it in a scathing, prescient attack entitled *A Counter-Blaste to Tobacco*. He concluded: “Smoking was a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless”.<sup>6</sup>

James expressed no such sentiments about Raleigh's other introduction, the potato, perhaps because the potato was then prized as an aphrodisiac, for reasons that, mercifully, have been lost. Further, Raleigh had been a leader of the war-with-Spain faction, indeed one of its most brutal and successful practitioners. James intended to be, and became, a peacemaker, even at the expense of piracy, one of England's most profitable industries.

Raleigh was an upstart parvenu, the son of a poor tenant farmer, whose swagger was as infuriating as his intelligence. His flamboyance and his arrogance were treated with scorn by his rivals and contempt by his social superiors. Some of them even expressed jealousy about Raleigh's beard, which was naturally curly, while they had to apply hot irons to conform to the contemporary fashion.

The accomplished courtier, adventurer, soldier, poet, scientist, historian, seafarer, explorer and coloniser had made many enemies over his years of patent, bordering on the neurotic, ambition and accomplishment, accentuated by the poisonous jealousy of court politics during his periods as Elizabeth's favourite. (I should note there is no historical record of the folktale about him casting his cloak over a puddle for her). An astute observer would call him "fortune's tennis ball".<sup>7</sup> So it would prove.

James was convinced, with reason, that Raleigh and Cobham, longstanding political allies, were amongst those members of the English political elite who had not regarded his succession as obvious. They had also actively opposed the faction of the Earl of Essex, who was regarded by James as a martyr for his own cause.

James' mind had been poisoned against them in his secret, pre-accession correspondence by Cecil, now the Earl of Salisbury, who had often been in conflict with Raleigh as a rival at Elizabeth's court, and by their intermediary, Henry Howard, later the Earl of Northampton, head of one of the leading Catholic-inclined families of England.

Cecil wrote to James that "the two hedgehogs", Raleigh and Cobham " would never live under one apple tree with him".<sup>8</sup> Howard wrote to James denouncing them as two members of a "diabolical triplicity"<sup>9</sup> – the third being the Catholic Duke of Northumberland – who were plotting against James. When they finally met, James treated Raleigh to a bad pun on his name: "I have heard rawly of you",<sup>10</sup> he said, truthfully.

Raleigh was Elizabeth's Captain of the Guard, a praetorian force which, as Raleigh had shown during the Essex rebellion, was a critical post for protection of the monarch and, accordingly, had to be held by a soldier of absolute and unquestioned personal loyalty. His removal from that post was no surprise. However, James also stripped him of his major source of income as the owner of monopolies over certain wines and tin, conferred by the late Queen. He had to resign as Governor of Jersey, a post with strategic implications as a possible stepping-stone for an invasion. Cobham was also regarded with suspicion in this respect, having succeeded his father as Lord Warden of the Cinque Ports.

James also forced Raleigh, on two weeks notice, to surrender Durham House on The Strand, his home of twenty years on which he had spent thousands of pounds for renovations, to his formerly nominal landlord, the Bishop of Durham, who had delivered the first of many sycophantic sermons to the new King immediately after he crossed the border to commence his triumphal journey south from Scotland. Raleigh wrote complaining to

Lord Chancellor Ellesmere, Chief Justice Sir John Popham and Sir Edward Coke – “The poorest artificer in London hath a quarter’s warning given him by his landlord”<sup>11</sup> – to no avail.

When Cobham’s brother showed up as a member of the hapless conspiracy organised by William Watson, Raleigh’s enemies, particularly Cecil and Howard but also James himself, seized the opportunity to destroy him. The principal weapon in the attack would be Attorney General Coke.

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Coke was newly knighted. Shortly after James’ accession he wrote to Cecil on 4 May 1603 seeking his support for such an honour. Citing a surplusage of historical precedent, as was his tedious habit, of the elevation of former attorneys back to Edward II, he told Cecil, disingenuously: “I thank God I am not ambitious,” and added, truthfully: “but as all my good fortunes have come either by your honourable father or by you, so I would account it the greater if it came by your honourable hand.”<sup>12</sup>

Within a few weeks Coke was knighted in a select band of six at the royal palace at Greenwich. Ellesmere was enobled and retitled Lord Chancellor in a personal ceremony. Francis Bacon became a knight too, not for anything he had done but in recognition of his late brother’s role as an intermediary between Essex and James, probably also as a spy for James and, no doubt, for his brother’s effeminate beauty – a quality which always attracted James. Bacon’s recognition occurred in the gardens of Whitehall in a mass investiture of 300 men to mark the King’s coronation, including sons of pedlars and the like. As Bacon recorded, this farce “almost prostituted [the] title of knighthood.”<sup>13</sup>

In his first year James created over a thousand knights, trebling the order,<sup>14</sup> more knights than the stingy Elizabeth had invested in her 44 and a half years reign.<sup>15</sup> The corruption involved was notorious, as the horde of comparatively impoverished Scottish nobles descended on England, selling their access to the King’s ear to anyone who could afford it. James and the Scottish courtiers were determined to enjoy England’s wealth. As a contemporary English ditty put it:

“Hark! Hark!  
The dogs do bark,  
The beggars have come to town”.<sup>16</sup>

James' total annual expenditure as King of Scotland had been some 50,000 pounds. In 1604, as King of England, he was able to spend about the same amount just on jewellery<sup>17</sup> and this by a man who abhorred earrings.

The debasement of the coin of knighthood was so pronounced that a few years later James would create a new category of baronets, to recognise the special place of those who came from families that had a family history of note, such as having knights for three generations, and could afford to buy the new title, which brought in some 90,000 pounds for the King in the first three years.<sup>18</sup> A new cottage industry of fake family histories, replete with forged documents, emerged. Everyone seemed to be able to trace his roots to the Norman Conquest. No doubt their descendants still believe it.

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In November 1603, London was beset by plague and the court moved to Winchester. It was there, in the great hall of Winchester Castle beneath the wall adorned, as it still is, with what was said to be King Arthur's Round Table, that the trial of Raleigh occurred. Sir John Popham, Chief Justice of the King's Bench presided over a board of eleven commissioners, including Raleigh's enemy Lord Henry Howard, with a jury of twelve knights and gentlemen.

The purpose of the commission was to provide public confirmation of Raleigh's guilt. It cannot really be called a trial: there was no presumption of innocence, the accused was given no notice of the case against him or of the evidence and the bench, including Popham, had been closely involved in the course of the investigation. The judges and the jury knew that the King wanted a conviction. The public was convinced of his guilt, not least because of the role Raleigh had played in the downfall of the dashing, deeply flawed Earl of Essex, still a popular favourite, as he had been of James.

Coke, determined to ingratiate himself with the new monarch, had decided that violent rhetoric, crass insults and unrestrained combativeness was what the prosecution required – what Macaulay would later call his habitual "rancorous insolence".<sup>19</sup>

Never was Coke's vanity – short of sight, he refused to wear glasses – nor his self-absorbed advocacy on more unfortunate display. Even by the undemanding procedural fairness standards of the day, his conduct was a disgrace. In this trial – a precedent which Coke would pointedly ignore when he came to write about the

law of treason in his *Third Institutes* – Coke's performance was worthy of Andrey Vyshinsky, the brutal prosecutor of Stalin's show trials

Raleigh was charged with inciting Lord Cobham to approach Spain for funds to finance a rebellion to place James' cousin, Arbella Stuart, who not only could claim Tudor ancestry but was English, on the throne and secure toleration for Catholicism. Innocent of any plotting herself, she was to remain the focus of the plots of others. Eventually James felt constrained to have her imprisoned and she died in the Tower. There was no suggestion that she knew of the alleged Raleigh plot.

Coke's address for the prosecution asserted that Raleigh was involved in a plan to kill the king and his children – based on a statement by one of the so-called Bye plotters, who had been convicted at Winchester two days before. Coke had no evidence connecting Raleigh to any of them.

As Raleigh replied to Coke's opening in calm, measured, dignified terms, Coke indulged in unadorned vitriol: "Thou art a monster! Thou hast an English face and a Spanish heart." And "Thou viper ... the rankest traitor in all England".<sup>20</sup> And "There has never lived a viler viper on the face of the earth".<sup>21</sup>

At one stage he was rebuked from the bench for his cantankerous conduct and Coke, asserting that his ability to do his duty to prosecute traitors was being undermined, sat down in a huff and had to be cajoled to continue. This was not the only time he displayed such arrogant petulance. In May 1605, when Ellesmere ruled against the admissibility of his evidence in a civil case, Coke refused to participate any further and sat there silent throughout the day.<sup>22</sup>

The sole live witness called by the prosecution was a sailor who swore that on a visit to Lisbon he had overheard an unidentified Portuguese man say that Raleigh and Cobham were plotting against James.<sup>23</sup> The so-called evidence didn't get much better than that.

There were a few bits of circumstantial evidence and Raleigh accepted that Cobham had offered him a Spanish bribe – hardly incriminating when the proclivity of English political figures of the era to accept bribes was notorious throughout Europe. Indeed, within a few years Cecil himself would accept a Spanish pension.

Raleigh had sent Cobham a letter, which was said to suggest a guilty mind, based on evidence about its content by the messenger who, Raleigh said, had been threatened with the rack. Sir William Waad, the Clerk of

the Privy Council and well known to be a torturer, who was a member of the bench trying Raleigh, spoke up to deny it: "We told him he deserved the rack, but did not threaten him with it."<sup>24</sup> That cleared that up.

The only evidence against Raleigh was a confession by Cobham – whom everyone knew to be a fool – implicating Raleigh in a plot. His statement was given weight because it incriminated himself, although his brother's evidence was enough to condemn him. At first Cobham had denied everything which might involve Raleigh. He was then told that Raleigh had implicated him with Spanish agents. Cobham confessed in fury, saying it was all instigated by Raleigh.

His first two statements, denying involvement, are filed in the State papers. Somehow his confession is not. The only record of it is Coke's paraphrase in the partial transcripts of the trial that have survived.<sup>25</sup> It is quite clear from those transcripts that Coke proceeded to read selectively from various statements when presenting the prosecution case. The records are such that it is possible in many cases to know what he omitted, but not with this critical document.

Although everyone who has reviewed the conduct of the prosecution over the centuries had denounced it as a travesty, it was not until 1995, when a researcher came across a summary of the prosecution brief prepared for Lord Ellesmere, that it became known that, after Cobham had made the statement implicating Raleigh, he had retracted all of it before the investigators.<sup>26</sup> This retraction was never mentioned at the trial, although Coke and Popham, who conducted many of the investigations, must have been aware of it.

Despite Raleigh's repeated pleas and legal argument – rejected by Popham – Cobham, who was in the castle, was not called to give evidence orally. Cobham had sent Raleigh a letter withdrawing his incriminating statement and Raleigh tendered it. However, Cobham also gave Coke a further statement retracting the retraction, which Coke then tendered. But there was no reference to the first retraction, originally given to the investigators.

In the retraction given to Raleigh, Cobham had proclaimed: "I protest upon my soul I never had conference with you in any treason."<sup>27</sup> In the retraction of that retraction, he was equally forthright: "I protest upon my soul to write nothing but the truth".<sup>28</sup> As Raleigh sardonically told the Commissioners: "You see how many souls this Cobham hath".<sup>29</sup>



After three of the four different versions – confession, retraction and retraction of the retraction – had been read out in public, at least in part, the presiding judge, Chief Justice Popham cleared it all up before the jury retired. He had been present, it transpired at the time of the first confession:

“I am persuaded that Cobham accused you truly. I observed his manner of speaking ...  
I am persuaded he spoke nothing but the truth.”<sup>30</sup>

The jury came back within fifteen minutes with a verdict of guilty of treason. Popham solemnly sentenced Raleigh to execution by being hung, drawn and quartered. In the course of the sentencing the Chief Justice, by way of afterthought, referred to the absence of oral evidence from Cobham:

“It now comes to mind why you may not have your accuser brought face to face: for such a one is easily brought to retract when he seeth there is no hope for his own life”<sup>31</sup>

Or, one could add, to tell the truth.

A few weeks later, Cobham, who *had* engaged in treasonous communications with the ambassador of the Spanish Netherlands, was brought to trial, Lord Ellesmere presiding. He confessed to some matters but denied key allegations. He re-affirmed, in a signed statement, that he had acted upon Raleigh’s incitement.

Many years later, when still a prisoner in the Tower, Cobham gave yet another version of his first confession. He had been tricked, he now said, by Sir William Waad into signing a blank sheet of paper to which his purported confession was later added.<sup>32</sup> This would have been entirely in character for Waad, a visceral hater of Catholics and the leading interrogator and torturer of his time who, with his father, served the Cecils, father and son, for half a century, including in such causes célèbre as Mary Queen of Scots, Father John Gerard and Dr Lopez. This final retraction by Cobham does not, however, explain the signed statement produced at his own trial, to which he made no objection. No doubt there were promises made from time to time of which we know nothing.

Cobham and two other participants were found guilty and sentenced to death. Each of them, observed by Raleigh, endured a process of being taken to the place of execution before being spared by the King at the last moment. Raleigh spent some fourteen years imprisoned in the Tower, writing historical and political works of which only one, *History of the World*, snuck past James’ veto and was published in his lifetime<sup>33</sup>.

Raleigh was eventually released upon a promise to find the gold of El Dorado for James, who was broke as usual. After all, Raleigh had been the principal progenitor of the myth two decades before with his naive narrative, *The Discovery of the Large, Rich and Beautiful Empire of Guiana*, in which he gave currency to the fable of a white crystal mountain covered in diamonds by saying that he had glimpsed a white mountain in the distance. Still the Elizabethan warrior, Raleigh destroyed a Spanish settlement in defiance of his orders. There was neither gold nor diamonds. When Spain complained – a close relation of the Spanish ambassador had been killed by Raleigh's expedition – James, then manoeuvring for a marriage alliance between his heir Charles and the Infanta of Spain, promised to act, if the King of Spain wanted him to. He did.

Rather than have a new trial, James relied on the original sentence imposed, ironically, for Raleigh's alleged conspiracy with Spain. Raleigh contended that he had impliedly been pardoned. The Chief Justice of the Kings Bench rejected that contention. A pardon for treason had to be express. He also rejected the suggestion that Raleigh's original trial had not been fair.<sup>34</sup> In 1618, fifteen years after sentence, Raleigh was executed. His original trial was so notorious a travesty that it may well explain, in part, future common law developments to ensure fairness in criminal procedure.

Cobham, after many years in the Tower, eventually had his liberty, but not his title, restored and died a pauper in the hovel of his former laundress.

## **GUNPOWDER PLOT**

The so-called Bye Plot was the first expression of Catholic disappointment with James' regime. Incomparably more significant was the conspiracy known to history as the Gunpowder Plot. After the first few months of his reign, when James manifested some degree of leniency towards English Catholics, his policy changed and the strict letter of the law was enforced. In addition to the participants in the Bye Plot, two seminary priests were executed for treason and the collection of the crippling recusancy fines recommenced.

The Gunpowder Plot was instituted and organised by Robert Catesby, whose family had long supported the covert Jesuit mission. Catesby had already manifested disaffection, as had some of his co-conspirators, by participating in the abortive Essex rebellion. Francis Bacon had received a moiety of Catesby's fine.<sup>35</sup> Catesby's leadership has been obscured by the fact that he died without trial, trying to incite rebellion even after the failure of the plot. The name that has passed into folk history is that of Guy Fawkes, an English born Catholic convert who, as a soldier of fortune in the armies of continental Catholic powers, understood explosives. He was the one caught with the gunpowder beneath Parliament on, it has always been said, 5 November 1605.

“Remember, Remember”, generations of British students were taught to chant, “The Fifth of November ... Gunpowder, Treason and Plot”. Except it wasn’t the Fifth of November at all. In almost all of Europe it was the Sixteenth of November.

Over the centuries from 45 BC, when Julius Caesar implemented what became known as the Julian Calendar, it lost time because it computed a year as eleven and a half minutes longer than a solar year. Easter was drifting from spring towards winter, Christmas from winter to autumn. The Gregorian Calendar, implemented by Pope Gregory XIII in 1582, corrected the problem, both for the future and the past. The latter was achieved by jumping from October 4 to October 15, so that October 5-14, 1582 simply never existed, except in England, Sweden and Russia, which did not recognise the pope’s authority.

As usual, England delayed before it joined Europe. In 1753, the British *Calendar Act* came into force and led to Euro-sceptic disquiet throughout England: “Give us back our eleven days” was one slogan and, in the words of a popular ditty:

“In seventeen hundred and fifty three  
The style it was changed to Popery”.<sup>36</sup>

By then it was too late to alter the date of Guy Fawkes’ night, which had become doubly significant as a day of Protestant deliverance, because it was on “5” November 1688 that William of Orange landed in England to ignite what immediately became known as The Glorious Revolution to depose the Catholic convert King James II, last of the Stuarts.

“5” November 1605 was the 9/11 of seventeenth century England. This was a conspiracy by religiously motivated terrorists. The role of Al-Qa’ida was played by the Jesuits, then widely regarded as an insidious covert organisation with revolutionary, albeit reactionary, objectives. The overwhelming majority of law abiding Catholics were treated, like Muslims today, as a potential fifth column and as the seed-bed for terrorists.

Inevitably, like 9/11, the political and religious deployment of the Gunpowder Plot has spawned factual controversy and a penumbra of conspiracy theories. However, the broad picture is not attended by any real doubt. A small group of upper class Catholics, with an acute sense of religious persecution, who had hoped that things would change for the better when the son of the martyred Mary, Queen of Scots, succeeded to the throne, had become disillusioned. They realised that the peace treaty with Spain of mid 1604 meant that reinstatement

of the true faith by external invasion was no longer an option. They came to believe that only the anarchy that would follow from the assassination of the King and the decimation of the English elite could do that.

A substantial proportion of that elite always gathered in one place for the formal opening of Parliament by the King. They could be despatched in one explosion. Although the gunpowder of the era was of variable quality, if it had exploded as planned, modern scientists have calculated that the 36 barrels of gunpowder would have obliterated the Palace of Westminster, Westminster Hall and Westminster Abbey and caused structural damage within a radius of 500 metres. No one present in Parliament would have survived.<sup>37</sup>

The plot was discovered, according to the official version, because of the delivery to Cecil of a letter sent to Lord Monteagle, probably by his brother in law who was the most nervous of the plotters, warning him not to attend the opening of Parliament. Lord Monteagle was a Catholic but, in order to preserve his wealth and position, outwardly conformed to the Church of England, while his wife remained a recusant. The key words in the warning letter were: "They shall receive a terrible blow this Parliament".

Although it is very unlikely that Cecil, with his extensive intelligence network, did not have some knowledge of the plot, the identification of what might be inferred from the word "blow" was said to have been made by the King himself. This is, in fact, quite likely. His own father had been murdered in a gunpowder explosion and James had a well-developed sense of self-preservation arising from a number of attempts over the years to kidnap and/or assassinate him, manifestations of the disgruntle gene endemic in the Scottish aristocracy.

The investigation led to the revelation that Thomas Percy, cousin of the Earl of Northumberland, the leading Catholic noble, had rented a room directly under the House of Lords, where the opening ceremony would be held. The search of the room led to the discovery of Fawkes and the gunpowder. There is no reason to doubt these objective facts, unless one believes one of the conspiracy theories, which I do not. The basic nature of the plot is clear. Who precisely was involved and how they became involved, especially the Jesuits, requires assessment of a factual minefield of self-serving assertions and confessions, most of which were extracted under torture, transparent in the crippled hand that signed Fawkes' final statement. Nevertheless, as one would expect, in the trials that followed, Coke presented a prosecution brief devoid of nuance.

The full text of Cecil's detailed instructions to Coke on how the trial of the surviving plotters – Catesby and Percy had been killed – should be conducted has survived. Cecil's letter, no doubt confirming more detailed

conversations, reveals the political requirements of a show trial. As usual, guilt had been determined in the course of the interrogations. What remained was the show, for the public and for posterity.

In order to deflect the suggestion that the plot was a reaction to James' "severity" towards Catholics, the Attorney General should make it clear that the plotters approached Spain for support before James became King. In order to deflect the suggestion that Lord Monteagle was once part of the plot but changed his mind, the Attorney must make it clear that Monteagle was above reproach and had acted promptly upon receipt of the letter. Further, the official, just published version of the plot and its discovery, purportedly written by the King himself and called *The King's Book*, must be scrupulously followed, but with rhetorical license – "as you know best how", he said. Cecil's final, curt instruction was: "You must remember to lay Owen as foul in this as you can".<sup>38</sup> In this respect, Coke was told, his talent for vituperation was required.

Nicholas Owen, known as Little John, was the genius designer of the priest holes crafted into the framework of many Catholic houses in England which proved so successful in hiding visiting priests during Protestant raids. He would die under torture by Sir William Waad – who put out the usual over-zealous torturer's story that Owen committed suicide.

Owen was a Jesuit lay brother and a key confidante of Henry Garnet, who had led the English Jesuit underground for twenty years, with considerable success in terms of moral and intellectual leadership, even though at their height the Jesuits never numbered much more than a dozen of the 200 or so Catholic clergy covertly in England.

On the fourth day of destructive searches of Hindlip House in Worcestershire, after about a dozen of Owen's ingenious, secret cavities in the brickwork and chimneys had been discovered, Owen was captured. It was 24 January 1606, three days before the trial was to commence. At the time Cecil gave Coke his written instructions, Owen was the only Jesuit who had been caught. Cecil could not have anticipated that, on the very day of the trial, further searches at Hindlip House would reveal Garnet himself.

The principal thrust of the prosecution was to proclaim that the plot had been a conspiracy of the Jesuits, who had corrupted patriotic English Catholics into their nefarious scheme. Many Catholics, like Monteagle, were completely loyal. Contrary to the later conspiracy theorists, who believe the outburst of anti-Catholicism that resulted from the failed Plot must have been planned, with only Cecil capable of such deviousness, James and Cecil were determined that the trial would not demonise all Catholics. Like his father,

Lord Burghley, Cecil regarded the divided loyalty of English Catholics as a security risk, but believed the problem could be managed without persecution, which he thought was often counter-productive.

The official record of the day-long trial has been carefully vetted for publication. There is a minimum of detail of who said what. Only statements that were consistent with the Crown case are set out. The bulk of the report consists of a long speech by Coke. There are signs it was corrected and polished after the event. No doubt something like what is recorded actually took place. However both the evidence adduced, and the formal record, were plainly manipulated for reasons of state. How far back the manipulation went is a matter of conjecture.

Coke obeyed his instructions from Cecil, save in one respect. No respecter of the aristocracy, he could not bring himself to proclaim Lord Monteagle's innocence. He plainly thought Monteagle and the Earl of Northumberland were involved. He must have known that James was adamant that the Catholic aristocracy must be kept on side. This was an early sign of Coke's capacity for insubordination.

"These were", Coke began, "the greatest treasons that ever were plotted in England", adding with an obsequiousness that rings false to the modern ear, "that concern the greatest king that ever was in England".<sup>39</sup> The Powder Treason, as he called it, commenced, he proclaimed as instructed, even before the death of Elizabeth, when Garnet sent a mission to Spain in support of the Infanta's claim to succeed, led by one of the accused. Coke could not help noting that Cobham was the Lord Warden of the Cinque Ports, through which any invasion would pass. Later in his long and tedious address, replete with historical diversions and biblical references, he would compare the plot to Raleigh's "Main Plot", as if he knew that his conduct at that trial required justification.

Coke's main target was obvious from the terms of the indictment. Garnet and the other Jesuits were the first named of the list of conspirators and it was they who, the indictment alleged, did "maliciously, falsely, and traitorously move and persuade" the others.

Coke asserted:

"The principal offenders are the seducing Jesuits; men who use the reverence of religion ... as a mantle to cover their impiety, blasphemy, treason and rebellion and all manner of wickedness .... Concerning this sect, their studies and practices consist in two d's: deposing of kings and disposing of kingdoms."<sup>40</sup>

No doubt, the rhetorical flourish of alliteration was not then as clichéd as it is now.

Coke asserted that Catesby had been told by the Jesuits that the plot was both lawful and meritorious. He simply did not read those parts of the confessions which denied that any priest had been involved. Meticulous as always, the records reveal, he had marked the parts he would not read in red before the trial.<sup>41</sup>

The eight surviving conspirators were quickly found guilty of treason and sentenced to death by being hung, drawn and quartered. The next trial was of Garnet himself.

### **GARNET TRIAL**

Garnet was a most unlikely participant in mass murder. He had a particularly attractive concatenation of virtues – mild mannered, scholarly, over fifty, overweight and balding – just about perfect really. Hardly the man to play the role of Osama bin Laden.

The constant fear of two decades of covert missionary work had been rendered tolerable by the need to generally confine his mission to the stately homes of rich Catholics. There, the intermittent discomfort of confinement to priest holes – like sparrows on a rooftop, as one contemporary put it<sup>42</sup> – was ameliorated by the excellence of the food and wine of which he was so fond, as he was of the company of intelligent, idealistic, young women – which induced Cecil at the trial to call him *senex fornicarius*, roughly “dirty old man” in Latin.<sup>43</sup>

There seems no reason to doubt Garnet’s assertions that he had done what he could to calm the militant Catesby. There is, however, a tension between those assertions and his other testimony.

Notwithstanding torture, none of the conspirators admitted that any Jesuit had been part of the plot. Nor, after weeks of investigation of Garnet himself, had even a circumstantial case of direct involvement emerged against him. While imprisoned in the Tower, he had been allowed to send letters and the secret writing in lemon or orange juice in the margins was intercepted. He was placed in an adjoining cell to another Jesuit to enable his captors to eavesdrop on their evening whispered conversations. Save for one observation, which did not go beyond knowledge, this evidence was not inculpatory, although a conversation in which names were being named was drowned out by a crowing cock and a cackling hen, called by one historian “a conspiracy of chickens”.<sup>44</sup>

Garnet eventually admitted that he had learned of the plot when another priest, to whom Catesby had made confession, told him – also in confession. He later accepted, according to the official record of the trial, that this knowledge was not entitled to privilege in English law. “It is not fit”, he said, “the safety of a prince should depend upon any man’s particular conscience”.<sup>45</sup> However he could not have revealed the information for religious reasons. This was enough to convict him for misprision of treason.

After his trial, he continued to be interrogated in order to elicit an explicit confession. He then accepted that he knew enough outside confession. Indeed, when falsely told that the priest who had confessed to him had been caught, he started to qualify his position: perhaps it had not been so clear to the other priest that the revelation was during confession;<sup>46</sup> perhaps the revelation was “not in confession, but by way of confession”.<sup>47</sup>

However, there was never any evidence – not even in the carefully composed and frequently concocted official transcript – that he actively participated in, let alone instigated, the Plot. Indeed, this was barely suggested to him in the course of his interrogations, clearly indicating that no one, with the possible exception of Coke, really believed it. His was to be another show trial.

It was held at the Guildhall in the City of London – chosen instead of Westminster so that the general public would attend and directly hear of Jesuit perfidy. Again, according to the official version, the trial consisted primarily of a long speech by Coke, interspersed by the reading of statements. Unlike the trial of the conspirators, Coke’s tone was one of respect for the accused. He subjected the audience to a long dissertation on the various treasons of the Jesuits – from Edmund Campion to the Gunpowder Plot – and a detailed chronology of the latter, emphasising every statement, however procured, that mentioned any of the Jesuits.

“He is a Jesuit and a Superior,” Coke declaimed, “as indeed he is superior to all his predecessors in devilish treason”.<sup>48</sup> He had worked on his rhetorical flourishes. The two “D’s” of the first trial now became five D’s: dissimulation, deposing of princes, disposing of kingdoms, daunting and deterring of subjects (which counted as one D) and destruction.<sup>49</sup>

Perhaps to explain the absence of any confession that the Plot had been Garnet’s idea, Coke focused on dissimulation, namely the doctrine of equivocation, which he attacked as a form of lying invented by the Jesuits. One example was that it was permissible to answer “No” to the question “Are you a priest?” on the basis of not being a priest of Apollo.<sup>50</sup> Such mental reservations were said to be acceptable in response to inquiry that could lead to persecution of a believer.



Coke referred to a treatise on the subject which Garnet had marked up and of which, unknown to Coke, he was in fact the author. Indeed, in an unconsciously ironic manifestation of the craft, Garnet had changed the original title from *A Treatise on Equivocation* to *A Treatise Against Lying and Fraudulent Dissimulation*.<sup>51</sup> Coke was incapable of recognising irony. He could, however, appreciate the utility for a prosecutor of an admission by an accused that anything he said could be false.

Coke's emphasis on equivocation as a manifestation of Catholic, especially Jesuit, deviousness would have a permanent impact on British public opinion – featuring in “5” November Anniversary sermons for decades.

The prosecution brief was carefully vetted in many respects. Following his original instructions to show that the plotters were not responding to James' policies, Coke sought to prove that some English Catholics had promoted the Infanta of Spain's claim to succeed instead of James. However, the involvement of Lord Monteagle, the hero of the hour, in that scheme was omitted from the statements read out at Garnet's trial<sup>52</sup>, but the involvement of the Gunpowder plotters was trumpeted.

Garnet's own statements, which were the only evidence against him, were read out in open court. There is extant a version which bears the marks of instructions to the court officer, in Coke's own hand, as to what should be read and what left out. Garnet's protestations of innocence, his efforts to pacify the zealots and his denials were not read.<sup>53</sup> Coke's presentation of the prosecution case was replete with such editing which, perhaps ironically, manifested the same vices as equivocation. Again Vyshinsky would have been proud of him.

During the trial Garnet said that he had not been tortured. Of course the transcript is an official document, but the hearing was public and it is unlikely that so blatant a deceit would have been included in a document immediately given wide circulation. There is no real evidence that he was tortured, although understandably many assumed he must have been. Ben Johnson in his post-Gunpowder Plot play *Volpone* refers to Garnet's reputation for drinking to excess when his character says: “I have heard the rack has cured the gout”.

Garnet was permitted to give a long speech in his defence. He proclaimed that he was always opposed to the Plot and had done his best to prevent it. These contentions did not sit well with his denials that he knew any detail until late in the piece. Cecil intervened and engaged Garnet in debate with considerable effect, exposing a number of contradictions in his case and reinforcing the conclusion that Garnet had other sources of information than the confession. Indeed, Garnet would later acknowledge that he had.<sup>54</sup> However, the debate with Cecil did nothing to advance the Crown case that the Plot was organised by the Jesuits.

The jury took only 15 minutes to convict him. He was executed, as one contemporary sneeringly put it, "by hanging without equivocation".<sup>55</sup>

In October 1970 after a long campaign, forty English martyrs were canonised, including Nicholas Owen and Edmund Campion. Henry Garnet was not one. I do not know why. I suspect that the closeness of his relationship with his most devoted admirer, Miss Anne Vaux, was an important factor.

The fury of the government with the Jesuits – whom James called "Puritan Papists" – and the certitude that they had been involved, was no doubt influenced by the fact that it had been the Jesuit Father John Gerard, with the approval of Garnet, who had tipped off Cecil about the Bye Plot. There was no word of warning about the Gunpowder Plot, instigated by the Jesuit's own followers when, it appeared certain, that Jesuit priests knew. Indeed, the key planning meeting at which the core group of five plotters swore an oath of secrecy, on Sunday 20 May 1604 at the Duck and Drake Inn just off London's Strand, was immediately followed by mass in an adjoining room conducted by a Jesuit priest, albeit it is not clear which one.

There were written instructions from Rome, both from the Pope and from the General of the Jesuits, not to get involved in any rebellious moves by English Catholics. Yet there was no warning this time. It is not possible to accept that everything Garnet and his colleagues knew was revealed within the confessional. Garnet himself eventually accepted that he had other knowledge that Catesby was planning something and tried to talk him out of it. It was the detail of the gunpowder in Parliament plan that he said had been conveyed only in confession.

It is difficult to avoid the conclusion that there was, at the least, an element of wilful blindness in the Jesuit position. Even allowing for the scepticism that must attach to the authenticity of many of the documents, I do not think it likely that either Garnet or the other Jesuits were bound to silence because all they knew was received in confession. If, as appears clear, the Plot was contrary to instructions from Rome a warning, such as that promptly given of the Bye Plot, was called for.

The instructions from Rome may have been understood to be pragmatic, based on an assumption that armed resistance was futile, particularly after peace with Spain in mid 1604. No one in Rome could have contemplated the destruction of the English elite in one explosion. Nothing like it had ever happened before. It must have been tempting for men who had endured decades of furtive frustration to obey their instructions not to get involved directly, but not to reveal anything they did not have to reveal about a plan that could actually work.

There can be no doubt that during this era all Jesuits were dedicated to the destruction of Protestantism. Everything else was tactics.

## **AFTERMATH**

In the immediate wake of the Plot, Parliament enacted the Oath of Allegiance, requiring recusants to deny the pope's authority over kings or forfeit their property and liberty. Immediately denounced by Pope Paul V, it gave rise to an intense disputation with Rome, particularly with Cardinal Bellarmine, in which James energetically engaged, clearly enjoying the intellectual challenge. His most recent biographer notes that he spent most of the winter of 1607-1608 "cooped up with his books" and produced a lengthy defence of the Oath of Allegiance intended to have the effect that "the Pope's bulls would pull in their horns".<sup>56</sup>

For more than two centuries, on every Fifth of November, even after the calendar changed, the judges of England processed from Westminster Hall to Westminster Abbey to hear the Gunpowder Sermon and, like their co-religionists throughout the nation, to kneel and recite the prayer, which remained in the Book of Common Prayer until 1859: "Lord who didst this day discover the snares of death that were laid ... by Popish treachery in a most barbarous and savage manner beyond the examples of former ages ... scatter our enemies that delight in blood. Infatuate and defeat their counsels, assuage their malice and confound their devices. Strengthen the hand of our most gracious King ... to cut off such workers of iniquity as turn religion into rebellion and faith into faction ...".<sup>57</sup>

Popular English sentiment about the plotters remained that expressed by Lord Ellesmere at the time: "I am ashamed they be English; I am ashamed they be Christian; but at least they be but Roman Christians".<sup>58</sup> Few events in English history had more significant long term consequences. The bias, vituperation and knowing involvement in public deception by Coke as the prosecutor, played an important role in bringing about those consequences.

## **MACBETH**

Garnet's epitaph was mockingly provided by William Shakespeare in *Macbeth*, written in the aftermath of the Gunpowder Plot. Immediately after the murder of King Duncan, Macbeth and his wife hear knocking and Shakespeare intrudes the only comic scene of the play, where the Porter imagines the response of the gatekeeper of Hell (Act II.iii.8-11):

"Knock, knock. Who's there ... [In the] devil's name?

Faith, here's an equivocator, that could swear in

both the scales against either scale; who committed  
treason enough for God's sake, yet could not  
equivocate to heaven: O! come in, equivocator."

The theme of equivocation appears in a number of passages in *Macbeth*, usually ironic. It is quite likely that when the play received its première at court in 1606, James smiled when Birnam Wood did begin to move towards Dunsinane castle and Macbeth denounced the witches who had predicted his fall as "the equivocation of the fiend that lies like the truth" (V.v.42).

Shakespeare, of course, also revelled in ambiguity and enjoyed nothing better than to leave his audience guessing. That does not mean, contrary to the cottage industry that has grown up around his works, that he wrote in code with a secret message to be deciphered.

In the wake of the Gunpowder Plot, heightened religious tensions required anyone of suspect affiliation to affirm their loyalty without equivocation. Shakespeare had a suspect background. His father was a recusant and was probably converted by Edmund Campion. If Shakespeare had any such affiliation himself, it was not possible to continue it by 1606.

*Macbeth* was Shakespeare's Scottish play designed in part to ingratiate himself with the new regime. His theatre company had been elevated from The Lord Chamberlain's Men to become The King's Men and the members were given the status of Grooms of the Chamber. Royal patronage was not, however, enough. Every play had to reflect on stage the anxieties of the day in order to attract the fickle public to the unsubsidised commercial theatre – where Shakespeare profited both as promoter and as part owner of the Globe.

The themes of *Macbeth* – the pathology of ambition, the legitimacy of royal succession, treason, political assassination, the disaster of disorder, deception, witchcraft and royal divinity manifest in touching to cure scrofula – reflect James' personal preoccupations, as well as widely held fears and beliefs.

As Shakespeare must have known, the main problem with James at the theatre was keeping him awake. Unlike his Queen, who was an avid supporter of the arts, James was not. He had little experience of the theatre, which had been banned in Scotland by the Calvinist Kirk. James compensated for some physical frailty with vigorous activity, especially hunting which he did about half of the time, to the fury of his senior officials used to the active involvement of the monarch in day-to-day decision-making. James' impatience at the theatre no doubt explains why *Macbeth* is one of Shakespeare's shortest plays.

The central theme of *Macbeth* is the disastrous effects of rebellion against legitimate authority and its ultimate futility. James would have nodded agreement, rather than nodded off, when Macbeth, having resolved to kill the king, prophesied his own doom when he referred to “bloody instructions which being taught return to plague the inventor” (I.vii.10).

As the repeated references to equivocation attest, one cannot understand *Macbeth* without knowing something about the immediate political background. Everyone in his contemporary audience had seen the commemorative Gunpowder Plot medal, issued to mark the nation’s deliverance, with a snake concealed by a garland of flowers. There was, no doubt, a shudder of recognition when Lady Macbeth, to strengthen her husband’s resolve, told him: “Look like th’innocent flower/ But be the serpent under’t” (I.v.65-66).

The drama of personal treachery when Macbeth, as host, murders Duncan, his guest, would have been understood by all as a reference to the Gowrie conspiracy against James in 1600, when a Scottish noble family, according to the dubious official version, tried to kill James but were themselves killed, allegedly in self defence. Contemporary observers recognised how convenient it was that James was thereby relieved of his debt of 80 thousand pounds to the deceased.

The introduction of witches in *Macbeth* was also designed to pander to one of the King’s obsessions. The European witch craze of, roughly, the period 1550 to 1700 was a bizarre late Renaissance phenomenon in which thousands of old women confessed to secret pacts with the Prince of Darkness. As Hugh Trevor-Roper observed, the craze was “a warning to those who would simplify the stages of human progress”.<sup>59</sup>

The craze was particularly virulent in Scotland. James was said to have been the target of treason by sorcery that led to a spate of witch trials in the 1590’s – replete with black toads’ venom and human body parts tied to christened cats. He was a true believer in black magic as a manifestation of the devil. To the bemusement of the urbane John Harrington, James earnestly sought an explanation from him of ‘Why the Devil did work more with old women than others’.<sup>60</sup>

In reply to a sceptical rationalist treatise, James had written a book entitled *Daemonologie* to prove the existence of witches and the threat they posed by doing the work of the Devil to destroy the kingdom and God’s anointed King, a divine status which James took very seriously, often calling kings God’s Lieutenants on earth who are themselves called gods.

Henri IV of France, who famously and unfairly called James “the wisest fool in Christendom” also said, in the same vein, perhaps with more justification: “Book writing is no occupation for a king”.<sup>61</sup> When he became King of England, James ordered that all copies of the treatise he had attacked be burned but, it seems, Shakespeare found a copy, for many of his witches’ best lines can be traced to that source.<sup>62</sup>

The most sycophantic element in the play is the character of Banquo, whom Macbeth murders only to be haunted by his ghost. Shakespeare distorted his historical source, in which Banquo was one of Macbeth’s murderous henchmen. However, the historical Banquo was regarded by James as the progenitor of the Stuart dynasty.

Plumbing the depths of obsequiousness, Shakespeare describes Banquo as “father to a line of kings” (III.i.60). When the witches conjure up apparitions of future kings of Scotland, he has Macbeth exclaim: “What! will the line stretch out to the crack of doom?” (IV.i.133). Macbeth’s vision of that royal line is reflected in a mirror displaying the image of the eighth descendent which, in the original royal command performance, was probably staged by showing James’ own reflection.<sup>63</sup>

This theatrical vision of a secure, long-lasting, legitimate, dynastic succession was calculated to appeal to James’ visceral fear of political assassination. James’ father had been murdered, his mother executed, there had been at least one attempt on his life in Scotland and, he believed, numerous attempts to kill him by witchcraft. One contemporary Englishman summed up the Scottish tradition: “They have not suffered above two kings to die in their beds these two hundred years. Our king hath hardly escaped them”.<sup>64</sup> And, of course, there was the Gunpowder Plot.

James, who could never abide the sight of an unsheathed sword, would have been mesmerised by Macbeth’s bloody dagger. As Rudyard Kipling would later put it, in a poem reflecting the bias of Whig historians:

“The sight of steel would blanch his cheek.  
The smell of baccy drive him frantic.”

The English public and political elite were all too conscious from their recent history just how fraught with danger succession uncertainty could be. The political message of the play was one of calculated reassurance.

Macbeth’s vision also contained what he called the “horrible sight” of Banquo’s line of kings: “That twofold balls and treble sceptres carry” (IV.i.120). This was a clear reference to the union of Scotland and

England under one monarch. The revelation of a harmonious future for a Great Britain reflected James' policy on one of the most controversial political issues of the time: the unification of the two kingdoms.

## UNIFICATION

James understood that a mere union of Crowns was inherently unstable and made his intent clear from the outset. He gave himself the grandiose title of Emperor of Britain and issued the first coin to portray a king of England as a Roman Emperor, replete with laurel wreath.<sup>65</sup> He had to drop the title in the face of resistance within England to any kind of formal unification of the two polities that had been at war so often. James adopted, by Proclamation without Parliamentary approval, his second preference, the title King of Great Britain. Formal union would not occur for a century.

In his address to the first Parliament of his reign in March 1604, James commenced by talking of peace, both externally with Spain and internally because of the legitimacy of his succession as a descendent of Henry VII, who had united the two Houses of Lancaster and York, just as James in his blood now united the two Kingdoms of England and Scotland.<sup>66</sup> He spoke lyrically and at length of the benefits of unity and described the geography of a single island as God's work:

"What God has conjoined then, let no man separate. I am the husband and the whole isle is my lawful wife; I am the head and it is my body; I am the shepherd and it is my flock. I hope therefore that no man will be so unreasonable as to think that I that am a Christian king under the Gospel, should be a polygamist and husband two wives."<sup>67</sup>

The House of Commons did not agree that this marriage was made in heaven. Dynasty was not destiny.

To James' consternation – he was not used to a legislature that operated with a will of its own – the most the House would agree to was a Commission of Inquiry on union and, after several years, that Commission achieved little beyond amending restrictions at the border. In the face of such obduracy in Parliament, which refused to naturalise Scotsmen by statute without conditions unacceptable to James, and after a blistering attack in a speech to the House of Commons in March 1607, James turned to the law. The status of Scots born after James' accession – called the *post-nati* – was a legal issue capable of determination by the courts.

The question raised a matter of constitutional principle: Was national allegiance a product of the law or was it a personal bond to the sovereign? James and his advisors asserted that allegiance – what we would now call citizenship – was a personal bond between subject and King. Led by the common lawyers, the House of

Commons maintained the other view: allegiance was not owed to the person of the King but to the Crown and laws of England. In a conference between the two Houses of Parliament to resolve the issue, the senior judiciary listened to the debate and provided an advisory opinion in favour of the King's position. Coke was one of the signatories.

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The post of Chief Justice of the Court of Common Pleas had become vacant and Coke was appointed in mid 1606. The Solicitor General, as was customary, was promoted to Attorney and it appeared that, at last, Bacon would have an official post. He wrote, complaining, to Ellesmere about how his reputation was "taken away by continual disgraces, every new man coming above me".<sup>68</sup> It was notable that, despite his formal status as Learned Counsel for the King, he had played no part in any of the dramatic legal cases of the first few years of the reign.

Francis Bacon never repeated the display of independence in his first Parliament of 1593. He never again failed to obey a royal order or failed to promote the royal interest.

James had promised to acknowledge Bacon's loyal work in Parliament for the Crown on the issue of union. Drawing on the King's proclivity to find the rules for a Christian kingdom in the Old Testament, Bacon had compared James to King David who united the kingdoms of Israel and Judea.<sup>69</sup> He was nevertheless kept waiting until mid 1607, when he was finally appointed Solicitor-General.

With his marriage to a wealthy alderman's daughter, that Cecil had brokered, and the death of the aged holder of the life estate of a sinecure in the Star Chamber, two decades after Queen Elizabeth had conferred the reversion on him, Bacon felt secure for the first time in his life. He sat down in July 1608 and methodically wrote out in longhand his personal balance sheet. He computed his assets – real estate, jewellery, furniture, plate, the lot – as worth 24,155 pounds, with the value of his offices being 8400 pounds, of which 2000 was the capital value of being Solicitor-General and 6000 was the capital value of the sinecure in the Star Chamber.<sup>70</sup>

One of Bacon's first tasks as Solicitor was to prepare the Crown's submissions in the case of the *post-nati*.

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The infant known to history as Robert Calvin – his actual name was Colville,<sup>71</sup> but accuracy in this respect was an immaterial detail in the contrived suit – was born in Edinburgh in 1606. Real property was bought in his supposed name in England and parallel suits were instituted: one in Kings Bench asserting title to land of which he had allegedly been deprived and a second in Chancery for access to documents touching the title of other land and an account of profits for its use. The compliant defendants pleaded that the Scottish born plaintiff was an alien and could not hold freehold in England.

The opinion of the judges was already known. With one dissentient, the common law judges had formally informed Parliament that the *post-nati* were not aliens at common law. The result was never in doubt. Nevertheless the formality of a test case was essential to establish the precedent and to do so on a reasoned basis that might convince the common lawyers, so influential in the House of Commons. Both proceedings were removed into the Exchequer Chamber, on which all of the judges sat to decide difficult questions of law. In June 1608, by a majority of 12 to 2 the bench held that a Scot born after James' succession was not an alien in England. Parliament had been by-passed.

In the Seventh Volume of his *Reports*, published in the immediate wake of the judgment, Coke called *Calvin's Case* "the greatest Case that ever was argued in the Hall of Westminster".<sup>72</sup> Lord Ellesmere, who had led the royal campaign for union in the House of Lords with Cecil, understood the realpolitik of the occasion and was less effusive. When presenting Cecil with a copy of his judgment, that the grateful King had ordered be published, Ellesmere described it as "an idle tale, ill told, which you heard with much patience but not without weariness."<sup>73</sup>

Coke published a version purporting to summarise the reasoning of the numerous judgements as a single piece of reasoning, probably mainly based on his own judgment. Neither the submissions for the defendants nor the two dissents were published, although their content can partially be deduced from another brief report and the contemporary parliamentary and private documents of the opponents of union.

Notwithstanding the constitutional significance of *Calvin's Case*, it must be remembered that the judiciary was not then independent of the Executive. The result was pre-ordained. Most of the judges had expressed a formal opinion on the very issue at the Parliamentary conference the year before. Scholars have spent much time assessing and comparing the respective theories of the nature of government which these documents reveal. However, all the authors, including the judges, should be treated as advocates not jurists.

*Calvin's Case* was so obviously contrived that Bacon felt obliged to commence his submissions by asserting that it was "no feigned or framed case; but a true case between true parties".<sup>74</sup> Similarly Coke, knowing that the political nation believed that the judges were just doing the King's bidding, felt it necessary to proclaim: "No commandment or message by word or writing was sent or delivered from anyone whatsoever to any of the judges to cause them to incline to any opinion in this case".<sup>75</sup> The judges needed no message to appreciate what was expected of them. Bacon and Coke were, to employ one of Shakespeare's most over-used phrases, protesting too much.

In his submission's Bacon drew on the law of nature – not the common law – where life, as his secretary Hobbes would later famously say, was "nasty, brutish and short". Persons submitted to sovereignty for protection in nature, not via the intermediation of the law. "Kings were more ancient than lawgivers", Bacon said. "The allegiance of subjects to hereditary monarchs can no more be said to consist by laws, than the obedience of children to parents".<sup>76</sup>

His best precedent was the fact that residents of Gascony and Anjou could hold land in England when Henry II was their Duke. He also called in aid what, in accordance with contemporary usage that regarded Parliament as a court, he called "judgments" of the High Court of Parliament in recent statutes, which made reference to James' dual role, no doubt references which he slipped into the Bills as the Crown's representative in the negotiations and which he now deployed for purposes directly contrary to Parliament's intention.

Bacon accepted the medieval theory of the King's two bodies: one natural – his person; the other politic – the monarch as the manifestation of the law, relevantly the King in Parliament. The allegiance of a subject, Bacon argued, was owed to the natural body, which operated with, but was not subsumed by, the body politic. Robert Calvin's allegiance to the natural body arose when he was born. It required no Act of the English Parliament.

Coke's report, after the necessary archaeological dig through reams of irrelevant historical references, was also grounded in the law of nature. Natural law, Coke said, preceded any judicial or municipal law. The first kings assumed sovereignty under that law, before there was any man-made law. Accordingly, the immutable law of nature was the source of allegiance for all subjects, not man-made law. Coke also asserted that allegiance was owed to the King's natural body, not to his body politic. After all, treason must be committed against the natural body because the mystical body politic can never die.

After 14 judgments had been delivered over about eight days, the last judgment was delivered by the Lord Chancellor on 7 June 1608. His speech took some four hours and is one of Ellesmere's few judgments to survive. He focussed on the suit in Chancery. He commenced by emphasising, as Bacon had, the "judgment" of the High Court of Parliament that England and Scotland were now perpetually united in allegiance to a single King. Like Bacon, but unlike Coke, he was selective in drawing on historical precedent.

His is the most eloquent, lawyerly, subtle and convincing of the three expositions. His prose is often pointed – "Can there be wars between the King of England and the King of Scotland?" and eloquent – "Divide a man's heart and you lose both parts of it, and make no heart at all."<sup>77</sup> Ellesmere was civil to those who had a different opinion – a virtue of which Coke had again proven himself incapable – but could not resist pointing out that the two dissenting judges were both called Thomas, like the doubting Thomas of the New Testament.

Ellesmere made passing reference to the law of nature, but primarily emphasised how the common law develops when a case without direct authority arises. Like Bacon and Coke he gave weight to precedents from English rule over places like Gascony and Anjou and concluded: "Where there is one Sovereign, all his subjects born in all of his Dominions ... are bound to him by one bond of faith and allegiance ... yet under several laws and customs".<sup>78</sup> Unlike Coke, who always ignored them, Ellesmere also drew extensively on civil law texts.

The most distinctive part of Ellesmere's reasons was his rejection of the medieval concept of the king's two bodies. He saw authority as flowing from the body personal, not the body politic. He warned of dangers in any distinction between the King and the Crown, particularly the implication, which he attributed to traitors, puritans and papists, that the king derived his authority from the people.<sup>79</sup> He felt no need to indulge in philosophical disputation about what came first: kings or laws. Aristotle and Plato – whom Coke had invoked – were interesting, but they lived a long time ago in pre-Christian times and, worse, in a democracy. They were as irrelevant to contemporary debate, he said, as the Utopia of that well known traitor and papist, Sir Thomas More.

The operative principle in England was simple: God made Kings and Kings made laws.<sup>80</sup> The circumlocutions of Bacon and Coke, his approach suggested, were just verbiage.

Ellesmere's judgment is imbued with the pragmatism that characterised his career. His concern was with what the contemporary polity needed. This was no time for new fangled social contract theories. Responding to the obduracy of the House of Commons he asked: "How long shall this suspicion and doubt continue? Shall there be a disunion forever?"<sup>81</sup> The concerns of the opponents of unification were as irrelevant,

he proclaimed, as the social and legal differences that still existed between England and Wales or between Kent and Cornwall. Get over it, was his message. Accept the inevitable.

## CONCLUSION

Towards the end of his speech in *Calvin's Case*, Ellesmere commented on the fact that the decision of the judges in favour of the plaintiff was overwhelming. The common law was quite clear. Otherwise it may have been necessary to invoke the court of last resort – recognised, he said, by both the civil law and the common law – a personal decision by the King himself.<sup>82</sup>

Ellesmere knew full well that there was an incipient controversy about whether the King could exercise judicial power. He was also aware that Coke was displaying signs of heresy and probably understood that Coke was driven by a new institutional imperative.

King James had made his views explicit in his first constitutional tract, entitled *The Trew Law of Free Monarchies*, when he drew on the Old Testament to say, as King David had, that the principal duty of the King was “To minister Justice and Judgment to the people” and to promise to do, as King Solomon had done, “To decide all controversies that can arise among them”.<sup>83</sup>

Coke's philosophy of the common law, as technical learning based on immemorial custom - what he would come to call “the artificial perfection of reason”<sup>84</sup> - had no place for a monarch as judge. Even more fundamental was the divergence about the nature of law, a divergence which would arise often thereafter. Is law the result of an evolutionary process based on reason, as Coke believed, or is it a manifestation of a sovereign will, as Ellesmere proclaimed and Bacon accepted?<sup>85</sup>

At Coke's swearing in, Ellesmere had administered the judicial oath, which read in part, in words which echo today: “Ye shall do equal law and execution of right to all the Kings subjects rich and poor, without having regard to any person”.<sup>86</sup> Coke understood the oath to extend to impartiality with respect to the interests of the King, which interests he had hitherto so dutifully served. Perhaps even more indicative of the conflicts to come was the personal motto Coke adopted: *Lex est tutissima cassis* – The law is the safest shield.<sup>87</sup>

On his first circuit at the Norwich assizes, he had commenced his charge to the jury with an express acknowledgement that his new office required him to “take leave of all former acquaintances”.<sup>88</sup> His intention to

serve the institutional requirements of his new office, as single-mindedly as he had those of his former office, was emphasised in a lengthy attack on the evils of judicial corruption.

No one could have been in any doubt that this was not merely an elevation. This was a transmutation. The first battle would be with the ecclesiastical courts. The Third Address will begin there.

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<sup>1</sup> A Fraser, *Faith and Treason: The Story of the Gunpowder Plot*, Anchor, London, 1997, p 45.

<sup>2</sup> A Hogge, *God's Secret Agents*, Harper Collins, London, 2005, p 305.

<sup>3</sup> A Stewart, *The Cradle King: a Life of James VI & I*, Pimlico, London, 2004, p 229.

<sup>4</sup> *Ibid*, p 309.

<sup>5</sup> M Kishlansky, *A Monarchy Transformed: Britain 1603-1714*, Penguin, London, 1997, p 72.

<sup>6</sup> Stewart, above n 3, pp 206-207.

<sup>7</sup> R Trevelyan, *Sir Walter Raleigh*, Henry Holt, New York, 2003, p1.

<sup>8</sup> L De Lisle, *After Elizabeth: The Death of Elizabeth and the Coming of King James*, Harper Perennial, London, 2006, p 78.

<sup>9</sup> *Ibid*, p 79.

<sup>10</sup> C D Bowen, *The Lion and the Throne: the Life and Times of Sir Edward Coke*, Atlantic-Little Brown, Boston, 1957, p 179; C Lee, *1603: The Death of Elizabeth I and the Birth of Stuart Era*, Review, London, 2003, p 268.

<sup>11</sup> Bowen, above n 10, p 1841.

<sup>12</sup> Bowen, above n 10, pp 181-182.

<sup>13</sup> D R Coquillette, *Francis Bacon*, Stanford University Press, Stanford, 1992, p 70.

<sup>14</sup> L Stone, *The Crisis of the Aristocracy: 1558-1641*, Clarendon Press, Oxford, 1965, p 74.

<sup>15</sup> Kishlansky, above n 5, p 24; *ibid*, pp 81-82.

<sup>16</sup> De Lisle, above n 8, p 206.

<sup>17</sup> Kishlansky, above n 5, p 83.

<sup>18</sup> *Ibid*, p 86.

<sup>19</sup> T B Macaulay, "Lord Byron" in *Critical and Historical Essays*, Longmans Green, London, 1877, p 355.

<sup>20</sup> Bowen, above n 10, pp 194-196.

<sup>21</sup> W Cobbett, *Cobbett's Complete Collection of State Trials*, London, Vol 2, 1809, pp 26-27; A Wharam, *Treason: Famous English Treason Trials*, Sutton, London, 2005, p 35.

<sup>22</sup> J Hawarde, *Les Reportes del Cases in Camera Stellata 1593-1609*, London, 1894, pp 203-204.

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- <sup>23</sup> Cobbett, above n 21, p 25.
- <sup>24</sup> Cobbett, above n 21, p 22.
- <sup>25</sup> D Jardine, *Criminal Trials*, Volumes 1 and 2, Charles Knight, London, 1832, p 410n.
- <sup>26</sup> Trevelyan, above n 7, pp 361-365. M Nicholls "Sir Walter Raleigh's Treason: A Prosecution Document" (1995) 110 *English History Rev* 902.
- <sup>27</sup> *Ibid*, p 448.
- <sup>28</sup> *Ibid*, p 444.
- <sup>29</sup> *Ibid*, p 446.
- <sup>30</sup> Bowen, above n 10, p 215.
- <sup>31</sup> *Ibid*, p 217.
- <sup>32</sup> Jardine, above n 25, p 444n.
- <sup>33</sup> C Hill, *The Intellectual Origins of the English Revolution – Revisited*, Clarendon Press, Oxford, 1997, pp 181ff.
- <sup>34</sup> Jardine, above n 25, pp 500-501; Cobbett, above n 21, pp33-34, 37 which refers to Coke presiding as Lord Chief Justice, but he had been removed from office two years before.
- <sup>35</sup> A Haynes, *The Gunpowder Plot*, Sutton, London, 1994, p 47.
- <sup>36</sup> Michael Stacey "Clash of the Time Lords" *Harpers Dec.* 2006 pp 53-55.
- <sup>37</sup> J Sharpe, *Remember, Remember the Fifth of November*, Profile Books, London, 2006, pp 7-8.
- <sup>38</sup> Jardine, above n 25, pp 120-121n.
- <sup>39</sup> Cobbett, above n 21, p 166.
- <sup>40</sup> *Ibid*, p 171.
- <sup>41</sup> Fraser, above n 1, p 222.
- <sup>42</sup> A G R Smith (Ed), *The Reign of James VI and I*, Macmillan, London, 1973, p 93.
- <sup>43</sup> J Travers, *Gunpowder: The Players Behind the Plot*, National Archives, Kew, 2005, p168.
- <sup>44</sup> *Ibid*, p 148.
- <sup>45</sup> Jardine, above n 25, p 292.
- <sup>46</sup> Jardine, above n 25, pp 326-327.
- <sup>47</sup> Jardine, above n 25, pp 333-334.
- <sup>48</sup> Jardine, above n 25, p 262.
- <sup>49</sup> Jardine, above n 25, p 262.
- <sup>50</sup> Fraser, above n 1, p 242.

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- <sup>51</sup> Fraser, above n 1, pp 240-241.
- <sup>52</sup> Fraser, above n 1, p 257.
- <sup>53</sup> Jardine, above n 25, pp 357-358, 375.
- <sup>54</sup> Jardine, above n 25, pp 323,341,343,374. See also Jardine's summary of the objective facts at pp 388-402.
- <sup>55</sup> Travers, above n 43, pp 169.
- <sup>56</sup> Stewart, above n 3, p 227.
- <sup>57</sup> Bowen, above n 10, p 272.
- <sup>58</sup> Kishlansky, above n 5, p 67.
- <sup>59</sup> H R Trevor-Roper, *The European Witch Craze of the 16<sup>th</sup> and 17<sup>th</sup> Centuries*, Penguin, London, 1969, p 11.
- <sup>60</sup> S Greenblatt, *Will in the World: How Shakespeare Became Shakespeare*, W.W Norton, New York 2004, p 342.
- <sup>61</sup> Stewart, above n 3, p 231.
- <sup>62</sup> Greenblatt, above n 60, p 353.
- <sup>63</sup> Greenblatt, above n 60, p 335.
- <sup>64</sup> B Galloway, *The Union of England and Scotland: 1603-1608*, John Donald, Edinburgh, 1986, p 4.
- <sup>65</sup> L L Peck (Ed), *The Mental World of the Jacobean Court*, Cambridge University Press, 1991, p 5.
- <sup>66</sup> J P Sommerville (Ed), *James VI and I: Political Writings*, Cambridge University Press, 1994, pp 134- 135.
- <sup>67</sup> *Ibid*, p 136.
- <sup>68</sup> J Spedding (Ed), *The Letters and the Life of Francis Bacon*, Longmans, London, 1868, Vol III, p 296.
- <sup>69</sup> *Ibid*, p 98.
- <sup>70</sup> *Ibid*, Vol. IV, pp 82-83, 85.
- <sup>71</sup> Galloway, above in n 64, p 148.
- <sup>72</sup> S Sheppard, *The Selected Writings of Sir Edward Coke*, Liberty Fund, Indianapolis, 2003, Vol 1, p 162.
- <sup>73</sup> L A Knafla, *Law and Politics in Jacobean England: the Tracts of Lord Chancellor Ellesmere*, Cambridge University Press, 1977, p185.
- <sup>74</sup> Cobbett, above n 21, p 576.
- <sup>75</sup> Cobbett, above n 21, p 657.
- <sup>76</sup> Cobbett, above n 21, p 596.

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<sup>77</sup> Knafla, above n 73, pp 246-247.

<sup>78</sup> Knafla, above n 73, p 237; Cobbett above n 21, p 684.

<sup>79</sup> Knafla, above n 73, pp244-245.

<sup>80</sup> Knafla, above n 73, pp 247-248.

<sup>81</sup> Knafla, above n 73, p 252.

<sup>82</sup> Knafla, above n 73, p 249.

<sup>83</sup> Sommerville (Ed), above n 66, p 64.

<sup>84</sup> E Coke, *The First Part of the Institutes of the Lawes of England or a Commentary upon Littleton*, London, 1823, Vol 1, s 97b.

<sup>85</sup> See J U Lewis, "Sir Edward Coke (1552-1634): Theory of 'Artificial Reason' as a context for Modern Legal Theory" (1968) 84 LQR 33.

<sup>86</sup> J Hostettler, *Sir Edward Coke: A Force for Freedom*, Barry Rose, Chichester, 1997, p 62.

<sup>87</sup> Bowen above n 10, p 280.

<sup>88</sup> Sheppard, above n 72, Vol II, p 528.



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## The Significance Of The Integrity System

### THE SIGNIFICANCE OF THE INTEGRITY SYSTEM

#### KEYNOTE ADDRESS BY

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CHIEF JUSTICE OF NEW SOUTH WALES

TO THE AUSTRALIAN PUBLIC SECTOR ANTI-CORRUPTION CONFERENCE 2007

SYDNEY, 24 OCTOBER 2007

On 26 January 1808, precisely 20 years after the arrival of the First Fleet in Sydney Harbour, the British regiment known as the New South Wales Corps deposed Governor William Bligh from office in an event which, some fifty years later came to be called, quite inaccurately, the Rum Rebellion. Australia Day next year marks the 200th Anniversary of this dramatic event in our history. Much of our history is written from the perspective of the long-term implications of our convict heritage. There are, however, also long term implications of our establishment heritage. They include matters of direct relevance to the theme of this Conference.

The New South Wales Corps was a British regiment formed for the express purpose of replacing the Marines who had come with the First Fleet. The group of officers of the Corps constituted a substantial proportion of the ruling class of the original settlement. Although that proportion diminished over time, as an increasing number of emancipated convicts emerged in a leadership role, the officers of the regiment were of considerable significance as the suppliers of the organisational skills and entrepreneurial drive that any society needs. The way in which they obtained the capital necessary to make this contribution was not, at least by contemporary standards, a good look.

The British taxpayer provided considerable funds, particularly in kind, for the creation of an open prison in this region. Money and supplies were provided to create the settlement and establish its ability to feed and provision itself. At the disposal of the authorities was a supply of free labour by the assignment of convicts and land, originally disposed by lease but soon by grant. The political culture of 18th Century England accepted that social standing and personal influence was a proper basis for access to such governmental largesse. The officers of the New South Wales Corps were unlikely to resist replicating the corruption of home.

When the first Governor Arthur Phillip left in 1792, the commanding officer of the Corps assumed complete administrative control of the Colony for three years before Phillip was replaced. During this period the collegiality of the officers mess transmogrified into a cabal that came to dominate the trading activity of the frontier settlement. As a group the officers could control the allocation of supplies from the government store, determine land grants and assign convicts. There was nothing to restrain such decisions being made in their own interests. Indeed, the operations of the rudimentary court system was suspended. Significantly, the fact that their salaries were paid in London meant that they could draw bills on the British Treasury, a form of payment which anyone who wished to trade in the colony would readily accept. This was the basis of their control over trade, including control over liquor which was in such demand that it became a form of currency in the barter system of the rudimentary economy.

The exceptional mark up arising from the restricted supply of liquor was a manifestation of the cartel controlled by the officers which eventually would lead critics to bestow on the regiment the derisory appellation: the Rum Corps. However, by the time of the so-called Rum Rebellion, the officers of the Corps were primarily interested in land. Trading was mainly conducted by non-commissioned officers.

Even after they lost direct control of the government, the power of the Corps was such that they could make the lives of the succeeding Governors, Hunter and King, exceptionally difficult. Governor William Bligh sought to curtail their economic activity, indeed to expropriate their property. He not only failed to

recognise the positive contribution made by the officers of the Corps, he challenged their social status as well as their prosperity. What we would now call corrupt practices had become endemic. The reaction of those whose interests were threatened shows just how difficult it is to extirpate entrenched corruption.

Two hundred years ago next Australia Day, the Corps carried out what can only be described as a military coup which removed Bligh, who already had one mutiny on his record, and took over control of the State apparatus in their own interests. That control could only be removed in one way: the arrival of Governor Lachlan Macquarie in command of his own regiment and the formal dissolution of the New South Wales Corps. Save for mild punishment of the commanding officer at the time of the coup, no-one else suffered in any respect. None of the profits or assets were disgorged. This was not a salutary precedent for the ability to control the private exploitation of public power and assets.

Things have improved over the last 200 years. However, the increase in the size and complexity of our society does mean that maintenance of integrity in government requires a more detailed institutional response than just sending out another Regiment. A wide range of institutions has been established for this purpose.

It is appropriate to characterise this range as a national integrity system as has been in the National Integrity Systems Assessment project conducted by the Key Centre for Ethics Law Justice and Governance of Griffith University and Transparency International Australia. This is a high quality comprehensive Report with which I am sure all members of this audience are familiar. One aspect of the Report with which I have some difficulty is the variety of visual metaphors which seem to have become common currency in this sphere of discourse: from a Greek temple to a bird's nest, together with a narrative explanation of what is going on expressed in terms of pillars or twigs.

Words, rather than images, are my basic tool of trade. I do not feel the need for visual props. Indeed, I regard even the Power Point tool as a form of structured oversimplification, calculated to dumb down discourse. The "birds nest" visual metaphor reminds me of what Aristophanes said in his play *The Birds* that: "Words can give everybody wings". I think I'll stick with words.

The visual metaphor of a bird's nest was, as I understand it, intended to convey the idea that the integrity system consists of a number of different elements which interconnect so that although each may be weak, the system as a whole can be strong. The synergy of interrelated elements is inherent in the idea of a "system". I accept that it is important to consider the interconnections in order to assess the efficacy of the system as a whole, not only the individual components.

As is mentioned in the Final Report of the National Integrity Systems Assessment, I suggested a few years ago that the scope, range and significance of integrity institutions was such that they deserved collective acknowledgement as a fourth branch of government to stand with the legislative, executive and judicial branches. [1] This was characterised in the Report as treating the network of integrity institutions in a "semi-constitutionalised fashion". [2] There is truth in this characterisation.

The concept of the integrity branch of government was intended to emphasise the significance of the role played by the range of institutions that perform integrity functions. Once the constitutional significance of the integrity function is acknowledged, that concept itself can play a role to strengthen the institutional framework, but also to keep it within proper bounds.

In my original address I was particularly concerned to identify the underlying principles of administrative law which, unless constrained by a concept such as an integrity function, could readily slip into merits review that, absent statutory authorisation, is not appropriate as an exercise of judicial power. The same kind of constraint exists for other integrity institutions although, in many cases, the relevant bodies do have statutory merits functions.

The institutions which support the integrity of our system of government include organisations with a principal responsibility for integrity matters such as auditors general, electoral commissions, corruption and integrity commissions and ad hoc inquiries, often in the form of royal commissions. Other institutions perform this function as a substantial proportion of their activities including ombudsmen, parliamentary committees, directors of public prosecutions and, particularly in the context of constitutional and administrative law, the judiciary. The significance of this role is recognised by ensuring that these institutions have institutional autonomy.

There are, of course, many different ways to conceptualise issues of corruption and integrity. My own

focus, given the perspective of the law which I adopted, was institutional integrity rather than personal integrity. In practice, of course, these matters are closely related.

My perspective was, and is, understandably, the legal basis of authority. It is necessary for a society that claims to be governed by the rule of law to accept that all governmental authority and power must find an ultimate source in the law, sometimes in a constitution, sometimes in a statute, sometimes in the common law.

However, the concept of institutional integrity goes beyond the question of legality understood in any narrow sense. Institutional integrity also requires a governmental instrumentality to be faithful to the public purposes for the pursuit of which a power was conferred or a duty imposed. Furthermore, its conduct must be in accordance with the values, including procedural values, which the institution is reasonably expected to obey by those who are affected by its conduct and decisions. In any stable polity there is a widely accepted concept of how governance should operate in practice. The role of integrity institutions is to ensure that that concept is realised.

The aspect of the integrity branch of government with which I am most familiar is, of course, administrative law.

Judicial review is the enforcement of the rule of law over the conduct of the executive. The judiciary is empowered, generally by legislation even in nations of the common law tradition, to prevent the executive arm of government from exceeding the powers given to it by law.

Every government institution requires legal authority for any action that it wishes to undertake. In contemporary circumstances such authority is usually found in legislation. However the holder of an executive position is often entitled to act by reason of his or her office and would generally be entitled to do whatever a private citizen is entitled to do. Such entitlement, however, must also be understood as authorised by law.

Action by any government agency that is not supported by legal authority is invalid. What invalidity may mean for the consequences of the invalidated conduct is a matter which each system of administrative law must address.

Judicial review has developed in all advanced legal systems beyond a narrow concept of legality. In the legal tradition with which I am most familiar, the expansion of judicial review has been one of the great projects of the law over the last half century or so. It is now clear that judicial review extends to ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised.

This is quite distinct from merits review for which separate statutory provision is often made. Merits review is concerned to ensure that the correct and preferable decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained. Judicial review is a manifestation of the integrity branch of government, whereas merits review is a manifestation of the executive branch.

The practice of judicial review, whether expressly authorised by constitutions, codes or statutes, or a development of judge made law, inevitably gives rise to tension between the judiciary and those whose conduct is being reviewed. It is an important objective of all mechanisms of governance that this inevitable tension should be a creative tension. How this is to be achieved depends upon the extent to which a formal separation of powers is entrenched in the constitutional arrangements of a nation.

Contemporary debates about judicial activism are only the latest in a long history of conflict over judicial review. In the common law tradition there was an intense period of conflict between the Court of Kings Bench and the Stuart Kings over the Court's assertion of a supervisory jurisdiction.

The solution to such conflict in France, after the Revolution, was a strict separation between the judiciary in the *ordre judiciaire*, which exercises the civil and criminal jurisdiction, and the *ordre administratif*.

Over the course of over two centuries, the administrative law developed by the Conseil d'Etat and its subordinate court structure, appears indistinguishable from the operation of judicial review in the common law tradition. Indeed, because of the absence of a detailed code, the law administered by the

Conseil d'Etat developed in ways similar to the judge made law of the common law tradition.

In French law the principle of *légalité* encompasses general principles of law - *les principes généraux du droit* - which include a range of propositions[3] that are very similar to the development in the common law tradition of principles of administrative law and of principles of the law of statutory interpretation, now often referred to collectively as the principle of legality.[4]

In both civil and common law traditions judicial review goes beyond issues of legality narrowly understood to encompass a duty to give a fair hearing, to act impartially, to give reasons and, to varying degrees, to recognise a range of human rights. It also extends to ensuring that powers are exercised for the purpose for which they were given and in the manner in which they were intended to be exercised, either expressly or on the basis of a procedure which is in conformity with public expectations of how government actors ought behave in the particular nation.

An independent judiciary confident in its own autonomy does not need to be hesitant in asserting its right to enforce the rule of law. Nevertheless, as controversies in many nations attest, those who find their conduct constrained by judicial intervention frequently assert that the judiciary has gone too far. Sometimes these criticisms are valid. More often, however, they merely reflect the frustration of powerful people who are used to getting their own way and cannot do so because of proper legal constraints.

In many jurisdictions the grounds upon which judicial review is permitted may be expressed in such amorphous terms as to invite the judiciary to intervene too frequently. The purposes of administrative law can be stated at different levels of generality. When stated in such terms as preventing "abuse of power" or advancing "good administration", it becomes very difficult to distinguish between review on the basis of legality and review on the basis of merits.

Such vague general standards are sometimes enshrined in a code or statute authorising judicial review. Even in nations of the common law tradition there is a noticeable tendency over recent decades to expand the scope of judicial intervention by imposing a general label such as "abuse of power" or "proportionality" or "legitimate expectations" beyond longstanding but more limited principles. This is not merely the traditional common law method of induction. It blurs the distinction between legality and merits.

The Australian judiciary has, generally, been more tough minded – some would say narrow minded – in holding the line, than the judiciaries of most other nations with which we compare ourselves. For example, we have refused to adopt the idea of "proportionality" which has entered English law from Europe. We have also rejected any idea of "deference" to administrative decision-makers of the kind adopted in the United States and to some degree Canada and, until recently, in the United Kingdom. Deference is only necessary if the standard to be applied is too wide.

The concept of an integrity function of government, with judicial review as part of an integrity branch of government, expresses appropriate limits upon the permissible scope of judicial review. If intervention by a court is understood as ensuring the institutional integrity of the decision-making process, the judiciary is more likely to act with appropriate restraint. When purporting to ensure that the executive does not exceed its lawful powers, it is of supreme importance that the judiciary must not exceed its own. The issue is judicial legitimacy.

Institutional integrity is, of course, reinforced by personal integrity, directed at the performance and conduct of individuals through whom either singly or collectively any organisation must act. Personal integrity invokes a range of additional requirements involving standards of conduct, particularly ethical standards. There is a debate about whether organisations can be moral agents and whether institutional integrity can also encompass such standards.

Corrupt conduct, in the narrow sense, is almost always personal rather than institutional: the concern with personal integrity is not simply negative – in the sense of preventing corruption. It is also positive – to promote high standards of ethical behaviour. Over recent decades most spheres of discourse, not least in public life, have adopted codes of ethics or of conduct which identify appropriate standards of behaviour.

Of particular concern has been the avoidance of conflicts of interests. Standards and procedures have been developed and, in some cases, formal mechanisms for advice on conflict issues have been established.

Integrity systems directed to both personal and institutional conduct have been described as a means of “institutionalising distrust”. This reflects the fact that such systems are based on the assumption that things go wrong.

Ironically, the purpose of institutionalising distrust is to create the conditions in which there is a high level of trust in mechanisms of governance. The *Analects of Confucius* record the Master saying that there were three matters that are essential for government: weapons, food and the trust of the people. [5] Of the three, Confucius said, trust was the most important.

The level of trust in our society is a form of social capital which has increasingly come to be recognised to be as important as physical capital for the effective and efficient operation of our society and our economy. Social capital includes the institutions which establish the bases for all forms of social interaction. It encompasses the values and rules for social conduct, including the acceptance of civic duties and responsibilities.[6] By enhancing the level of trust in our society integrity systems are a form of social capital which enable transactions with government to occur in an effective and efficient manner.

The sense of personal security of citizens, indeed the existence of social order, is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct, including relations with government, it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security, both of their person and of their property.

All forms of social interaction including, relevantly, interaction with public decision-makers, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. A high level of predictability establishes the requisite social order and the confidence that one can act in accordance with reasonable beliefs as to one’s rights and obligations and that reasonable expectations will be met.

Social capital, like all other forms of capital, is subject to a process of depreciation and requires continuing investment to replenish the capital base. Social capital, like all other forms of capital, is also subject to the possibility of obsolescence, by reason of social and technological changes. Again, this requires constant replenishment of the capital stock. Finally, social growth and increased complexity of society, including in mechanisms of governance, requires additional capital to be deployed, as is the case with other forms of capital in a growing society.

Expenditure on integrity systems can be regarded as a form of investment in social capital, particularly directed to ensuring that a high level of trust exists with respect to the mechanisms of governance.

That does not mean that there are no limits on how much society can afford to invest in such matters. There are limits to the proportion of the gross national product than can reasonably be expended. Investigating agencies are no less prone than other organisations from becoming preoccupied with the significance of what they are doing to the point of self-absorption. Government does not exist for the purpose of being investigated.

In a world of scarce resources, choices have to be made. Nevertheless, to approach expenditure on the integrity system as a form of investment in social capital may provide a useful perspective.

Institutionalising distrust is not a complete statement of the integrity function. That system is not simply negative – in the sense of preventing corruption. It is also positive:

- to ensure that public institutions serve the purposes for which they were established and observe the values to which they are subject – in the case of institutional integrity.
- to ensure the achievement of high standards of probity, honesty and ethical conduct – in the case of personal integrity.

Many years ago Isaiah Berlin published an influential essay on two concepts of liberty in which he distinguished negative liberty – in the sense of freedom from restraint, and positive liberty – in the sense of capacity to have control over the ability to act. It may be useful to analyse many issues in

terms of two concepts of integrity - negative and positive. As Berlin found with liberty, the two forms may not be entirely complementary. They may conflict. Priorities may need to be determined.

These are issues with which I have been grappling for some time. My first book was entitled *Secrecy: Political Censorship in Australia*, published in 1972. The style was more polemical than I adopt today. Together with a lecture which summarised the thrust of the book at the Australian Institute of Political Science Summer School that year, this was early advocacy of Freedom of Information legislation.

In order to see just how far we have come, I found it instructive to look back at the opening chapter of my book. It covered the case of Detective Sergeant Phillip Arantz who, in November 1971, leaked to the *Sydney Morning Herald* a secret report on the incidence of crime in New South Wales.

Arantz was a key member of the research branch of the Police Department responsible for the collection of crime statistics. He noticed that the Police Commissioner's Annual Report to Parliament provided false and misleading statistics on crimes committed and solution rates. All his attempts to correct the information internally were rebuffed. He first leaked information to parliamentarians, but their questions in Parliament were ignored or evaded and the true statistics remained secret.

Frustrated, Arantz gave the full report to the *Herald*. He was disciplined for a breach of public service rules and dismissed from the force. Even more disturbingly, his conduct was regarded, in the then police culture, as so bizarre that the Police Commissioner ordered that he undergo a psychiatric examination. It was later disclosed that the Commissioner had personally rung the psychiatrist at Prince Henry Hospital who noted on his report: "Possible political expediency in bringing pressure to bear on patient's admission".

Over a decade later he was exonerated, notionally reinstated in the force and given an ex gratia payment. Later, after the change in the culture of the force brought about in large measure as a result of Jim Wood's Royal Commission, he was posthumously awarded the Police Commissioner's Commendation for Outstanding Service.

The most direct result of Arantz's public spirited sacrifice – which was considerable – was the establishment of the Bureau of Crime Statistics and Research. This Bureau is a regular source of independent objective information on crime and criminal justice policy in this State. Public debate on the administration of criminal justice is enriched to a degree that other spheres of discourse should envy.

The treatment that Phillip Arantz received is inconceivable today. The institutional structure has been transformed – Freedom of Information legislation, Whistleblower legislation, the Ombudsman, ICAC and with respect to the police, the Wood Royal Commission and the Police Integrity Commission. If and when necessary, each of these mechanisms feed into the ultimate accountability institution, namely, the Parliament of New South Wales.

Furthermore, in all these respects the attitude and involvement of the judiciary, has been transformed both by statute and by development of the common law. The invigoration of administrative law is the most significant judicial development of the law in my legal lifetime. We now have a vigorous set of principles and practices, much of which has been conferred or extended by legislation.

This process is not complete. The High Court's jurisprudence under s75(v) of the Constitution is still developing. Although not directly applicable to State administrative law, the principles applicable to what we now call the constitutional writs will exercise a gravitational pull on the common law.

I do not intend to sound complacent. Like the poor, corruption will always be with us. We have however developed integrity systems over the course of two or three decades which were barely conceivable when I first entered public life. The size of this Conference is itself a manifestation of the strength of the Integrity system of this nation and I wish you well in your deliberations.

#### END NOTES

1. See J J Spigelman, "The Integrity Branch of Government", (2004) 78 *ALJ* 724. Also accessible at the Supreme Court website <http://www.lawlink.nsw.gov.au/sc> under speeches.

2. *Chaos or Coherence?: Strengths Opportunities and Challenges for Australia's Integrity Systems*, Final Report, December 2005, p15.

3. See N Brown & J S Bell *French Administrative Law* (5th ed) Clarendon Press Oxford 1998 pp214ff.
4. See J J Spigelman "The Principle of Legality and the Clear Statement Principle" (2005) 79 *ALJ* 769 and accessible on the Supreme Court website above.
5. See the *Analects of Confucius* translation by Simon Leys, W W Norton & Co, New York, 1997 par 12.7.
6. See for example, *Social Capital: Reviewing the Concept and its Policy Implications*, Productivity Commission, Canberra, 2003.

## Commercial Litigation And Arbitration: New Challenges

**COMMERCIAL LITIGATION AND ARBITRATION: NEW CHALLENGES  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE FIRST INDO AUSTRALIAN LEGAL FORUM  
NEW DELHI, 9 OCTOBER 2007**

Australia is a federation with six States and two Territories, each of which has a Supreme Court with commercial jurisdiction, and a national court called the Federal Court of Australia which also has a commercial jurisdiction. Practices with respect to both commercial litigation and commercial arbitration can vary from one jurisdiction to another. There are, however, common themes and, subject to inevitable differences associated with variation in the size of jurisdictions, practices are generally similar throughout Australia.

The broad themes of this paper are fourfold.

First, for a considerable period Australian courts have subjected commercial litigation to intensive case management. That extends beyond individual case management to caseload or case flow management. This reflects concerns encompassing delays in the system for cases generally, as well as the costs which the courts impose on the parties in litigation. The techniques of and priority given to case management in commercial cases has been influential and has generally been adopted, with some delays, with respect to the management of other kinds of cases. Generally speaking management of commercial cases has been in the vanguard of all of these developments.

Secondly, because of long established special treatment, delay with respect to commercial cases have always been less than for other kinds of litigation. Generally speaking, delay is no longer a significant issue with respect to commercial litigation and is of considerably lower significance than it was a decade or two ago.

Thirdly, by reason of the fact that delay is no longer the significant problem that it was once, the focus of attention with respect to commercial litigation and arbitration is now reducing the costs of the dispute resolution process. This has brought to prominence questions of legal fees, expert evidence, discovery and length of hearing.

Fourthly, commercial arbitration, both domestic and international, is the subject of a uniform national regime. Generally speaking it operates with considerable success. Past judicial attitudes which may have treated arbitration with suspicion are now entirely superseded. Judges, especially commercial judges, actively support and promote alternative dispute resolution.

### **Case Management**

Throughout the common law world over recent decades the judiciary has accepted a considerable expanded role in the management of the administration of justice. This appears to be virtually a universal phenomenon. The courts are no longer passive recipients of a caseload over which they exercise no control.

Generally speaking, Australian experience is that effective and efficient use of resources requires something more than managing individual cases for trial. The focus must be on the overall caseload, not on the individual case, i.e. a top down approach rather than the bottom up approach. This involves an overview of a particular caseload, which itself implies some form of disaggregation of the total caseload of the Court into distinct categories which require different treatment. This is based to a significant degree not only on specialised law, but also on specialisation amongst legal practitioners.

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) Case management and caseload management cannot be successful without judicial leadership and commitment.
- (3) Procedures must be clearly established by 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.

All of these requirements are reflected in Australian court practices and generally receive particularly stringent application in commercial litigation where they were often first developed.

Case management has involved considerable intrusion on what many may have once regarded as the pristine operations of the adversary system. However, complete freedom on the part of the legal profession to conduct cases in accordance with their own interests and wishes is not an essential feature of an adversary system.

Litigants who are dilatory in their preparation, or who otherwise take up too much of the court's time, waste public resources and exacerbate the delays which other litigants have to suffer. Experience in all common law countries has led to the conclusion that delay reduction requires 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 widely and whose clients interests, or whose personal interests, may not conform with the public interest in these respects.

In many respects these developments have required a cultural change amongst legal practitioners, a change which is not yet fully reflected in day-to-day conduct of the adversary system. Nevertheless, over about two decades changes in the behaviour of legal practitioners has been substantial.

In some jurisdictions more formal steps have been taken to require change in legal practice. For example, legislation may require a legal practitioner before filing a pleading to certify that the claim has reasonable prospects of success. This formalises the traditional professional obligation of legal practitioners, being a duty to the court that they must not permit the commencement or continuance of baseless proceedings. In other jurisdictions detailed statutory preconditions designed to promote settlement are imposed and must be complied with before instituting proceedings.

The requirements of commercial litigation have long been accepted as special in these respects. The Commercial Court in London was established in 1895. The first special legislation providing for separate treatment of commercial causes was passed in Australia in 1903. The essential requirements of commercial litigation were established at that time and remain the same today.

Technical rules and long encrusted practices and procedures have been set aside. Judges have been empowered to require the parties to identify the real issues in dispute at an early stage and, thereafter, give directions to ensure speedy and efficient determination of those issues. These are the basic principles. They apply not only to individual cases but also to the body of commercial cases considered as a whole.

The cost structure of Australian commerce has been transformed over recent years by new management techniques, by technology and by the full gamut of microeconomic reforms. The contemporary commercial community has an expectation that all areas of its cost structure is subject to similar review. Lawyers are not and have not been immune to this expectation.

The costs and delays of commercial litigation and of corporate insolvencies can also be regarded as a drag on the economy. The amounts in dispute are, in effect, dead capital. Neither party to a commercial dispute can treat the amount in dispute with confidence as either working capital, capital for investment or capital for distribution to investors. A creditor with a claim on a company in

liquidation is similarly constrained. The longer a commercial dispute continues, or the longer a corporate liquidation continues, the greater the loss to the community in terms of dead capital.

Some jurisdictions have adopted an “overriding purpose”, influenced in this respect by the Woolf reforms in England. The way that overriding purpose is expressed in one jurisdiction is that a court must attempt to facilitate the “just, quick and cheap” resolution of the real issues in dispute. By statute the parties are required to participate in court processes and to comply with directions and orders in order to further this overriding purpose. Legal practitioners have a statutory duty not to conduct themselves so as to cause his or her client to breach that client’s duties to assist.

Different courts in Australia adopt different approaches to the application of case management although the objectives are the same. There are variations in the degree to which caseload management and individual case management is divided between registrars of the court, who are not judicial officers, and judges. There are also variations in the degree of specialisation associated with particular areas of commercial litigation. Plainly the smaller courts are not able to operate on the basis of specialist judges who devote the whole or a substantial proportion of their time to dealing with particular categories of dispute in the same way as larger courts are able to do.

Most case management systems involve some system of differentiation, sometimes called “tracks”. A number of courts have specialist lists which deal with particular kinds of cases in a manner specifically adapted to the requirements of the particular sphere of disputation. A number of courts have commercial judges and corporation judges who are usually responsible for the case management of defined categories of commercial cases with a view to those cases being heard only by certain nominated judges. In one court the American style of “docket system” had been adopted, but judges do specialise to a certain degree by self-nominating to serve on a panel of judges to whom a case of the particular character will be referred.

There is a degree of specialisation in both the allocation of jurisdiction between courts and also within courts. Intellectual property, competition law and most admiralty cases are heard in the Federal Court and a number of judges within that Court have developed particular expertise in that field. The larger Supreme Courts have judges who case manage and hear commercial cases, defined to include a broad range of disputes about contracts, insurance, bills of exchange and such matters. Corporations law cases are divided between the Federal and Supreme Courts. The former are allocated to a self-nominal panel. One State Supreme Court allocates the bulk of corporation law disputes to a nominated small group of judges for specialist treatment, separate from the judges who sit in the commercial list. Some courts also have separate case management for building and construction disputes.

As noted above, practices which developed originally in the management of commercial litigation are now regularly deployed in other areas of the Court’s jurisdiction. Accordingly, the relevant statutes and court rules, which may once have focused on commercial cases, are now expressed in general terms applicable to all kinds of cases. These rules are also often backed-up by detailed Practice Notes with respect to the conduct of proceedings, including separate Practice Notes for special areas of the Court’s jurisdiction. Annexed hereto are the Commercial, Technology and Construction and Corporations Practice Notes of the Supreme Court of New South Wales and the Admiralty Practice Note of the Federal Court.

Court rules confer a range of powers on judges enabling directions and orders to be made to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. The comprehensive range of powers include:

- Power to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed, with respect to discovery, admissions, inspection of documents or property, pleadings, particulars, cross-claims, affidavits or statements, time place and mode of hearing.
- 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.
- The exercise of such powers may identify certain matters required to be taken into account including the subject matter, complexity or simplicity of the case, the costs of the proceedings compared with the quantum of the subject matter in dispute and the efficient administration of

court lists.

- Powers have also been conferred 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.
- Powers have also been conferred to order costs to be paid by a legal practitioner, where costs have been incurred by reason of some serious neglect in competence or impropriety.

Generally, Court practice in commercial litigation is to reject the traditional forms of pleading and to make provision for something in the nature of an initiating statement which sets out in summary form:

- The nature of the dispute;
- The issues which are likely to arise;
- The contentions and the response to contentions;
- The questions that either party considers appropriate for resolution such as reference to a referee;
- Identification of matters that may be appropriate for determination by a single expert;
- Description of all attempts to mediate.

The general practice of commercial judges includes the following steps:

- Reviewing the suitability for mediation or reference out or the use of a single expert or a court appointed expert;
- Laying down of timetables for preparation of matters for trial in considerable detail including;
  - Filing of statements on agreed issues;
  - The making of admissions;
  - The appointment of single experts;
  - The exchange of expert reports and the holding of conferences;
  - The filing of lists of documents and provision of copies of documents (often referred to as "the agreed bundle");
  - The administration and answering of interrogatories (increasingly rare);
  - The serving and filing of affidavits or statements of evidence by specified dates;
  - Directions about the use of technology in the exchange of documents, statements and also for the course of the trial.

Reduction in the backlog, which was perhaps never as great in commercial litigation as it was in other forms of civil litigation, has been substantial over the last two or three decades in most Australian jurisdictions. A number of measures have led to that result.

First, in most jurisdictions additional judges have been appointed. This has included both fulltime judges and, in some jurisdictions, acting judges.

Second, the jurisdiction of lower courts has generally been increased and a significant number of cases have been transferred from the Supreme Court to the District Court and, in some cases, to a Local Court or, in federal jurisdiction, to a newly created Federal Magistrates Court. The courts lower in the hierarchy have generally been able to approach matters with a higher degree of expedition. The Australian experience is that getting the distribution of the caseload in the hierarchy of courts correct is an important way of achieving the most effective use of limited resources. Some lower courts have also adopted specialist commercial or building and construction lists.

Thirdly, the courts have actively encouraged mediation and commercial arbitration and other forms of alternative dispute resolution in all areas of litigation, but especially in commercial litigation.

With respect to some areas of litigation, though not in the commercial area, the courts adopted a technique of backlog reduction which was called a "blitz", in which a large number of cases of a particular character were listed together in a form of running list. Each such blitz was preceded by a series of listing conferences designed to ensure that cases were properly prepared for hearing,

including requirements for greater pre-trial disclosure and strictly enforced a no adjournments policy.

The blitz technique involved sitting a very substantial number of judges, including on occasion virtually the entire court as well as acting judges and including appeal judges, to hear cases that were listed for a particular week rather than for a particular day in the form of running list so that whenever one case settled or was determined the next case in the list was sent to the judge immediately and that occurred irrespective of the convenience of counsel.

From time to time courts conduct "mini blitzes" with respect to particular kinds of cases when filings build up, but that is not generally the case with commercial litigation where there are specialist judges managing the caseload.

### **Costs**

Attention is increasingly given in the course of case management, both before and during a trial, to ensuring that the costs of proceedings are proportionate to the complexity and significance of the matters in dispute. In some cases the test of proportionality has a statutory basis.

The major cost is, of course, legal fees. Such costs are increased by delay, by multiple attendances at court and by the length of the trial. There is a tension between case management and cost control. Many aspects of case management bring costs forward and may increase costs in those cases which would have settled in any event.

The new focus on costs, instead of delay, has required greater attention to these issues, e.g. by attempting to limit the number of attendances at court and discouraging interlocutory applications. Case management practices differ widely in this respect.

Australian courts are still developing techniques for controlling the costs of commercial litigation. Recently the technique of a "stop watch" or "chess clock" system, developed by commercial arbitrators, has been applied in commercial litigation. In this system, in advance of the hearing, the parties agree on the total time that the case ought to take at trial and a formal allocation of time between the parties, usually equal, with some time reserved for the court, is made in advance. All the parties know that if they take too much time in opening the case, they will have to take less time in cross-examination or in final submissions etc. A count of the time that each party takes is maintained on a rolling basis.

The allocation of time and the total length of time is not rigid and can alter as the trial unfolds. However, this mechanism provides some form of discipline on the parties which a judge is able to enforce. This technique is of particular significance where there is a real risk that the trial could incur costs that are wholly disproportionate to the amount in dispute.

In Australian commercial litigation the second largest cost after legal fees is the cost of expert evidence. Various steps have been taken in Australian jurisdictions to both improve the quality of expert evidence and also to minimise the costs associated with such evidence. Courts have developed guidelines or codes of conduct for expert witnesses, directed to establishing the proposition that the expert witness' paramount duty is to the court rather than to the party that calls the witness. Those guidelines and codes also set out a range of matters that must be disclosed in any report. The Federal Court guidelines are attached.

It has often been the case that both parties in a commercial dispute have prepared extensive expert reports that overlap to such a significant degree that a substantial proportion of the costs incurred are duplicated and therefore wasted. By means of guidelines, codes and directions parties are encouraged to agree on the appointment of a single expert, especially for specific matters which are rarely in genuine dispute, such as quantification issues. Furthermore, directions are made requiring experts to confer in order to identify areas of agreement and disagreement and to prepare joint reports setting out the matters which are agreed and the matters about which there remains dispute. Some rules enable a court to direct that such conferences occur in the absence of legal representatives of the parties.

The operation of the adversarial system has been such that, in significant areas of disputation, highly qualified people refuse to accept a retainer to give evidence. On the other hand a hard core of professional expert witnesses emerge in particular spheres of legal disputation. There are doubts about the integrity of such expert witnesses because of their tendency to be called on a systematic basis only on one side of the record.

By guidelines, rules and directions, courts now encourage the use of single experts. Provision exists in the rules for court appointed experts, but those rules are rarely invoked.

More significantly, in terms of the efficiency of the process of giving expert evidence, is the system of concurrent evidence, sometimes referred to as "hot tubbing". This is a system in which experts on a particular issue are sworn together and their evidence is given under the direction of the judge, who often directs the issues upon which the evidence is to be given and asks many of the questions. The process also allows the experts to ask each other questions. Properly conducted concurrent evidence allows experts to join in a discussion about the issue with the judge and advocates, rather than to follow the normal form of examination, cross-examination and re-examination with the information restricted to answering specific questions at all three phases.

Experience with the use of concurrent evidence suggests that many experts who have in the past been reluctant, or have even refused, to give evidence are now prepared to accept retainers. Furthermore, the experts confirm that the process increases the integrity of the expert evidence because it gives all experts an appropriate opportunity to contribute their learning to the resolution of the problem and diminishes the sense of obligation which they would otherwise feel to assist a particular party. It appears that the use of this approach has increased the pre-trial settlement rate of complex litigation.

Of particular importance in many commercial disputes is the cost of discovery. Australian jurisdictions vary in their practices in this regard. Some still adopt the traditional rules of a broad basis of discovery. Increasingly, however, particularly in commercial litigation, judges case manage commercial litigation with a view to limiting discovery to matters likely to be in dispute and direct that discovery occur by categories of documents.

In significant commercial litigation full scale discovery can now cost multiples of millions of dollars. These expenditures are quite often disproportionate to the amount in dispute. This is an ongoing problem. It is now exacerbated by the fact that, for most Australian commerce, information is now kept entirely in electronic rather than documentary form. The process of discovery now involves access to corporate records that have always been kept in an electronic form and, in many cases, have been deleted from hard drives in accordance with document management policies designed to ensure the documents are only kept for the time in which they are commercially relevant, as distinct from relevant for purposes of future litigation.

In most cases the deletion of documents in the course of managing the electronic database of a particular commercial enterprise is not completely effective. Various recovery techniques are available by means of interrogating hard drives, with different levels of sophistication. There are now frequent disputes in commercial cases about what steps it is appropriate to take, in order to ensure that deleted documents are recovered so that they can be the subject of discovery. Frequently searches are requested for deleted emails or drafts of documents. These requests can add considerably to the costs of discovery.

No clear rules have emerged for balancing the costs of the process of discovery on the one hand against ensuring that the court is in a position to determine the truth of a particular commercial dispute on the other hand. One step taken recently has been to attempt to stop the multiple handling of documents. As most documents are originally in electronic form the traditional mechanisms of dealing with them in the course of litigation has proved particularly costly: it involved taking something in electronic form, producing it in a hard copy format able to be checked by lawyers for purposes of relevance and to assess issues of legal professional privilege before disclosure and then disclosing them both in hard copy and, frequently, scanning the disclosed materials to make them available to the other party and to the court in electronic form.

New rules have been developed and are being developed to ensure that information that is in an electronic form originally is kept in that format through the different stages of the discovery and inspection and trial process. This is a specific manifestation of the manner in which the court's emphasis has shifted to controlling costs rather than being concerned with delays.

### **Arbitration and Mediation**

All Australian courts now actively encourage alternative dispute resolution mechanisms. These are basically in the form of arbitration and mediation. Detailed provision formerly made for neutral evaluation was not much used and in some cases has been removed from the rules. There has been

a substantial increase in the number of legal practitioners who are skilled in mediation and arbitration. The most successful of these practitioners have been retired commercial judges.

All courts offer some form of court-annexed mediation. Sometimes it is done by registrars of the court, who are not judicial officers. In other courts, however, judicial officers become involved in the process of mediation.

In some Australian jurisdictions specific requirements are imposed upon parties to attempt settlement, particularly by means of mediation, either before instituting proceedings or before the matter is set down for hearing. There has been some use of what is known in England as "pre-action protocols" which set out, at least in one State, in statutory form detailed steps that must be taken prior to the actual institution of proceedings. In other jurisdictions there are obligations under rules or practice notes that mediation should be attempted prior to a matter, or a particular kind of matter, being given a trial date. As noted above, case management of commercial cases, whether in lists or by judges under an individual docket system, systematically encourages alternative dispute settlement.

One matter that appears somewhat counter intuitive is the conferral upon courts of a power to order mediation. This was once thought to be pointless because it appeared unlikely that a party who was ordered to mediate would be prepared to enter such negotiations in a co-operative manner. That has proven to be false. Reluctant starters have often proved to be willing participants in the negotiation process. It appears that many litigants have either not understood, or not been advised by their lawyers about, the weakness in their case, or have adopted a negotiating posture from the outset that they could not possibly lose. A formal order of the court requiring mediation has overcome such inhibitions and has proven particularly successful in a number of spheres of jurisdiction.

One well-established technique of particular significance in building and construction disputes, but also used in general commercial cases, has been a formal mechanism for reference of the whole or part of a proceedings to independent referees. These referees are sometimes experts, e.g. engineers who are asked to determine a particular technical matter for purposes of proceedings. Increasingly, however, the referees are retired judges to whom the whole of a matter, including legal issues, is referred.

Such a reference is conducted under the general supervision of the Court and culminates in a report by the referee to the Court, which the Court must adopt before it is effective. The principles applied are that such reports will be adopted save for very good reasons. This mechanism is of particular significance in cases where technical expertise is required. It is also of particular utility where only some parties, or only some issues, in a wider dispute are subject to an arbitration clause. A person can be nominated as both an arbitrator and as a referee and, therefore, resolve the whole of the dispute. Many of the referees are in fact retired commercial judges who also act as commercial arbitrators.

With respect to international commercial arbitration Australia is a full participant in the coherent international system for resolving commercial disputes by arbitration: i.e. the interlocked provisions of the UNCITRAL Model Law, the New York Convention for Enforcement of Arbitral Awards and the Washington Convention for Investment Disputes. Australia has implemented all of these international provisions by statute. It also has a long established system for commercial arbitration by uniform legislation in all jurisdictions.

The mechanisms for mediation are not so structured. However, in all significant commercial centres commercial legal practitioners are well aware of the availability of mediation and have well-established connections with the pool of independent mediators. Increasingly, in-house counsel in commercial firms and the clients themselves are conscious of the cost and time benefits of successful mediation. The universal approach of commercial judges who case manage such litigation is to encourage mediation. That is reflected in the settlement rate both during the course of case management and after a matter has been set down for hearing. These approaches have required a change in the culture of the legal profession which has been more gradual than the change in the attitude of the judiciary.

Many persons involved in commercial arbitration are critical of the way in which legal practitioners adopt the full panoply of formal trial procedures for the course of an arbitration, including all of the traditional delaying techniques such as requests for particulars, interrogatories, disputes about disclosure of documents and the formal steps of examination in chief, cross-examination and re-examination, as if conducted under formal rules of evidence. Many commercial arbitrators are now critical of what they see to be a failure on the part of arbitration to take advantage of its ability to

deliver a comparatively quick and cheap dispute resolution process, by reason of the fact it is not formally bound by rules of evidence and traditional procedures. Practices may well be changing in response to these criticisms.

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

## A Guide to Sentencing

**A GUIDE TO SENTENCING: LAUNCH OF PUBLICATION  
OF THE JUDICIAL CONFERENCE OF AUSTRALIA  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
SYDNEY, 5 OCTOBER 2007**

Sentencing of convicted criminals 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.

Over the years I have expressed concern that public confidence in, and public respect for, the judiciary are diminished by reason of ignorance about what judges actually do in terms of the sentences that are imposed. I accept, of course, that there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. I have, however, been concerned that such cases appear to be widely regarded as typical, when they are not.

There appears to be a widespread belief that judges generally sentence more leniently than they actually do. There is a considerable body of research which indicates that, with respect to crime, and particularly with respect to sentencing, there is a significant disparity between what actually happens and what a majority of the public believes happens.

This disparity can have significant effects. One of the important purposes of sentencing for crime is deterrence. The belief that judges sentence more leniently than they actually do, means that the deterrent effect of the sentencing process is lessened. It is, accordingly, of general significance that the public is properly informed both about the actual level of sentences imposed and the principles upon which the sentences are imposed.

The general media are an important source of information for the public but, space limitations and an understandable focus on high profile cases and controversy, necessarily means that the public cannot be informed by the media about what judges actually do in the normal line of case and why. Judges in Australia hand down something of the order of three-quarters of a million sentences a year. Probably only about 0.1 percent of them receive any kind of media attention.

The Judicial Conference of Australia has performed a significant public service by compiling the publication being launched today: *Judge for Yourself: A Guide to Sentencing in Australia*. This publication is available both in booklet form and, in a more detailed version, on the JCA website which is accessible to any member of the public – <http://www.jca.asn.au>.

This Guide outlines in a logical and comprehensive manner the context and the practice and procedure of sentences as well as an overview of the principles and legal requirements of the sentencing exercise. The project was an initiative of Justice Ronald Sackville when he was President of the JCA. He chaired the Committee. I congratulate the JCA on this excellent initiative and thank Justice Sackville and members of the Committee for devoting their time and applying their experience and learning to the preparation of the Guide. It represents a significant contribution to public confidence in the administration of justice and public respect for the judiciary.

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 retributive punishment, as were their descendants. However, the descendants of Adam and Eve were given some prospects of rehabilitation. Animal rights activists will, no doubt, be concerned about discrimination against the snake.

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 requirements of deterrence, rehabilitation, denunciation, punishment and restorative



justice – all of which are identified as purposes of sentencing in the Guide – do not point in the same direction. Specifically, the requirements of justice, in the sense of just deserts and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. The judiciary cannot satisfy all these points of view. It is important to recognise that the permissible range for the sentencing discretion by the judiciary is narrower than the breadth of the range of opinion held within the community. That means that someone will always be disappointed.

Inevitably, individual judges will have different philosophical approaches to the task of sentencing. The purpose of sentencing principles or guidelines and of the appellate process is to ensure that these individual differences are kept within proper bounds. It would undermine public confidence in the administration of criminal justice if it became widely believed that the result was a lottery based on who the judge was. It is essential that the outcomes of similar cases are, within reasonable bounds, the same so that offenders do not have a sense of grievance that they have drawn a particularly harsh judge and victims do not have a sense of grievance that the offender has drawn a lenient judge.

The need for consistency is only one of numerous constraints on the sentencing task. One of the key features of the Guide is that it identifies those constraints in a manner that is clearly explained.

It is understandable that the media and members of the public concentrate on only one aspect of the sentencing process, i.e. the actual penalty compared with the most prominent aspect of the particular crime. Judges are not permitted by law to adopt such a narrow focus. Judges are required by statute and by common law principles to take into account a wide range of relevant considerations, being all of the circumstances of the offence and also the circumstances of the particular offender. This Guide outlines in an intelligible manner the full range of considerations which a judge is required to take into account.

These legal requirements mean that a judge cannot focus only on the requirements of punishment and deterrence and denunciation. S/he also has to have regard to the prospects of rehabilitation and the wide range of matters that impinge upon the moral culpability of the particular offender. This extends beyond details of the act and its immediate consequences upon the victim. Judges are required by law to take into account a range of matters – some mitigating moral culpability, such as youth and remorse, and others aggravating moral culpability, such as repeat offending and cruelty.

Perhaps the most significant development over recent decades has been the introduction of a greater emphasis in the sentencing process upon the effect of crime on victims and, particularly crime resulting in death, upon the family of the deceased.

The urge of victims to seek revenge for criminal conduct, particularly violent criminal conduct, may not be the most noble of human motivation. Nevertheless, it must be accepted that the demand for retribution and denunciation is a basic human response to loss and grief. Assuaging the need for retribution cannot be ignored, even by those who regard it as an ignoble human characteristic.

One of the most important functions of the criminal justice system is to ensure 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 sentencing takes into account the possible outrage by victims about inadequate punishment.

Furthermore, the community as a whole has the same basic instinct to denounce criminal conduct, as those directly affected. Everyone is outraged by criminal conduct and expects punishment. It is not only victims who believe that the gravity of the offence is determined by the extent to which the offence has made other persons suffer. Such denunciation affirms community standards of morality and operates to enhance social cohesion.

Changes in public opinion about the weight to be accorded to the various considerations to which regard must be had in the exercise of the sentencing discretion are changes which judges have to take into account. The increased prominence given to the effect on victims, such as provision for victim impact statements, reflects such a change.

It does appear that the central significance given to the objectives of rehabilitation, even a decade or two ago, has been displaced. This reflects a more widespread change in social philosophy which focuses upon the importance of persons taking responsibility for their own conduct. When such a

broad shift in social philosophy occurs one should not expect that the criminal justice system can be insulated from it. Nor has it been.

Nevertheless, as this publication so effectively attests, the multiplicity of considerations involved in the sentencing exercise remains the basic characteristic of the task. There may be changes in the weight to be given to particular considerations over time. The fact that there are multiple considerations will not change.

Despite the widespread belief that judges are excessively lenient, I do not believe that the public as a whole is generally more punitive than judges. Numerous studies have confirmed that where the public is provided with the detailed information that a judge receives about the offence and the offender, they are not more punitive. About the same proportion believe the judge was too severe as believe the judge was too lenient. This research confirms there is no single correct answer. It also confirms that judges are not systematically lenient.

Centuries of practical experience establishes that the sentencing task is best conducted by the exercise of the broad discretion. That experience also establishes that the difficult process of weighing and balancing all of the relevant considerations is best done by an independent, impartial, experienced, professional judge.

One hears much less today of proposals that were common even a few years ago for significant restrictions upon the sentencing discretion by means of a sentencing matrix or minimum mandatory terms. This booklet explains why such legislative restrictions would impede the ability to achieve justice in an individual case. We have long had experience of this character. The *Criminal Law Amendment Act* of New South Wales 1883 created a strict sentencing structure involving five distinct steps with maximum and minimum sentences. The scheme led to such palpable injustices that the *Sydney Morning Herald* editorialised on 27 September 1883:

“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because of the rigidity of the law left him no discretion.”

The scheme was abandoned by statute a year after its introduction.

Rigid restrictions of this character will inevitably be counter-productive. What is required is an informed public debate, by which the judiciary ensures that it stays in touch with changes in community's expectations and standards of what is fair and just.

This continuing dialogue is enhanced if the public has a high level of understanding of what judges do in the sentencing task and why. To this important task the Judicial Conference of Australia has made a singular contribution.

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

## Judicial Appointments And Judicial Independence

**JUDICIAL APPOINTMENTS AND JUDICIAL INDEPENDENCE  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
THE RULE OF LAW CONFERENCE  
BRISBANE, 31 AUGUST 2007**

The topic on which I have been asked to make some observations is appropriately subsumed in the general theme of this conference. The rule of law is the ultimate foundation of the three "i's" of judicial conduct: independence, integrity and impartiality. In turn, these requirements are the criteria for judicial appointment. I commence, accordingly, with some necessarily general observations on the rule of law.

No complex society can operate without the efficient and expeditious performance of legal functions, by means of direct enforcement of rules and by the deterrent effect of threatened or possible enforcement.

The sense of personal security of citizens, indeed the existence of social order, is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security, both of their person and of their property.

All forms of social interaction, including economic interaction, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. A high level of predictability establishes the requisite social order and the confidence that one can act in accordance with reasonable beliefs as to one's rights and obligations and that reasonable expectations will be met.

The legal system performs a critical role in the promotion of social order by the administration of the law in a manner which answers the fundamental requirements of justice namely, fair outcomes arrived at by fair procedures. The fairness of the procedures is as essential as the correctness or fairness of the outcomes. When people talk about having their "day in court" this is a matter that is of significance to their sense of freedom and of personal autonomy.

Those in society who are wealthy or powerful, including but not limited to the numerous manifestations of the executive branch of government, have other means of getting their way. What confines those with power, whether in government or commercial corporations or the media or, in some societies and contexts, social or religious groups or trade unions, is the effective operation of the rule of law.

Citizens are entitled to protection from the exercise of the power that others are able to exercise over their lives. Actual or threatened transgression of civil rights in society, notably but not limited to the exercise of the police function of government, are in large measure deterred by the very existence of an independent legal profession with access to courts consisting of independent judges. From time to time deterrence does not work and the judicial arm of government must be invoked, sometimes against other arms of government, both executive and parliamentary.

The rule of law involves a principle of universality, that is to say every person however powerful or wealthy is governed by the ordinary law and is personally liable for anything done contrary to the law. All authority and power, including all aspects of governmental authority and power, must find an ultimate source in the law. It is this principle that ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law.

A second aspect of the rule of law is the concept of boundedness: that the law is not all encompassing. There is a substantial sphere of freedom of action. Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, so constraint

ends. Judges and lawyers are boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.

The minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, must be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence, in an environment of social order. Judicial independence ensures that any such determination is, in fact, objective.

Of course the rule of law is not simply a system that contains rules that must be obeyed. The law is a system to be used by citizens for their own protection and for their own advancement in their relations with the State and with other citizens or organisations.

None of this can happen without the active participation of lawyers both by means of advising people of their rights and obligations and by ensuring that they are enforced. However, enforcement can only be reliable if there is an independent forum for the resolution of disputes about rights and obligations.

A society cannot be governed by the rule of the law without an institutionalised arrangement for the independence of the judiciary. Furthermore, democracy depends on the courts enforcing what the legislature intended, not what the Executive wants.

The form of social order which we identify with a society operating under the rule of law can only exist if laws are administered fairly, rationally, predictably, consistently and impartially.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties of the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Any form of improper influence, incompetence, inefficiency or bias is inconsistent with each of these objectives. Without institutionalised judicial independence, distortions are inevitable. Without a high level of competence, integrity and capacity for impartiality on the part of judges, distortions are inevitable.

As is recognised in the terms of numerous constitutional and international instruments, judicial independence is a fundamental right of citizens. It is not some kind of privilege which judges acquire as a perk of office. It is an aspect of the rule of law. For the reasons I have mentioned competence, integrity and capacity for impartiality is also an aspect of the rule of law. Judicial appointments must be understood in this context which is, in the full sense of the term, constitutional.

The starting point for the impartial administration of justice is some form of institutional autonomy. An effective judiciary requires a distinct esprit de corps and its own legitimising traditions. This is often reflected in distinctive form of dress. The judiciary must be, and be seen to be, institutionalised, a distinct group performing distinct functions.

There are many choices in the institutional design of the judiciary with respect to these matters. Insofar as a polity wishes to be a society in which the rule of law operates, it is essential that the ultimate guardians of the law must have the level of integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a competent source of impartial decision-making.

The judiciary must be independent of any person who may seek to exercise influence on the outcome of legal proceedings, in any manner and for whatever reason. Unless that is so, the rule of law is inevitably compromised.

Obviously, the parties to a dispute are the most likely persons who would seek to exercise such influence. However, persons who wish to manifest their power, or to pursue a political, religious or social agenda, are all likely to seek to have their wishes or views implemented in the course of judicial decision-making. That is, of course, particularly true with respect to judgments that have broader implications, such as Constitutional decisions, but it is a form of pressure that could arise in any kind of case. Unless judges are hard to get at, because of institutional autonomy and personal independence, there will be no shortage of persons who try to do so.

Judicial independence does not only involve freedom from direct interference. It also involves freedom from dependence, of a character which may lead to actual, or even perceived, influence, without the need to exert actual interference.

People who are used to getting their way do not usually take kindly to their wishes being frustrated. In the past that has included the aristocracy, when it was the centre of social and economic power. These days such centres of power include major corporations and the mass media. Throughout history, the executive branch of government has been such a centre of power.

The threat to independence from the Executive branch is, of course, particularly acute because the Executive is, in one manner or another, the ultimate source of power for the appointment of judges, for the administration of mechanisms for discipline or removal of judges and the source of funding for all aspects of the administration of justice.

The most significant single aspect of the institutional arrangements for judicial independence is the need to insulate, indeed to isolate, the exercise of judicial power from interference or pressure from the Executive branch of government. To a substantial degree this is simply a manifestation of the need to ensure impartiality. So far as I am aware, in all jurisdictions, the hydra-headed Executive branch is the single most frequent litigant in the courts.

Citizens confront the Executive branch in all its various capacities in the course of litigation.

- Courts are frequently called upon to determine the validity of executive action and the constitutional validity of legislation promoted by the Executive.
- Any citizen can be subject to investigation or prosecution by the various authorities that exercise the police power of the state, not only with respect to matters that involve allegations of criminal conduct, but also with respect to the full range of regulations that seek to confine or direct the personal behaviour of citizens and corporations.
- As taxpayers, citizens are engaged in disputes with revenue authorities.
- As property owners, citizens are engaged in disputes with the wide range of regulatory authorities that determine what they can do with their property, indeed whether it can be compulsorily acquired, and if so, at what price.
- As employees, citizens confront the largest single employer in the nation.
- As persons entitled to legislative benefits, citizens are confronted with the full range of bureaucratic decision-making processes.
- A significant proportion of injured persons seek compensation from government agencies such as hospitals, railways, road authorities and police.
- Governmental organisations manifest the full range of commercial interests as suppliers or purchasers of goods and services from others, which are as much prone to disputes over property rights or contractual terms as any other commercial relationship.

It is important that the principle of judicial independence is not stated too widely. Not every aspect of the administration of justice can be encompassed within the concept of independence. Not every matter which impinges upon access to justice or the quality and fairness of adjudication or operates as a restraint on judicial conduct constitutes a threat to independence.

Necessarily, threats to judicial independence differ significantly from one jurisdiction to another. It is, accordingly, extremely difficult to generalise about this matter, although there do appear to be certain common themes in countries in similar stages of economic development.

There are nations where the enforcement of the protection of the judiciary is suspect and, in such situations, any individual or group who can threaten the personal security of a judge or a judge's

family may be tempted to do. Persons of wealth, of power or those with a monopoly of force, such as the police and armed forces, may constitute such a threat. In some societies social groups, notably of a fundamentalist religious character, may have similar inclinations.

Even where no issue of personal security arises, there may be the possibility of public ridicule and contempt of individual judges or of the judiciary as a whole. This may be driven by, or reflected in, the mass media, which can mount a campaign of intimidation of a character short of physical threats, but nevertheless capable of interfering with the actual or perceived impartiality of judicial decision-making processes.

There are numerous decision-making processes capable of impinging on judicial independence. Judges who are selected or promoted on the basis of how they are likely to decide, rather than on the basis of their professional expertise, may not disappoint the authorities who select and promote them. Judges who may have their appointments terminated by a mechanism which does not contain real restraints, of a formal and informal character, are less likely to be prepared to offend persons or groups capable of exercising power in their community. Courts that are continually requesting additional resources from government in order to perform their functions effectively may prove more likely to be subject to subtle pressures to achieve particular outcomes in matters of significance to those who control the resources. Judges who are inadequately remunerated, given the economic circumstances of their particular nation, are subject to temptations which may be difficult to resist. Similarly, in the case of judges who are not accorded the status required to ensure that the administration of the law in their society is regarded as a matter of constitutional significance. A judiciary which is accorded a low status and, accordingly, a low level of respect in its community, will be less likely to have the level of competence and impartiality required for the effective administration of justice.

Often the most significant point of pressure on members of the judiciary comes from public pressure, particularly as reflected in the media which, in turn, influences politicians. Objectivity, impartiality, adherence to legal principle and precedent and maintenance of equality before the law can all be compromised by the extent to which judges respond to actual or anticipated pressure.

Judges are human and it is appropriate to be concerned and to ask whether the anticipation of public hostility is adversely affecting the objectivity and neutrality of the administration of justice, even if unconsciously. Fortitude is required. A principal source of strength is the bond of collegiality, often developed in practice at the bar where, that most important of judicial virtues – the capacity for detachment – is also inculcated. However, fortitude is not enough in the long term. We must be concerned with structural issues of institutional design.

In many nations respect for authority has diminished over recent decades to a significant degree. Judges are not alone in this. Public sector remuneration has declined when compared with rewards in the private sector. Again judges are not alone in this. The pressures of public life when compared with private endeavour – parading under the twin banners of accountability and transparency – deter the most competent and successful lawyers from assuming the responsibility of public life. Again, the judiciary is not alone.

Heightened standards of accountability – with respect to both the use of public resources and the integrity of public decision-making – requires the judiciary to explain and defend itself in ways which would once have been regarded as an affront to its dignity and, perhaps, to its independence. I am not talking about that development.

What concerns me is the fact, discernible in many jurisdictions, that the judiciary is subject to transient rages and enthusiasms, generally ill-informed or partly informed, designed to influence judicial decision-making either on appeal or in future cases and which may also influence judicial appointments.

The judiciary's traditional reticence to engage in public debate makes it a soft target. We have not developed an institutional alternative to the rigorous defence of the judiciary by Attorneys General who are able to detach themselves from the political *melée*.

In many different jurisdictions, the political capacity, or the political will, to resist contemporary pressures has been attenuated or has broken down. The institutional mechanisms that protected the judiciary in the past are showing signs of strain.

Generally, the judiciary has manifested a high level of resilience in the face of ill-conceived and unsupported allegations that judges are out of touch with community values. However, personal resilience is not enough to maintain the level of integrity, impartiality and independence that the rule of law requires. If these trends continue we may need to develop new mechanisms to protect the integrity of judicial decision-making and our longstanding ability to attract the best lawyers to the judiciary.

I do not intend to enter the debate about models for judicial appointment procedure. It is sufficient for me to observe that there is no single model applicable to every jurisdiction. There are strengths and weaknesses in all the models.

What is appropriate in England, where the Lord Chancellor has to make hundreds of appointments per year in a nationally integrated judicature, is not appropriate for, say, Tasmania where in some years there is no appointment at all. Similarly, procedures such as advertising or otherwise seeking expressions of interest which are appropriate for a large jurisdiction, such as a Local Court, where unexpected people may prove to be interested, are not appropriate for a Supreme Court, let alone for the Chief Justice of that Court.

Everyone agrees that judicial appointments should be based on merit. There is less unanimity on precisely what that means and how, or by whom, it should be assessed.

There are a wide range of judicial virtues: legal learning, trial experience, wisdom, compassion, clarity of thought and expression, robust independence, capacity for detachment, impartiality, attentiveness, diligence, common sense, strength of character and administrative skills. This is a diverse skill set of essentially incommensurable matters. There is no means of reducing them to a single metric.

It is possible to attain a reasonably broad consensus about the persons who are appropriate appointees. However, there are very few, if any, occasions on which a single person will stand out as the obviously best appointment. In my opinion, no mechanism is necessarily better than any other in balancing and assessing the wide range of attainments to which I have referred. Success necessarily depends on the background and character of whoever must formulate the judgment, recognising that it is a judgment on which reasonable people will differ. I do, however, wish to express my scepticism that it is a task capable of being performed by a committee.

Whatever mechanism is chosen for judicial appointment the process of selection, by whomsoever it is performed, must be guided by the proposition that the above judicial virtues are required so that laws are administered fairly, rationally, predictably, consistently and impartially. These are requirements of the rule of law, as the theme of this Conference correctly emphasises.

## International Commercial Arbitration Conference Address

**International Commercial Arbitration Conference: Opening Address  
Address By The Honourable J J Spigelman AC  
Chief Justice Of New South Wales  
To The Joint Conference Of ACICA and ACLA  
SYDNEY, 10 AUGUST 2007**

I have had a number of opportunities over recent years to express my support for the process of international commercial arbitration. One such invitation also came from ACICA in a similar role to which I find myself today, at the Inaugural Conference of the Asia Pacific Regional Arbitration Group ("APRAG") which brought together arbitral institutions from throughout the region. That conference, like the present conference, manifests the vitality of this international system for commercial dispute resolution.

The multi-faceted process known as globalisation has brought with it a widespread recognition of the benefits potentially available from reducing national barriers to mutually advantageous exchange by trade and investment. The rapid expansion of such commercial interaction inevitably brings with it the need for dispute resolution.

One of the non-tariff barriers to international trade and investment, being barriers which impede such mutually beneficial exchange to a greater degree than domestic trade and investment, arises from the transaction costs and uncertainties involved in international dispute resolution. Lawyers and other practitioners in this field can make a significant contribution to reducing such non-tariff barriers and, thereby, improve the economic welfare of all those who benefit from trade and investment.

The coherent international system for resolving commercial disputes that has been devised in the interlocked provisions of the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention for Enforcement of Arbitral Awards and the Washington Convention for Investment Disputes, plays an essential role in this process. These international instruments are, as this audience is well aware, so widely adopted that they facilitate international commerce to a substantial degree.

Nothing remotely comparable to this international system for enforcement of arbitral awards exists with respect to enforcement or judgments of courts. There have been numerous attempts to develop some kind of system for enforcement of judgments and they have all failed. I cannot see this situation changing. The Hague Convention gave up on its attempts to devise such a system but did produce a *Convention on Choice of Court Agreements* two years ago. No state has yet acceded to this Convention and only one has signed. That delay arises because, as I understand the position, it is usual for states to await the Hague Conference issuing a detailed Explanatory Report. That was published only a few months ago.

This Convention creates a regime in which states agree to enforce commercial arrangements pursuant to which parties choose a court to have jurisdiction. The *Convention on Choice of Court Agreements* has the same core justification as the New York Convention with respect to arbitral awards. Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons that that has been accepted by the large number of nations that have adopted the New York Convention.

It will be interesting to see whether nations approach this Convention as if it were an application of the commercial autonomy of the parties who have chosen a specific forum for resolution of disputes, or whether the element of national sovereignty involved with the formal courts will lead nations to adopt the traditional territorial approach that has bedevilled any attempt to produce a regime for enforcement of judgments.

Issues of national sovereignty remain the dominant theme whenever the institutions of one nation are faced with the exercise of the sovereign power of another nation as manifest in the courts of that other nation. In contrast, the international community has, to a significant extent, been prepared to set aside the capacity of nation states to interfere with international commerce in favour of giving respect to the choices made by parties to international commercial transactions involving arbitrations.



It is well to remember that this abdication of formal power is accepted throughout the world only on the basis that it serves the interests of each nation that participates in such a system. Reciprocity is at the heart of this international deal. Each such nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner. There is no law of nature which says that this form of enlightened self-interest will continue.

In the world before World War I, when international communications had been revolutionised by wireless telegraphy over international cable connections and a substantial decline in transportation costs, the benefits of globalisation were as obvious as we believe them to be today. That globalised world changed very quickly into war and national autarky, at great cost. No-one should assume a similar regression is impossible today.

For all of those who are involved as practitioners in the resolution of international commercial disputes, whether as lawyers or arbitrators or judges, the contribution that we can make to the maintenance of the system is twofold. First, to ensure that the public and political decision-makers are aware of the benefits of the system. Secondly, to ensure that the system actually delivers the benefits of which it is capable.

The costs and uncertainties of international commercial dispute resolution are capable of being minimised, and brought into some kind of reasonable relationship with the costs and uncertainties of domestic commercial dispute resolution, only if all of us who are involved in the process are committed to the just, quick and cheap resolution of such disputes.

Business lawyers have been described as “transaction cost engineers” who facilitate commercial intercourse by reducing future transaction costs. Well drafted commercial arrangements avoid conflict with regulatory regimes, anticipate and therefore avoid disputes and create structures for dealing with the unknown or the unanticipated. By such involvement transaction lawyers add value to commercial transactions. The same is true of dispute resolution processes.

The cost structure of most 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, both domestic and international. Lawyers are not and will not be immune to these pressures. The same is true of commercial arbitrators.

Both lawyers and arbitrators must be seen to deliver a cost effective service or they may very well find themselves bypassed by the requirements of commerce. Judges as well as arbitrators must be sensitive to the costs that the procedures for dispute resolution impose upon the parties. That is particularly the case in international commerce, the benefits of which can be substantially undermined by the transaction costs that arise whenever something goes wrong.

I know that many believe that commercial arbitration mimics court processes too often and to a greater extent than it should. This restricts to a significant degree the extent to which arbitration delivers in fact on its potential to be cost effective. Generally speaking, in the jurisdictions with which I am familiar, I see little evidence that commercial arbitration is in fact quicker and cheaper than decision-making processes by commercial judges. It is possible for it to be so but it does not seem to happen as much as it should.

The international regime for commercial arbitration does have one advantage because it avoids the proclivity to engage in venue disputation that has bedevilled such litigation in Australia, England and North America, but not yet elsewhere. The burgeoning case law on anti-suit injunctions and then anti-anti-suit injunctions and, inevitably, anti-anti-anti-suit injunctions, reflects the simple proposition that when it comes to the procedure of courts and the quality of judiciaries, parties believe that where a case is determined matters. This is so even if the disputation involves considerable expenditure that is, on any objective view, completely wasteful. Avoiding venue disputation is a real cost and time advantage for choosing the international arbitration regime.

There is of course a long history of tension – one hopes that in this day and age it is a creative tension – between courts and arbitrators who have on occasions treated each other as if they were trade rivals in the dispute resolution business. I do not believe that is a prevalent attitude today, but one cannot say that it has completely disappeared.

As many of you are aware, in a joint judgment to which I was a party in *Raguz v Sullivan* (2000) 50 NSWLR 236, President Mason and I referred to the traditional hostility of common law judges to commercial arbitration in the period up to the middle 19th century, until the famous case of *Scott v Avery* upheld the validity of arbitration agreements which made an award a condition precedent to any right of action under a contract. As we said in that judgment, the canny Scot, Lord Campbell, explained that hostility by the fact that judicial salaries were almost entirely dependent upon court fees and, accordingly, English judges had a personal financial incentive to maximise the number of cases that were brought in the courts. That incentive did not disappear until the mid 19th century. It was never a feature of Australian judicial practice, although the first Chief Justice of New South Wales, Sir Francis Forbes, had to suppress the wishes of his fellow judges to establish such a system here. Only those judges who are historians can look back wistfully to the days when being a judge was a route to substantial wealth.

As we pointed out in *Raguz v Sullivan* this part of Lord Campbell's judgment must have caused quite a stir because it was removed from the published reports of the decision.

Of course these days the financial interest in ensuring that the flow of work is maximised is now only relevant to commercial arbitrators. In the case of judges, incentives are limited to matters of status and self-importance, motivations which it would be wrong to dismiss as trivial, but which nevertheless are not quite as compelling as money.

As the judgment in *Raguz v Sullivan* clearly shows, Australian commercial judges have, generally, become active proponents of alternative dispute resolution mechanisms, including commercial arbitration. This was manifest most recently in the judgment of the Full Federal Court last year in *Comandate Marine Corp v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45.

Of course there will be exceptions, but there is no doubt that throughout Australia commercial judges do not manifest the kind of hostility to commercial arbitration that may once have been the case. This is in part a function of the managerial role that judges have assumed over recent decades with respect to both individual case management and case load management within their courts. By comparison with the past, judges do not sit back as neutral umpires allowing parties to take as much time as they like but, particularly in commercial litigation, insist on the early disposition of the real issues in dispute in the most economical manner possible. Often enough that involves support for alternative dispute resolution processes.

When it comes to international commercial litigation, Australian judges are conscious of the advantages of arbitration from the point of view of enforcement. They are also aware that arbitration has certain other advantages, particularly to those parties who wish, for perfectly appropriate commercial reasons, to ensure confidentiality. Of course one person's privacy is another person's secrecy and there are many people, not simply trade rivals, who have an interest in knowing what is going on.

There is, of course, express provision for judicial supervision of commercial arbitration. I am well aware that many arbitrators remain doubtful that judicial expressions of support are fully reflected in the exercise of these powers. You should recognise that you may be in no different position to those numerous trial judges who complain about the intervention of appellate courts, or administrators who complain about judicial review.

Courts have specific statutory powers, indeed duties, with respect to commercial arbitration. The statute must, of course, be applied in accordance with its terms. However, in my opinion, these statutory powers should be regarded as conferring a supervisory jurisdiction principally directed to maintaining the integrity of the process of arbitration. This is an essential function which the courts perform in a number of different spheres of conduct – notably in other supervisory jurisdictions such as administrative law.

The statutory power to review creates an appeal on a question of law. That does not mean that whenever such a question exists the power to intervene must be exercised. The exercise of the discretion to make orders raises distinct issues. Whenever a court's intervention is concerned with matters of personal and institutional integrity, the system of commercial arbitration is enhanced.

Practitioners should accept that arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court.

It cannot be suggested that a light-handed but effective supervisory jurisdiction interferes in any way with the autonomy of the parties which is the underlying rationale of commercial arbitration and the reason why it has acquired a broad level of acceptance in dispute resolution. The party's choice was not, however, to select arbitration per se, but to select arbitration by persons and by procedures that manifest a high degree of integrity.

Knowledge that the integrity of arbitration can be assured by a light-handed but effective supervisory jurisdiction, enhances the confidence of the commercial community with respect to the arbitration process. Accordingly, a supervisory intervention should be welcomed by arbitrators, rather than treated with suspicion.

The confidence of the commercial community in arbitration depends, in large measure, on the knowledge that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the processes is assured.

Sometimes that requires the exercise of a supervisory jurisdiction after the event. Plainly, the process of selecting arbitrators and agreeing upon the rules pursuant to which the arbitration will be conducted, plays an important role in maintaining the confidence of the commercial community in this regard. The recognition that institutions are fallible and sometimes need to be corrected in retrospect, is not an insight unique to arbitration.

The very existence of a supervisory jurisdiction assists in maintaining confidence in the system by ensuring that, on those few occasions when that confidence may not be fulfilled, that the failure is capable of correction. Such a jurisdiction is not a threat to commercial arbitration. It is a desirable, indeed an essential part of its effective operation.

I accept that it is necessary for commercial judges to bear in mind the need to support, to the extent that they are able while acting in accordance with law, the autonomous choice of the parties to refer disputes to arbitration. Furthermore, a significant advantage of commercial arbitration is the potential it has, albeit not always realised, for being more cost efficient than the processes of a formal adversary system.

It is not desirable for the courts to insist upon the replication of the procedures with which they are familiar in commercial arbitrations although, it appears, that many who practice in arbitration are continually pushing the process in that direction. Such tendencies are, I understand, a matter of concern to many of you.

I am aware of the recent decision in *BHP Billiton Limited v Oil Basins Limited* [2006] VSC 402 which requires arbitrators to give reasons, in certain circumstances, in the same form as is required from a judge. It is not appropriate for me to say too much about that decision, because I understand it is the subject of appeal. However, I wish to note that there are a number of cases on the subject, not referred to in the judgment, which were the subject of comprehensive exposition two decades ago by Tom Bingham in an address in which he set out in point form the different requirements of reasons by a court and reasons by an arbitrator. (See Bingham "Reasons and Reasons and Reasons: Differences Between a Court Judgment and an Arbitral Award" (1988) 4 *Arbitration International* 1 reprinted in Australia in (1997) 16 *The Arbitrator* 19.) There is much wisdom in his Lordship's analysis.

The relationship between courts and arbitrators should remain one of collaboration which, in my opinion, is how the relationship has developed over recent years. Indeed, many of the ideas for case management now regularly employed in commercial litigation, were first developed in commercial arbitration. Most recently, the addition in our Commercial List Practice Note of a stopwatch system was an idea I picked up from commercial arbitration. In my opinion, it deserves more widespread use in both spheres of dispute resolution.

With respect to collaboration, as a number of people attending this conference are aware, a few years ago I raised the possibility of having the *Supreme Court Act* amended to permit judges of the Court to be appointed as commercial arbitrators, where parties wished that to occur. I was acting on the suggestion to that effect made by Andrew Rogers QC at the Commercial List Centenary Dinner.

Such an option has long existed in England, although it is very rarely used. Tom Bingham, the current senior Law Lord, when he was a commercial judge, did once sit as a commercial arbitrator in a dispute between two of the United Kingdom's major corporations. He told me that that had been a

successful exercise, because those corporations wanted to have a senior commercial judge resolve their disputes, but to do so in private. I thought it possible that the availability of an option of this character may be useful in establishing Australia as a desirable venue for international commercial arbitration.

This idea was worth pursuing so long as the arbitration community regarded it as a valuable addition to the Australian scene. The Supreme Court of New South Wales does not have the spare judicial resources which can readily be diverted to such a function, and should not do so in the absence of real enthusiasm for the idea. When I consulted ACICA the response was supportive, but not enthusiastic and, accordingly, I took no further steps in this direction.

This suggestion may arise again in the future. If it does I am sure you will realise that it is not a means of taking bread out of the mouths of your children. It is worth doing only if it is a reinforcement of the role and significance of commercial arbitration, which it is the purpose of this conference to proclaim.

Insofar as this formality is required, I declare the conference open.

## Address to the Australian Association Of Crown Prosecutors Conference

**OPENING ADDRESS**  
**THE AUSTRALIAN ASSOCIATION OF CROWN PROSECUTORS CONFERENCE**  
**BY THE HONOURABLE J J SPIGELMAN AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**SYDNEY, 5 JULY 2007**

Some observations on the administration of criminal justice suggest that the commentators would never be happy unless legal decision-making occurs either by means of polls on talkback radio or by means of voting on reality television.

Ancient Greece did not have the technology that would enable citizens to sit at home, watch a trial and record a verdict by electronic communication. The reality audience of that era had to be gathered in one place. Major trials in Ancient Greece were conducted in the public agora by a jury of 500 citizens voting on guilt or acquittal and then on penalty. [1].

It was one of the great Pericles' innovations that jurors were entitled to significant pay for their deliberations, hence allowing the poorest of Athenians to participate, indeed for them to do so at a profit.

Lawyers were banned. Any litigant had to speak for himself or herself. However, a class of speech writers or logographers emerged and their drafts have come down to us as one of the major sources of our knowledge of Athenian society. Our other major source is such of the Greek plays as have survived.

It is noteworthy that a common theme, particularly in the plays of Aristophanes, is a sustained attack on the excessive litigiousness of Athenian society. Aristophanes satirised citizens who became as obsessed with litigation as any dedicated watcher of reality television, thrilled by the power of rendering a verdict, in the same way as a reality television audience is thrilled by the power of voting for an eviction from the programme.

A principal target of the dramatists, particularly Aristophanes, was the class of litigants who flooded the courts with tendentious prosecutions. This class was denounced as "sycophants". The word did not then mean a servile flatterer, as in contemporary usage, but something like a public informer, with an overtone of being a pest.

The plays of Aristophanes characterise sycophants as freelance operators out to make money, if necessary by blackmailing individuals, inventing false charges and indulging in slander.

On the two occasions when the Greek democratic system was suspended during the course of the 5th Century BC, law reform, particularly the control of sycophancy, was high on the list of changes. One of the leaders of the revolt known as "The Thirty Tyrants" was a student of the philosopher Socrates. Even Aristophanes had, before this revolt, characterised Socrates as a subversive, when he described a gang of pro-Sparta aristocratic youths as "Socratified".

Socrates was convicted by a jury of 500 citizens, voting 280 to 220 for guilt on charges of corrupting the youth of Athens and impiety. When Socrates treated the verdict with scorn, during the hearing on sentence, the 500 jurors overwhelmingly voted for death.

Any reality television audience would have done the same. This model of reality law has serious defects. One obvious defect is the failure to develop a body of professional prosecutors.

As this audience is, occasionally painfully, aware, there are those in our community who approach the administration of justice on the basis that it requires an outcome that is responsive to the immediate wishes of the community. This approach assumes that one could devise a mechanism for identifying such wishes. It also assumes that those wishes are well informed and neither transitory, nor likely to alter after tranquil deliberation. It is an approach which frequently expresses a great deal of

impatience with the mechanisms that the administration of criminal justice has developed over many centuries for the protection of civil liberties and to ensure that persons accused of criminal conduct receive a fair trial.

The maintenance of public confidence in the administration of criminal justice is a matter of the utmost significance to the peace, stability and harmony of our society. Public confidence has been described as "in present times, ... the meaning of the ancient phrase 'the majesty of the law'". [2] All participants in the administration of criminal justice, including I need not tell you prosecutors, make a contribution to this objective.

We must not confuse public opinion, which is fragmentary and transient, with public confidence, which is broadly based and enduring. All of us involved in the administration of criminal justice have to tolerate, from time to time, a certain level of public outrage when we act to respect the rights of unpopular people or otherwise apply the legal requirements for a fair trial.

It is, however, necessary to maintain a sense of perspective as well as of proportion about these matters. It is almost exactly a century since Roscoe Pound delivered a lecture entitled "The Causes of Public Dissatisfaction with the Administration of Justice". [3] Much of what Pound said a century ago is still applicable. We have to accept a level of popular dissatisfaction as inevitable. We simply have to do whatever we can to ensure that public debate on these matters is properly informed.

At the heart of the contribution to public confidence in the administration of justice that is made by prosecutors is the special range of duties and responsibilities of prosecuting counsel that have been developed over many years of practical experience, throughout the common law world, in the course of ensuring that the criminal justice system attains fair outcomes arrived at by fair procedures. Inevitably, as no institution is perfect, there are from time to time lapses in the conduct of prosecutors. This is understandable because the boundaries of permissible conduct cannot be stated in terms of a fixed body of rules. Issues of fact and degree are involved, about which judgments may reasonably differ.

The overriding duty of a prosecutor to act as a minister of justice and not to obtain a conviction at all costs lies at the heart of our understanding of what is required. The High Court reminded us of these principles only a fortnight ago in *Libke v The Queen*. [4] Although the Court divided on whether the trial miscarried, the criticism of the conduct of the prosecutor by all of the members of the Court will, I am sure, provide useful guidance to prosecutors throughout Australia as to the boundaries of proper behaviour in the conduct of a cross-examination.

However, as Heydon J emphasised, the conduct of the cross-examination was not simply in breach of a prosecutor's duties. It was also in breach of the rules established by the law of evidence. [5] This insight highlights the fact that both prosecutorial duties and the law of evidence have a common origin in the principle of a fair trial which, as I have sought to show in another address, is a principle that permeates the common law. [6]

As Lord Devlin once put it:

"[N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused." [7]

Over the last decade the High Court has emphasised on a number of occasions that the criminal justice system in this nation is not only adversarial, it is accusatorial. The first such reference I have found was in 1996. [8] That characterisation has since been deployed in High Court judgments when explaining the right to silence and the inapplicability of the rule in *Jones v Dunkel* to a criminal trial [9]; the inapplicability of the rule in *Browne v Dunn* to a criminal trial [10]; to explain the approach a court of criminal appeal should adopt to applying the proviso [11]; and to determine whether or not the conduct of counsel caused a miscarriage of justice at trial. [12]

One essential aspect of the accusatorial system is that it is adversarial. However, the idea of an accusatory system is not equivalent to the idea of an adversary system. It has a broader scope. It carries with it procedural and, especially, evidentiary requirements which go beyond adversarial processes. It carries with it a requirement about the onus of proof and, probably, that the onus of proof

must be discharged beyond reasonable doubt. Most significantly it carries with it the idea of a formal, separate law of evidence by which numerous matters which pass the test of relevance are not admissible into evidence. Although many of these rules find their origins in the jury system, the rules are not, or are no longer, so confined.

The existence of a separate law of evidence, constituting a distinct body of exclusionary rules, is one of the most fundamental differences between the common law tradition and the civil law tradition. About two decades ago, Italy formally abandoned the inquisitorial system for a system based on the common law. The new system has been characterised as accusatorial and not merely as adversarial. [13]

There are important differences in the ethical requirements placed upon members of the profession, including prosecutors, in the two different systems. [14] In the process of what comparative lawyers call the convergence between civil law and common law legal traditions, of which the Italian adoption of an accusatorial model for criminal justice is an excellent example, an understanding of the differences in the respective traditions can enrich the understanding of all.

Traditionally the inquisitorial system, which did not clearly separate the processes of investigation and trial, also did not have a clearly separate law of evidence containing the kinds of exclusionary rules with which we have become familiar. The distinction between an accusatorial system and an inquisitorial system was once described, as accurately as shorthand labels can do so, as the distinction between “procedural truth” and “fact”. [15]

No doubt from time to time prosecutors experience frustration at the manner in which some of the traditional rules of procedure and of evidence make it difficult to secure a conviction and, accordingly, fail to ensure that the administration of justice attains the actual truth rather than some kind of “procedural truth”.

In 1846, in a judgment which Lord Chancellor Selborne would later describe as “one of the ablest judgments of one of the ablest judges whoever sat in this Court”, [16] Vice-Chancellor Knight Bruce said:

“The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be opened to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.” [17]

When Chief Justice Gleeson and Justice Hayne in a joint judgment described the accusatorial process as one of the “fundamental underpinnings of the criminal law”, their Honours went on to affirm some fundamental principles that I know are deeply ingrained in the administration of criminal justice and amongst prosecutors, and are so ingrained notwithstanding the frustration that sometimes must arise. Their Honours said:

“[21] A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone’s precept ‘that it is better that ten guilty persons escape, than that one innocent suffer’ may find its roots in these considerations.” [18]

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. I regret to inform you that this debate is unlikely to end.

#### END NOTES

1. The following analysis is based in large measure on Matthew R Christ *The Litigious Athenian* John Hopkins Uni Press, Baltimore (1998).
2. *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J.
3. (1906) 29 ABA Rep 395; accessible in full at <http://www.answers.com/topic/the-causes-of-popular-dissatisfaction-with-the-administration-of-justice>.
4. *Libke v The Queen* [2007] HCA 30, see esp at [2], [34]-[40], [71]-[85], [118]-[135].
5. See *Ibid* at [118]-[120].
6. See J J Spigelman "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *ALJ* 29.
7. *Connelly v DPP* [1964] AC 1254 at 1347.
8. See *Walsh v Tattersall* (1996) 188 CLR 77 at 94.
9. See *RPS v The Queen* (2000) 199 CLR 620 at [22]; *Azzopardi v The Queen* (2001) 205 CLR 50 at [34], [38], [64]; *Dyers v The Queen* (2002) 210 CLR 285 at [9], [60].
10. *MWJ v The Queen* (2005) 80 ALJR 329 at 340.
11. *Weiss v The Queen* (2005) 80 ALJR 444 at [43]; see also *Nudd v The Queen* (2006) 80 ALJR 614 at 618 which refers to the adversarial nature of the process; *TKWJ v The Queen* (2002) 212 CLR 124 at [109].
12. *Ali v The Queen* (2005) 79 ALJR 662 at [25].
13. See e.g. Ennio Amodio "The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy" (2004) 52 *American J Comp L* 489 and Michelle Panzavolta "Reforms and Counter Reforms in the Italian Struggle for an Accusatorial Criminal Law System" (2004-2005) 30 *N.C.J. Intl. & Com. Reg.* 577.
14. See Felicity Nagorcka, Michael Stanton and Michael Wilson "Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice" (2005) 29 *Melbourne Uni. L. R.* 448.
15. See G L Certoma "The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?" (1982) 56 *ALJ* 288.
16. *Minet v Morgan* (1873) LR 8 Ch App 361 at 368.
17. *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-29; 63 ER 950 at 957.
18. *R v Carroll* (2002) 213 CLR 635 at 643 [21].



## International Commercial Litigation: An Asian Perspective

**INTERNATIONAL COMMERCIAL LITIGATION:  
AN ASIAN PERSPECTIVE  
KEY NOTE ADDRESS  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
20TH BIENNIAL LAWASIA CONFERENCE  
HONG KONG, 7 JUNE 2007**

We live in the most dynamic economic region in the world. As a result of the multifaceted process called globalisation there is a general recognition that the economic welfare of citizens of all nations can be substantially enhanced by reducing the barriers to mutually advantageous exchange by trade and investment. One such barrier arises from the complexities of resolving the disputes that inevitably arise in international commerce.

Throughout Asia, every government, except North Korea and Myanmar, actively encourages and supports co-operation between its own citizens and corporations and those of other nations. The benefits of globalisation in this respect are widely accepted. For that reason, restraints previously imposed on the grounds of national sovereignty have often been reduced or abolished. However, with respect to co-operation relating to the administration of civil justice, the perspective of national sovereignty continues to dominate. Accordingly, significant progress to reduce the legal transaction costs involved in international commerce and investment has been difficult. Compared to what has been achieved in reducing other barriers to trade and investment over recent decades, the changes in non-tariff barriers associated with the dispute resolution process have been modest.

In an address I gave last year, [1] I put forward a case for the recognition of the costs and uncertainties associated with international litigation as a significant barrier to mutually beneficial exchange in trade or investment. Legal transaction costs can be reduced. That, however, will only occur if members of the legal profession act to ensure that reforms directed at reducing such costs and uncertainties are actively pursued in the course of governmental negotiations which are concerned with the reduction of barriers to trade and investment. Such involvement can occur in a wide range of overlapping forums.

At a multilateral level these issues may be pursued in discussions at the World Trade Organisation, by the implementation and expansion of the Hague Conventions or in the deliberations of organisations such as UNCITRAL, UNIDROIT or INSOL.

At a regional level, the experience of Europe suggests that some matters may be capable of being pursued in the context of ASEAN, or the East Asia Summit involving ASEAN together with Japan, China, South Korea, Australia and New Zealand or in the proposed free trade agreements between individual nations and ASEAN. Some matters may be pursued in the context of APEC. In two weeks time 119 delegates from throughout the region will attend the Asia Pacific Regional Meeting on the Hague Conference on Private International Law to be held in Sydney. This follows on from a seminar held in Malaysia in 2005.

At a bilateral level there is a range of negotiations between individual nations with respect to free trade agreements in which some of these issues could be raised, if lawyers can successfully put them on the negotiating table. There are also a few examples of bilateral arrangements between nations with respect to judicial assistance and other matters directly involving legal issues. A wide range of distinct issues arise only some of which can be discussed. [2]

### **International Commercial Arbitration**

The prominence given to issues of sovereignty whenever a court of law is involved, stands in marked contrast with the acceptance throughout the world, including throughout Asia, of the system for international commercial arbitration. That system is treated as a manifestation of mutual agreement between parties, the barriers to which, as I have said, nations throughout the region are committed to reducing. This is so even though this informal dispute resolution process operates as a substitute for the formal court processes of each state.

The coherent international arbitration system for resolving commercial disputes is based on the

interlocked provisions of the UNCITRAL Model Law, [3] the New York Convention for Enforcement of Arbitral Awards [4], and the Washington Convention for Investment Disputes.[5] These international instruments have been widely adopted by legislation throughout Asia. [6]

Commercial arbitration is sometimes said to be preferable to dispute resolution by court processes for a range of reasons. Sometimes, it is suggested that commercial arbitrations is quicker and cheaper. No doubt it can be. However, there is little evidence in Australia that commercial arbitration is in fact more cost effective. Furthermore, by reason of the considerable reduction in delays in judicial processes that have occurred over recent years and the continued operation of special treatment of commercial cases, to which I will further refer, delay is not a pertinent consideration in Australia. It appears to remain important in some other nations.

One advantage of international commercial arbitration is the fact that, unlike the administration of justice by courts, commercial arbitration can occur in private or, from a different perspective, in secret. Commercial parties are frequently reluctant to wash their dirty linen in public.

Perhaps even more significant is the ability to effectively and efficiently enforce arbitration awards, virtually throughout the world, pursuant to the New York Convention. Nothing remotely like this facility exists if one obtains a judgment from a court. Nor, in view of failure to develop a coherent international regime for enforcement of foreign judgments, is this likely to change.

The complexities of international commercial litigation, by way of invidious comparison with arbitration, accurately have been described as a "jungle".[7] The one significant cost advantage that international commercial arbitration has over international commercial litigation is the proclivity of parties to engage in venue disputation, i.e. controversies about the appropriate jurisdiction in which litigation should occur. These complex, time consuming and costly disputes are always a waste of time and money and, generally, ultimately futile.

To a substantial degree the international system for enforcement of arbitral awards is such that the cost and futility involved in venue disputation is, in large measure, avoided. This invidious comparison is not likely to alter to any significant degree in the future. Accordingly, judges who are sensitive to the need to minimise costs and delays of commercial dispute resolution should support the system of international commercial arbitration by manifesting a reluctance to intervene with arbitral decision-making pursuant to the statutory authority which that international regime permits individual nations to confer upon the courts. Such reluctance is, in any event, appropriate out of respect for party autonomy.

For many years in common law jurisdictions, including Australia, courts treated commercial arbitration with suspicion. In the famous case of *Scott v Avery* the House of Lords settled the validity of arbitration agreements which made an award a condition precedent to any right of action under a contract. That overturned a long history of judicial opposition to arbitration which, historically, was derived from the fact that judicial salaries in England, until well into the 19th century, were determined by the amount of fees paid to the court. Accordingly, judges had a direct financial interest in maximising the amount of litigation in the official courts and minimising dispute resolution by private mechanisms. [8]

In contemporary debates, commercial arbitrators frequently complain that courts still interfere too much with the arbitration process but, in contemporary circumstances, this refrain manifests the same commercial self-interest of such arbitrators to maximise the workflow to the private system.

Judicial hostility to arbitration has now been replaced, at least amongst commercial judges in all of the jurisdictions with which I am most familiar, with a recognition of the significance of commercial arbitration and a determination to support it by exercising a high level of self-restraint in the exercise of statutory powers. This is clearly the case in Australia.[9]

The judiciary plays an important role in support of the arbitration process: where there is a gap or a failure in the arbitration mechanism; where there is a need to make provisional arrangements pending an award; to enforce the award. Furthermore, it is necessary to recognise the essential role that courts play in maintaining the integrity of commercial arbitration processes.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can 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 is to maintain the integrity of the process. This should be welcomed by arbitrators, rather than treated with suspicion. The knowledge that the integrity of an arbitration can be assured by a light handed but effective supervisory jurisdiction, enhances the confidence of the

commercial community. Furthermore, such supervision constitutes the fulfilment of, rather than any interference with, the autonomy of parties, which is the underlying rationale of commercial arbitration and the reason why it has acquired a privileged status in dispute resolution.

In addition it must be recognised that not all commercial disputes are appropriate to be resolved by mediation or arbitration. Subject to contractual obligations, parties may choose to litigate in preference to arbitration. As with the submission to arbitration itself, such wishes should be respected as a manifestation of party autonomy, where contractually permissible. Furthermore, some disputes raise novel legal issues that can only be authoritatively determined by the formal court process. Finally, commercial arbitration may be rendered ineffective by the inability to invoke the coercive powers available to courts, for example by compelling discovery of documents, the attendance of witnesses and ensuring the preservation of assets.

Accordingly, notwithstanding the fact that, for the foreseeable future, international commercial arbitration is likely to remain the most readily enforceable mechanism for resolving international commercial disputes, those of us who are concerned to minimise the transaction costs that the legal system imposes on international trade and investment, must remain concerned with the particular difficulties that occur in the formal dispute resolution process involving courts.

### **Civil Procedure**

International commercial litigation does not, in principle, differ from domestic commercial litigation in its basic requirements. The need to minimise delay and cost, present in all areas of litigation, is particularly acute and has long been acknowledged as special in most jurisdictions. Uncertainty and increased risk result in commercial timidity or increased insurance premiums. Disputation and delay diverts entrepreneurial energy. Perhaps most significantly, delay means that capital is frozen. While the party ultimately found to owe money may acquire some kind of working capital advantage, neither party can employ the capital for longer term purposes and provisions for contingencies must be increased.

Much civil litigation is about dividing a pie. The effects of delay in commercial litigation is that the pie to be divided is smaller. I have no doubt that in any jurisdiction, reduction in delays involving commercial litigation would liberate significant amounts of dead capital for deployment in the economy.

International commercial arbitration has developed a widely recognised set of procedural rules reflected in the formal rules of the numerous bodies, variously styled "associations", "chambers", "centres" and courts, which differ but display considerable overlap. The core procedures are of such universality that parties can approach the process with a high level of certainty and of familiarity. It would be desirable if the same could be said of international commercial litigation.

One could not expect harmonisation of procedure throughout a group of jurisdictions as diverse as those in LAWASIA. Nevertheless, some degree of harmonisation with respect to the basic principles applicable to commercial litigation could play a significant role in minimising the transaction costs of litigation which has a cross-border element. The sense of uncertainty and unfamiliarity that exists when a party is embroiled in foreign proceedings can be significantly attenuated.

There is in existence 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) for application to transnational commercial transactions.[10] These Model Principles combine features of both the civil and common law legal traditions in an attempt to overcome the problem of long arm or exorbitant jurisdiction which all nations have traditionally adopted as a manifestation of national sovereignty.

There is a significant substantive element in the Model Principles. It proposes the adoption of a uniform rule for assuming or rejecting jurisdiction: a "substantial connection" test. That test is also found in the Brussels Convention and the EU Regulation, applicable in Europe. There is a body of interpretation to draw on. Although not free from difficulty in a commercial context, this is as good a general criterion as is likely to receive widespread acceptance. Whether there can be a significant level of agreement to replace, at least for commercial cases, the variety of different tests developed in various nations, must be doubted.

The procedural elements for which the Model Principles make provision may be more susceptible to widespread agreement. They extend to joinder of parties, service of process, pleadings, composition and impartiality of the court, default judgments, summary dismissal, mechanisms for settlement, coercive interlocutory orders, case management, discovery, exchange of evidence, admissibility, privilege, burden of proof, cross-examination of witnesses, costs, appeals and enforcement provisions.

The Model Principles are a serious attempt to develop a comprehensive, hybrid model which is understandable to lawyers from both the civil law and the common law traditions. It is a model that could be widely adopted with respect to, at least, practice and procedure. A significant part of the Model Principles – not the “substantial connection” test – could be adopted by Courts under existing powers over practice and procedure in the form of court rules.

Of particular significance for international commercial litigation is the possibility of mutual judicial assistance based on the principle of reciprocity. This is reflected in Principle 31 of the Model Principles:

“The courts of a State that has adopted these principles should provide assistance to the courts of any other State that is conducting a proceeding under these Principles, including the granting of protective or provisional relief and assistance in the identification presentation and production of evidence.”

This Principle applies to freezing orders and search orders which I will discuss below.

Many jurisdictions identify a distinct group of judges to deal with commercial matters, which often include corporations law disputes as well as matters such as contracts and insurance. The original model is the Commercial Court in London which was created in 1895. In my State this model was followed seven years later. Indeed the business lawyers of Sydney celebrated the Centenary of our Commercial List in 2003. [11] The New South Wales Supreme Court also has a separate Corporations List to which specific judges are assigned.

Many other jurisdictions in Asia make such special provision, for example the Commercial List of the High Court in Hong Kong, special Commercial Courts in the Philippines, the Commercial Division in the High Court of Malaysia and Kuala Lumpur and the Commercial Division of the District Court in Tokyo, which is primarily concerned with corporations matters.

Some jurisdictions have a separate group of judges for construction disputes, derived from the old Official Referees List in England, now called the Technology and Construction Court. The New South Wales Supreme Court has such a separate list. So does Hong Kong.

In 2003 the Law Commission of India made a recommendation for the constitution of what it called “Hi-Tech, Fast-Track Commercial Divisions” in High Courts in the States of India. Its report highlighted the need for commercial cases involving significant amounts to be disposed of expeditiously. The authors of the report reacted to the fact that a number of judgments in the United Kingdom and United States had assumed jurisdiction in cross-border cases on the basis that delays in Indian courts were such that those courts would assume jurisdiction in cases where, otherwise, *forum non conveniens* considerations would have favoured India as the appropriate venue. [12]

I will refer below to the proposal to create a new National Company Law Tribunal to replace the existing company courts in each High Court. There is no doubt that delays are substantial. One study revealed that, in 2003, about 500,000 cases in the High Courts were over ten years old and 80 cases in the Supreme Court were over 20 years old. [13]

I am not aware of any statistics about delays in China. However, there are significant issues with enforcement of court judgments. The Supreme People’s Court is working with Committees of the National People’s Congress to reform the Civil Procedure Code with respect to enforcement.

There is, in my opinion, considerable scope for judges in the region, either separately or together with commercial practitioners, to exchange information about their practices with respect to commercial litigation generally and, particularly, about international commercial litigation. Some element of harmonisation using the ALI/UNIDROIT Model Principles as a standard should not be beyond the realms of achievement with respect to procedural matters. Interaction amongst judges, perhaps in a Conference devoted to these issues, would enhance the understanding of the judiciary of one nation about the practices of other nations and enable judges to make decisions on cases involving cross-border disputes with a higher level of understanding of what is likely to happen if the court declines jurisdiction in favour of another.

The *Model Principles* are not, of course, a treaty or convention. They may be adopted in whole or in part in any jurisdiction by statute or by rules of court. However, some degree of harmonisation, by

reference to an agreed model such as this, could significantly increase the degree of confidence that judges and lawyers have about jurisdictions with which they are not familiar. Such confidence is essential if we are to achieve the level of cooperation between courts now required by the extent of commercial interaction across borders. It is also desirable to ensure that an appropriate level of judicial comity is adopted in the course of making decisions to accept or decline jurisdiction, under the relevant domestic rule in cases of venue disputation.

Anything which reduces the sense of unfamiliarity, indeed of bewilderment, which can sometimes be held by parties and their legal advisors who become embroiled in litigation in a foreign jurisdiction, would also be an advance. In terms of the involvement of commercial practitioners in such a process, LAWASIA is very well placed to be the forum. A first step could be for each interested jurisdiction to assess the degree to which its own practices conform with the ALI/UNCITRAL Model Principles, as we have done in New South Wales. [14]

### Venue Disputation

In the jurisdictions with which I am most familiar, globalisation has had a major impact on the nature of legal disputation. Over the last few decades the frequency of disputes about venue have increased dramatically. There were always such issues, but nothing of the size and frequency with which we have become familiar over recent decades. The motivations vary but it is quite clear that lawyers throughout the world have decided that where an issue is litigated matters. It is a feature of the recent development in international commercial litigation, in contrast with the past, that the disputes have not involved the traditional private law issues of choice of law. The disputes have primarily been concerned with issues of jurisdiction. [15]

The process of forum shopping, in recent years including anti-suit injunctions and anti-anti-suit injunctions, represents a transaction cost imposed only on international trade and investment and which, therefore, discourages such trade and investment. [16]

The essential background for venue disputation is the fact that all nations make claims from exorbitant or long arm jurisdiction – in civil law countries generally turning on citizenship or residence and in common law countries generally turning on service of process. The net is cast deliberately widely in all cases, but a discretion is created, by doctrines such as *forum non conveniens*, to restrict the broad claims to some kind of rational extent. When rules of an unnecessarily wide character are qualified by broadly expressed discretions, the prospect of disputation is inevitably increased. This is a burden on international commerce which is not imposed on domestic commerce.

The frequency and intensity of battles over jurisdiction indicates quite clearly that parties and their lawyers attribute considerable significance to venue. The choice of venue is made, at least in the first instance, by a plaintiff. This is obviously not a neutral process.

Plaintiffs have a “first mover” advantage. Properly advised, a plaintiff will take advantage of the options available. There is nothing neutral about the choice of jurisdiction by a plaintiff, subject of course to an act of self-denial on the part of the jurisdiction first chosen or to an anti-suit injunction issued by another jurisdiction and which can be made effective against a plaintiff. [17] An anti-suit injunction may be commenced as the first action in order to give the first mover advantage to a prospective defendant. Inevitably, in this battle for first mover advantage prospective plaintiffs have resorted to the pre-emptive strike of an anti-anti-suit injunction. [18] Such litigation has emerged in common law jurisdictions, especially the United States, England and Australia but not, it appears, in civil law nations. [19]

The appellation “forum shopping” is no longer universally regarded as a term of abuse. Motivations for choosing a venue vary: some are perfectly legitimate and some offend any objective test of the purposes of the administration of civil justice. For example, in Europe, integrated as it is in these respects, parties to a commercial dispute that believe considerable delay would give it a commercial advantage have been known to institute proceedings in Italy, where they could be confident that no court will hear the matter for many years. This tactic is known in Europe as “the Italian torpedo”. [20] On the other hand, some parties that wish commercial disputes to be resolved quickly will choose a jurisdiction that has an efficient and expeditious mode of determining such disputes. The former motivation would be universally condemned and the latter accepted as legitimate.

In between such clear cases of legitimate and illegitimate motivation is a wide range of advantages and disadvantages in the litigation process about which different opinions can reasonably be held. This includes the scope and speed of requirements for disclosure of documents; the extent of sovereign immunity offered under domestic legislation; variations in approach to the lifting of the corporate veil to

bring home the sins of the subsidiary to a parent company or to directors personally; the availability of freezing orders against assets and the existence of "mandatory rules" under local statutes, which provide causes of action or procedural advantage unique to a particular jurisdiction.

Furthermore, judgments are made about the quality of the judges in different jurisdictions. The quality of the judiciaries of different nations varies considerably. Although this is difficult to discuss in international conferences, let alone negotiation, in some nations the skill, learning and efficiency of judges is greater than in others. Indeed, some nations the judiciary has significant problems with corruption which does not exist in others. Judges may also vary, as they do within any jurisdiction and over time, with respect to the parochialism or international comity that they display in exercising discretions or formulating judgments within the wide range of choice that, on any view, is permissible on matters of this character. The extent to which litigants from a particular nation could expect some kind of hometown advantage will vary from one nation to another and, indeed, will vary amongst different judges within a nation.

I have already referred to mandatory rules which must be applied by the courts of a jurisdiction even if parties to a commercial arrangement have stated that their agreement is to be subject to the law of another jurisdiction. Australian case law contains a particularly good example of the futility and increased costs associated with an attempt to enforce an Australian statute which modified insurance contracts. [21]

As is well known the forum of choice, if it can be invoked, for many plaintiffs is to establish jurisdiction in the United States. There a case can be pursued on the basis of a contingency fee arrangement without any liability for legal fees or exposure to an order for costs in the event of failure; pre-trial discovery is available to a degree that most jurisdictions would regard as oppressive fishing expeditions; juries award damages that would be regarded anywhere else as exorbitant and statutory provision exists for treble damages in certain situations. [22] The position of the United States is such that multilateral enforcement is not an attainable objective. In any multilateral negotiation about legal issues, the United States is the thousand pound gorilla sitting in the corner. If you ask it for a dance it will decide when the dance is over.

Co-operative arrangements and the establishment of a sense of international comity are most likely to be effective between different jurisdictions that have a lot in common in their legal traditions or in their culture or other alignments. This is the case, for example, between England and Scotland, between Australia and New Zealand and, increasingly, between Hong Kong and China. It is also the case within Europe.

The range of different legal systems operating in the Asian area is such that an overall regional arrangement of the character that is possible in Europe would not appear likely of achievement. Nevertheless, particular regional groupings may be able to make progress to different degrees. For example, within the core ASEAN group of nations may be able to develop European style arrangements on some legal matters. The bilateral free trade agreements between particular nations, or between ASEAN and other nations, could also cover some of this ground under the general rubric of promoting trade in services. A range of models is available for what may be achieved on a bilateral or multilateral basis including the close relationship between Australia and New Zealand [23] and the *Brussels Convention* applicable in Europe. [24]

### **Choice of Court Convention**

For major commercial litigation one step that could reduce the intensity of disputation and, accordingly, reduce the substantial transaction costs imposed upon international trade and investment, is to ensure that a choice of court provision in contractual documentation is effective.

After many years, the Hague Conference accepted the inevitable: its attempt to draft a multilateral convention on enforcement of foreign judgments was unlikely to come to fruition. That process did, however, lead to the conclusion on 30 June 2005 of a more limited convention applicable to commercial contracts being the *Convention on Choice of Court Agreements*. No State has yet acceded to this Convention and only one has signed. This delay arises because, as I understand, it is usual for States to await the Hague Conference to issue a detailed Explanatory Report. That has only recently been published. [25]

Under this Convention a court chosen in a commercial arrangement will have jurisdiction, unless the agreement is null and void under the law of the designated State. A court not chosen in a commercial agreement does not have jurisdiction and must decline to hear the case.

There are difficulties with the scope of the Convention.[26] For example, in some jurisdictions, including Australia laws are designed to protect small businesses and may be the subject of statutory mandatory rules. Although the Convention does exempt consumer transactions, it does not exempt small business transactions which, from a policy perspective, are not distinguishable from the protection afforded to consumer transactions. It would not be acceptable for large corporations to insert a foreign choice of court clause in its standard form contracts to evade local laws in the case of small business. International commercial litigation is usually concerned with contractual arrangements of a substantial size. Accordingly, the ultimate purpose of the Convention could be served notwithstanding an exemption directed at small businesses. Article 6 of the Convention excludes agreements which are made null and void by domestic law. Existing statutory mandatory rules may need to be reviewed.

This Convention is concerned with jurisdiction of the official courts. It will be interesting to see whether, in the process of considering ratification, nations approach the Convention with the approach hitherto applied to any matter capable of being described as an interference with sovereignty, on the one hand, or whether the approach applied to international commercial arbitration agreements will determine how nations respond.

In my opinion, the *Convention on Choice of Court Agreements* has the same core justification as the *New York Convention of Arbitral Awards*. Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons as it is accepted by all those nations that have adopted the New York Convention. As one commentator has noted, the only difference between an arbitration agreement and a choice of court agreement is that, in one case, the parties select a private forum and, in the other case, the parties select a public forum. [27] The international commercial community and its legal advisors have an interest in the widespread adoption of the principles of this Convention in the Asian region.

No doubt, within each nation represented at this Conference some sort of process of consultation will eventually be undertaken. Whether or not it is pursued with any priority may well depend on lawyers who represent corporations likely to be involved in venue disputes promoting the new Convention. Furthermore, acknowledgement of the significance of party autonomy in commercial contracts implicit in this Convention could well be reflected in bilateral treaties or in any of the regional forums to which I have earlier referred. [28]

There will, in any event, be some delay in each nation identifying what kinds of matters should be included in a list of statutory provisions invoking the "null and void" exception. One way to develop a constituency for increasing the priority of this issue is to increase awareness of the fact that the frequency and intensity of venue disputation that has grown dramatically in recent years is likely to expand geometrically in future years unless some such provision is widely adopted.

### **Cross-Border Insolvency**

The single most significant field requiring a high level of international co-operation between courts of different nations is, in my opinion, corporate insolvency where there are assets in more than one jurisdiction. This is not a subject to which the well-established regime for international commercial arbitration has any direct application. The economic significance of reform in this field should not be understated.

The East Asian Financial Crisis of 1997 created a widespread understanding of the need to improve the state of insolvency law and practice in many nations in the Asian region and to establish coherent means of dealing with cross-border issues in all nations throughout the region, indeed, internationally. In the ten years since that Crisis the scope and intensity of cross-border trade and investment throughout the region has increased geometrically.

Furthermore, another development complicates the issues that will need to be determined in insolvency proceedings. The dramatic expansion in the activities of hedge funds which, unlike banks, operate without capital adequacy requirements will give rise to exceptionally complicated issues of considerable commercial significance.

I refer in particular to the explosive growth in the credit derivatives market which did not exist a decade ago. In the course of the 2006 calendar year alone, such derivatives grew from US\$294 billion to US\$470 billion dollars in terms of gross market value. [29] Credit derivatives slice debt into distinct risk profiles which are acquired by different parties. Issues about location of assets and enforcement will inevitably be more complex than has hitherto been the case.

When, as inevitably will occur, a particular nation or the region as a whole, suffers from an economic recession in the future, the absence of effective mechanisms for ensuring the speedy disposition of cross-border issues will so delay the process of liquidation for corporate groups operating throughout the region as, in my opinion, to significantly impact on the prospects of economic recovery.

The problems of cross-border insolvency are widely recognised. This is a multi-faceted issue about which much can and has been written. [30] There are, however, two particular matters which I wish to emphasise.

First, the broader economic effects of delay in the finalisation of corporate liquidations needs to be acknowledged. Liquidators, and the lawyers who advise them, do not in fact have a commercial interest to ensure that a liquidation is completed within the shortest possible time. Most liquidators and lawyers are dedicated to achieving such a result because of their professional obligations. Regrettably, meetings of creditors, who do have a commercial interest in finalising the liquidation as quickly as possible, are not always capable of joint effective action in this respect. This problem is considerably exacerbated when the liquidator can point to the difficulties associated with the liquidation process by reason of the need to pursue assets in other jurisdictions.

Liquidators, however competent, are not entrepreneurs. Capital tied up during the course of a liquidation is in many respects dead capital. I have no doubt that if we could reduce the period that liquidations of companies in Asia now take by, say, 12 months, this would liberate some hundreds of millions of dollars of capital into the economies of the region.

Delay in this respect has very real economic costs. This is true now. If, as inevitably will be the case, economic conditions turn adverse, the considerable expansion of cross-border relationships and transactions, that a decade of globalisation has brought, will mean that these effects are much larger than they have ever been.

The second issue I wish to emphasise is the problems that arise when assets are held in a corporate group of companies in numerous jurisdictions and there are creditors in each of the jurisdictions. In the absence of a high level of integration and co-operation it is natural that courts in any particular jurisdiction have sought to protect the interests of the creditors of that jurisdiction, whenever they are likely to receive a higher dividend if they get access to those assets than they would if those assets were placed into a general pool available to all creditors. This is sometimes called "ring fencing". This is a classic case in which the protection of special interests has a detrimental effect on the economy as a whole.

The practice to which I have referred is no different to any other kind of government regulation which constitutes a non-tariff barrier to trade and investment. It is a form of protection sanctioned by the state through its courts, albeit perhaps not as blatant as some other forms of government regulation. However, it has the same detrimental effect on the operation of the economy as a whole as any other non-tariff barrier to trade. It should be recognised as a form of protection and, accordingly, feature in free trade negotiations, whether of a bilateral, regional or multilateral character.

The fact that the processes of globalisation significantly exacerbate the problems arising from cross-border insolvency has long been recognised. At an international level it has led to the formulation of the UNCITRAL *Model Law on Cross-Border Insolvency* of 1997. This international standard has gathered considerable weight by reason of the economic significance of the nations that have adopted it: Japan in 2001; the European Union in 2002; the United States in 2005; the United Kingdom in 2006. Australia announced some years ago that it intends to do so, but the legislation has not yet been introduced and I am unaware why this is taking so long.

In part based on the UNCITRAL Model Law, there have been a range of multilateral and bilateral initiatives seeking to address these issues. This is an exceptionally complicated field on which it is only possible to touch briefly in a paper of this length.

The principal initiatives in the Asian region occurred in the immediate wake of the East Asian Financial Crisis of 1997, when the Asian Development Bank instituted a number of Technical Assistance Programmes with certain Asian nations. These programmes encompassed detailed work on legislative reform and included conferences, workshops and reports about individual nations, culminating in a final report in 2005 which summarised the work that had been done. [31] This contained a range of recommendations. Both UNCITRAL and INSOL have been involved in support of the ADB Technical Assistance Project.



Furthermore, the OECD, in co-operation with APEC and the ADB with assistance from the governments of Japan and Australia, has established a co-operative conference referred to as Forum for Asian Insolvency Reform ("FAIR"). There have been annual meetings since 2001 at which a wide range of issues have been discussed.

The Australian Government, under the auspices of APEC, is proposing to establish a regional network on insolvency reform which will also involve information sharing and constitute a forum for dialogue. This proposal has been endorsed by the APEC Technical Working Group and supported by FAIR. As I understand the proposal, the membership will consist of public sector official responsible for advising governments on insolvency reform.

These examples of international and regional co-operation indicate the scope and complexity of the issues that arise. They also indicate the multiplicity of different organisations and forums in which these issues are being pursued. This is, regrettably, typical of most matters involving international commercial litigation.

UNCITRAL continues to be involved in promoting development in this area particularly in association with the international organisation of practitioners INSOL. In March of this year at Cape Town, judges from some 30 nations, including a judge from my court, attended a conference on cross-border insolvency which discussed the UNCITRAL paper: "Facilitation of Co-Operation – Direct Communication and Co-ordination in Cross-Border Insolvency Proceedings". This Judicial Colloquium considered proposals for the development of formal protocols for co-operation between judges, particularly in the fields of scheduling proceedings i.e. the order in which matters would be decided between two jurisdictions; the preservation and collection of assets and restraint of enforcement actions.

Necessity has created a mechanism of direct court to court communications – with the agreement, or at least the knowledge, of the relevant parties – in cross border insolvency cases. Formal or semi-formal protocols between courts have been agreed to ensure the efficient distribution of assets. [32] Such protocols have been called "case specific private international insolvencies treaties." This is an overstatement, but it conveys the significance of the development. [33]

Perhaps the best known example of such protocols was the arrangement between the United States and English courts over the insolvency of the *Maxwell* group of companies. The interaction between the Supreme Court of NSW and the High Court in London over the liquidation of HIH, a major insurer, is a good case study of this phenomenon. [34]

It may be that such a decentralised ad hoc system will prove adequate. However, in my opinion it will not be able to cope with a major recession. In that eventuality a more formal set of rules and practices – such as the UNCITRAL Model Law – will be required.

The most basic need is to improve the domestic capacity to handle insolvency matters of the judiciary within each nation. Obviously the more significant the economy the more important it is that the judiciary is competent in this regard. There are many programmes such as the ADB Technical Assistance Programme, directed to this need.

There is a wide range of options for addressing cross-border insolvency issues: from "territoriality" at one end, in which separate full scale proceedings are conducted pursuant to a local insolvency law in every forum where a debtor has assets, to "universality" at the other end, where primary, but not exclusive, weight is given to identified central proceedings under one insolvency law. There are, of course, numerous possible permutations in between. [35] Future development must recognise the major cultural differences in attitudes to the stigma of bankruptcy. [36]

The Asian Development Bank has advocated a regional arrangement within ASEAN based on the principle of universality. However desirable, there are real questions about the ability of ASEAN to progress so far in the short term. [37]

The most significant single nation in this regard is the People's Republic of China. There is some evidence that China is moving away from a strict territorial approach to these matters and the new Chinese Bankruptcy Law contains a provision for recognition by the enforcement of foreign insolvency proceedings, at least where there is a "treaty or reciprocity" subject to certain conditions, potentially of a restrictive character. There are, I understand only two such treaties: with Italy and Hong Kong. That will make this recent charge of limited application unless steps are taken to ensure that the matter is pursued in bilateral discussions with China e.g. in the context of free trade agreements with Australia

and ASEAN.

An increase in international confidence in the administration of insolvency laws within China, and the creation either at a bilateral or regional level of effective mechanisms for co-operation between the judiciary of China and that of other nations, is clearly a high priority. The issues are complex and require considerable effort. [38]

The position in India is that it is not a party to any international conventions and has no cross-border legislation. However, I understand the government is considering implementing the UNCITRAL Model Law. [39] At present insolvency proceedings are conducted by the Bureau of Industrial Financial Reconstruction in the established Commercial Courts of the High Courts. The quality of the judiciary in these courts is regarded as high. However, issues of delay do arise.

It is proposed that the existing structure will be replaced by a single body entitled the National Company Law Tribunal to replace the Commercial Courts with ten benches at different locations and an appeal court in New Delhi, with a further appeal to the Supreme Court.[40] I understand there are constitutional issues that arise with this process, which is referred to in India as "tribunalisation", where jurisdiction is removed from the mainstream judiciary. It is by no means clear to me that the proposal to develop an expert group of decision makers in company law, including insolvency, will survive a constitutional challenge.

In Hong Kong, I understand there is no statutory provision governing the recognition of foreign insolvencies, but common law principles of comity may be successfully invoked, albeit with a high level of judicial discretion that makes the results somewhat uncertain. The Hong Kong Law Reform Commission has recommended a wait and see approach to the implementation of the UNCITRAL Model Law. [41]

In Korea a new unified insolvency statute entitled the Act on Rehabilitation and Bankruptcy of Debtors came into effect on 1 April 2006. This allows a foreign liquidator to approach a court in Korea to request recognition of insolvency proceedings or to seek co-operation in the exchange of information with a Korean Court. The legislation provides that local and foreign creditors are to be treated equally. The Seoul District Court is given exclusive jurisdiction in cross-border insolvency cases. [42]

In Malaysia and Singapore there are modern insolvency laws based on the United Kingdom model but, as I understand the position, no cross-border mechanisms for corporate insolvencies. I am unaware of any proposals to change the situation, although, if the Asian Development Bank initiative with respect to developing an ASEAN based approach proceeds, this would change.

In Indonesia insolvency judgments of foreign courts have no effect unless they can be enforced by a treaty of which there are, I understand, none. [43]

The territorial approach appears to be adopted in Taiwan which has an archaic insolvency law system and does not appear to be considering the UNCITRAL Model Law. [44]

The position in Thailand is that the insolvency law is closely based on the United States model. The law does not recognise foreign insolvency proceedings as affecting Thai assets. Thailand is investigating rules to govern cross-border countries. [45]

In the Philippines the courts operate on a principle of comity with respect to the enforcement of foreign judgments. Consideration is being given to reform based on section 304 of the US Bankruptcy Code, but this does not appear to involve much more than freezing orders. [46]

In Vietnam there is no legislation on cross-border insolvency although the matter was considered during the process of drafting the recent 2004 reforms. [47]

Nations such as Bangladesh, Bhutan, Brunei, Burma, Cambodia and Sri Lanka have, as I understand it, no cross-border insolvency legislation and the principle of territoriality applies.

This survey indicates the wide divergence of approaches in the different jurisdictions. It emphasises just how difficult the process of harmonisation is likely to be. The issues involve such a high level of complexity that one has to be pessimistic about the ability to devise a new institutional structure. There are, as I have pointed out, a wide range of initiatives underway in recognition of the significance of these problems. Somehow they have to be brought together.

A different perspective may need to be adopted, so that the task involved will not be primarily dependent upon the work of insolvency practitioners in the different jurisdictions. I do not believe that lawyers and accountants, together with the relevant judges, have sufficient international clout to make substantial, let alone rapid, progress in this regard. The perspective that I recommend be adopted is one that recognises this issue as a non-tariff barrier to trade and investment. That perspective would allow the matter to be pursued at a multilateral, regional and bilateral level in a context where the recognition of the need for reform, based on the principle of reciprocity, is well established. So are the mechanisms for pursuing negotiations involving the deployment of diplomatic and political capital at the highest level.

### **Judicial Assistance**

The expansion of international commercial litigation makes the established mechanisms for the provision of judicial assistance by the courts of one jurisdiction to those of another jurisdiction of even greater significance. Furthermore, there is a need for the development of new modes of assistance. [48]

The significance of judicial cooperation was recognised in the 1999 *Seoul Statement on Mutual Judicial Assistance in the Asian Pacific Region* signed by or on behalf of the Chief Justices of Australia, Bangladesh, Brunei, China, Fiji, Hong Kong SAR, India, Indonesia, Japan, Kazakhstan, Republic of Korea, Marshall Islands, Micronesia Mongolia, Myanmar, Nepal, New Caledonia, New Zealand, Solomon Islands, Sri Lanka, Northern Mariana Islands, Papua New Guinea, The Philippines, Russia and Samoa.

That statement said:

1. "Increasing numbers of individuals, corporations and other forms of business associations are doing business internationally.
2. Forms of judicial administration and civil procedure differ widely among countries in the Asia-Pacific region.
3. The increasing number of commercial transactions between individuals, corporations and other forms of business associations resident, incorporated or registered in different countries within the Asia-Pacific region creates the potential for conflict over the most appropriate forum in which to determine commercial disputes.
4. International commercial transactions may also involve capital, goods or services in any number of countries throughout the region.
5. The prompt and fair resolution of civil and commercial disputes between residents of different countries in the Asia-Pacific region requires the establishment of procedures for the efficient and effective service of process, taking of evidence and enforcement of judgments by a resident of one state in the territory of another.
6. This Conference adopts as its objective, the establishment of such procedures.
7. In order to achieve this objective, this Conference recommends the formation of a strong network of arrangements on the service of process, taking of evidence and enforcement of judgments between countries in the Asia-Pacific.
8. The Conference notes the provisions of the proposed Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea, a copy of which forms Annexure 'A' to this Statement, and encourages the adoption of similar or other appropriate arrangements between countries within the Asia-Pacific Region."

The last paragraph reflected the priority given to these matters by the then Chief Justice of South Korea. The treaty between South Korea and Australia has not been followed elsewhere. This experience emphasises the need for judicial leadership in these matters.

In most nations the same persons are involved in developing legislation and programmes of assistance. Questions of priorities inevitably arise. There is no correct answer to what comes first. My own priorities are as follows:

- Cross- Border Insolvency (discussed above);
- Freezing and search orders;
- Assistance with evidence;
- Service of process;
- Enforcement of foreign judgments.

### Freezing and Search Orders

For courts in the common law tradition, what we used to call Mareva injunctions are now called freezing orders and what used to be called Anton Pillar orders are now called search orders. Such orders are designed to prevent a person dissipating assets or destroying evidence in order to frustrate a potential judgment. These are of significance for a wide range of commercial disputes, but are of particular significance wherever fraudulent conduct is likely or suspected. Each jurisdiction has to determine whether it will provide support of this character for proceedings in the jurisdiction of another nation, not simply in support of proceedings within its own jurisdiction.

The UNCITRAL Model Law for Cross Border Insolvency was motivated in part by the ability of insolvent debtors to fraudulently conceal assets, particularly by way of transfer to other nations. Such conduct is not limited to insolvent companies. International fraud demands the same high level of international judicial co-operation. [49]Multilateral initiatives with respect to provisional measures have been at best tentative.[50] This is a matter where communications between courts with a view to ensuring judicial cooperation is highly desirable.

Originally, judicial decisions in England restricted the grant of freezing orders in aid of foreign proceedings.[51] However, this was criticised and altered by legislation. [52] In Australia the courts developed the common law in such a way as to free Australian law from the constraints imposed in England. Orders freezing Australian assets in support of foreign proceedings were made.[53] A harmonisation committee of the Australian Council of Chief Justices formulated a standard form set of court rules with respect to both freezing orders and search orders which have generally been adopted in all Australian jurisdictions.

Australian courts will support foreign proceedings by preserving the assets of foreign defendants held in Australia. On the basis of reciprocity, it is reasonable to request that courts in other nations will preserve the foreign assets of a defendant in Australian proceedings. It would, accordingly, be perfectly appropriate for Australia to seek to incorporate reciprocal obligations in the form of bilateral treaties.

In commercial litigation, these issues are the same everywhere. Wherever genuine and enforceable reciprocity is proffered, it is in the interests of every jurisdiction to offer such assistance on request, especially where the request is made by a court to another court. It may not be too optimistic to pursue bilateral or regional arrangements for all commercial, including corporate, disputes in this regard.

By reason of the ease with which funds and assets can be transferred from one jurisdiction to another, the problem of international fraud is likely to increase. The various forms of regional co-operation to which I have referred could readily be invoked for this purpose. It is also a matter which deserves the attention of the Hague Conference to devise an international convention.

### Assistance with Evidence

The Hague Evidence Convention has been one of the most successful of all of the Hague Conventions. However, one of the few regions of the world in which it has not been widely adopted happens to be the Asia Pacific region. Australia is a party, as are China (including Hong Kong), the United States and Singapore. India has recently acceded to the Convention, but it is not yet in force. Nations which have not acceded include Pakistan, the Philippines, Thailand and Japan, as well as the nations that are not members of the Hague Convention such as Indonesia, Bangladesh, Cambodia and Vietnam. It may be that ASEAN is an appropriate forum in which these matters could be pursued by way of a collective accession.

This Convention has been very successful. However, its adoption preceded the considerable expansion of international commercial litigation. It was designed for any kind of civil litigation. It may be that a more efficient regime would be acceptable for commercial litigation and arbitration of significant size. The convention involves a considerable degree of unnecessary expense and delay and its mechanisms are cumbersome. Where the witness is co-operative, the Convention is now regularly bypassed in Australia by the taking of evidence via video link. [54] There is no doubt that more expeditious mechanisms could be adopted.

In lieu of the excessively bureaucratic regime of Central Authorities receiving requests from foreign courts, alternative mechanisms should be developed. Perhaps this can be done on a bilateral or regional basis. Australian practice is, in effect to bypass the Central Authority, because the role has been delegated to the Supreme Courts of each State, by means of their nomination as Additional Authorities under Article 24 of the Convention.

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 (Article 2(d)). Such a representative can apply *directly to a court* of a participating State.

No doubt, in many nations some sort of prior processing by an arm of the central government, referred to as the Central Authority, will remain necessary. However, the degree of interaction which now occurs directly between judges at an international level is of a different order of magnitude than it was when these Hague Convention structures were first determined.

Surely at a time of almost instantaneous international communications, less bureaucratic and cumbersome mechanisms can be devised. I do not see any reason why all requests should be vetted by a central bureaucracy. It would be sufficient for the bureaucracy to receive copies of any request and to intervene if a policy decision is made that in some manner the request impinges upon an issue of national sovereignty. A system based on the presumption that *every* such request impinges upon national sovereignty appears antiquated in an era of globalisation. Provision should be made for direct communication between courts in this regard.

Furthermore, the only alternative mode of communication, which is by mail, is now completely out of date. The Hague Convention on the authentication of foreign public documents – known as the Apostille Convention – is being reviewed to simplify the required documentation and to facilitate electronic communications. These mechanisms should be considered for the Evidence Convention and the Service Convention as well.

I cannot claim that Australia is a model international citizen in this regard. It is over a decade since the Australian Law Reform Commission prepared a detailed report on updating and improving the Australian legislation which implemented the Hague Evidence Convention. Originally that Convention was enacted in Australia in a form derived from English legislation and adopted by most nations of the British Commonwealth. [55]

The recommendations of the Law Reform Commission covered amendments about a number of 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. [56] Unfortunately no action has been taken to implement these recommendations.

### **Service**

Like the Evidence Convention, the Hague Service Convention is one of the most successful of the Hague Conventions. Nations that have acceded to the Convention include China, South Korea and Sri Lanka. A number of nations in the Asian region have not acceded including Malaysia, New Zealand, Singapore and Thailand. Australia is only now in the process of doing so. India has acceded to it with effect from 1 August this year. As mentioned above, a number of nations in the Asian regions are not members of the Hague Convention at all. Again a collective process to determine accession through ASEAN could be considered.

As with the Evidence Convention, a cumbersome process of making requests through a Central Authority is the general rule. In Australia it is proposed that the Supreme Court of each State will become an Additional Authority, pursuant to Article 18 of the Convention. Mechanisms will need to be put in place to ensure that the Central Authority can intervene should, in its opinion, an issue of national sovereignty arise. It is likely that our system will be based, like the Evidence Convention, on direct application to courts.

This will not be possible in some nations. China has objected to all methods of service except by that of the Chinese Central Authority. [57] Hong Kong has its own Central Authority which permits service by mail. In Taiwan, which is not a member of the Hague Convention, service is effected through a process of judicial assistance pursuant to a Taiwanese statute entitled the *Law Governing the Extension of Assistance to Foreign Courts*, which requires a request for assistance and a signed copy of original foreign court documents translated in Chinese. India is only just acceding to the Convention. The requirement for all requests to be processed by the Indian Central Authority is part of the scheme.

The central bureaucratic mechanisms for service give rise to an unnecessary element of delay and complication. The fact that the Convention makes provision for service of documents by direct post, but

permits any State to object to such service, as many have done, manifests the antiquity of the Convention. "Snail mail" as it is called, is now technologically obsolete. In this, as in other respects, this Hague Convention is also out of date.

Pending the outcome of the long process required for multilateral reform, more efficient mechanisms for dealing with such requests could be devised in the context of bilateral free trade agreements or in regional arrangements of the character I have earlier discussed. This is a matter capable of being implemented in bilateral treaties as indeed it has been in the treaties that Australia has entered into on judicial co-operation with South Korea and Thailand. [58]

### **Enforcement of Judgments**

The diversity of legal systems and the link with national sovereignty considerations that led to the inability of the Hague Conference to develop a Convention on Enforcement of Judgments, is reflected in the LAWASIA region. For the same reasons a broad regional agreement is unlikely. In my address last year I outlined the different approaches towards enforcement of judgments amongst Asian nations. [59] More detailed summaries of the position in each Asian nation are available. [60] There is a wide range of different approaches which complicate the process of assessing reciprocity.

The transaction costs of international commerce are substantially increased wherever the system in one nation involves the re-litigation of substantive issues that have already been determined in another. There is no doubt that whatever can be done in this regard should be done. However, past failures do not suggest that this matter should not be given a high priority, unless determined by clear necessity or in the context of a particular bilateral relationship.

### **Judicial Globalisation**

There is a definite sense of international collegiality amongst judges of different nations, of a character that did not exist a few decades ago. This is a part of a phenomenon that has been called "judicial globalisation" [61] or the creation of a "global community of courts". [62]

Judges from different nations now meet in many different multilateral, regional and bilateral contexts, sometimes with practitioners, but often only with judges. The new sense of collegiality is enhanced by the recognition that all judges can learn from each other, from each other's judgments, and that there are many common structural and institutional issues about the administration of justice.

This development is of significance if, as I believe to be the case, the range of circumstances in which judicial cooperation is required will expand as part of the overall phenomenon of globalisation. Direct court to court communications have already shown their value e.g. in the development, discussed above, of formal protocols in cross-border insolvency cases. Similarly, the Hague Convention on International Child Abduction has been widely adopted because of the ease of international travel, which has facilitated the removal of children to another jurisdiction by one party of a failed marriage.

The argument from necessity for direct court to court communication and co-operation is, in my opinion, applicable to the context of international commercial disputes.

Judicial interaction and co-operation has been described as "international judicial negotiation." [63] This process can be seen as an alternative to the anti-suit injunction approach. It requires court to court communication with the knowledge of, and usually with the approval of, the parties, who often mediate the communication. Such communication is designed to ensure the just and expeditious disposal of the real issues in dispute. The system is still evolving.

### **Judicial Comity**

Although there have always been cases involving jurisdictional disputes in private international law, the frequency and intensity of such disputation has expanded considerably. This trend has not yet seen its course. In determining whether to assume or refuse jurisdiction and in determining what level of cooperation to offer, the traditional conception of the "comity of nations" has inadequacies. A new conception of "judicial comity" appears to be evolving.

The expansion of judicial dialogue, both in general contexts and in case-specific contexts has, perhaps perversely, reduced the willingness of judges to defer to colleagues simply because of their status. However, it has increased in the willingness to defer because the other jurisdiction, if accepted as capable, is more appropriate. The concept of international comity gave automatic deference because of the position of a foreign court as the manifestation of another state. Judicial comity requires respect but not automatic deference. In the context of international commercial litigation what matters is what

works.

Judges are now quite willing, at the request of parties in international litigation, to assess the capacity of the another legal system which could resolve the dispute, most clearly on such matters as delay. Increasingly, the overriding principle being applied is to serve the requirements of practical justice in determining the particular dispute, rather than technical rules of conflict of laws or comity based on national sovereignty.

There have been cases in which judges of one jurisdiction have made decisions about jurisdiction, or about enforcing judgments, on the basis of an assessment of the quality of the judges of the other state. [64] Inevitably, this can be controversial. This case law should be understood as early steps in the process of developing the new principles of judicial comity.

As one author has observed:

“Judicial comity provides the framework and the ground-rules for a global dialogue among judges in the context of specific cases. It has four distinct strands. First, judicial comity is marked by a respect for foreign courts *qua* courts and hence for their ability to resolve disputes and interpret and apply the law honestly and competently, rather than simply as the face of a foreign government. Second, it recognises that courts in different nations are entitled to adjudicate their fair share of disputes - both as co-equals in the global task of judging and as the instruments of a strong ‘local interest in having localised controversies decided at home’. Third, it places a distinctive emphasis on individual rights and the judicial role in protecting them. Fourth, in a seeming paradox, it is marked by a greater willingness to clash with other courts when necessary, as an inherent part of engaging as equals in a common judicial enterprise.”[65]

## Conclusion

The assertion of a right to exercise jurisdiction by a court is a specific manifestation of national sovereignty. The dynamics of international trade and investment challenge national sovereignty in numerous ways. International commercial litigation is only one kind of conduct in which traditional modes of international government behaviour are subject to pressure for change. To facilitate trade and investment, judges and practitioners must pursue enhanced levels and methods of cooperation between courts. This is a multifaceted process only some aspects of which I have discussed. This is an objective for the attainment of which LAWASIA is particularly well positioned to provide a forum.

In the decade since the East Asian financial crisis of 1997, this region has experienced exceptionally favourable economic conditions. Disputes in courts increase when the economy turns bad. Inevitably that will happen. When it does there will be a dramatic escalation in disputes about venue in all courts in the region. All of the matters to which I have referred will become more important. The difficulties of dispute resolution with a cross-border element will escalate so as to inhibit mutually beneficial exchanges thereafter. It would be preferable if the institutional infrastructure to avoid this kind of eventuality was in place before the inevitable downturn occurs.

## END NOTES

1. See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *Aust LJ* 35. Also available at <http://www.lawlink.nsw.gov.au/sc> “Speeches”.
2. For an overview see P Schlosser “Jurisdiction and International Judicial and Administrative Cooperation” (2000) 284 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 9; See also C R Einstein and A Phipps “Trends in International Commercial Litigation in Australia” (2005) *IPRax* 273, 365 at 367 (an article that comprehensively surveys many of the issues considered in this article and from which I have benefited) also available at <http://www.lawlink.nsw.gov.au/sc> “Speeches”.
3. *Model Law on International Commercial Arbitration* (1985).
4. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) 330 UNTS 38.
5. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*

(1966) 575 UNTS 159.

6. See M Pryles (ed) *Dispute Resolution in Asia* (3rd ed) Kluwer Law International (2006). 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.

7. See *Airbus Industry GIE v Patel* (1999) 1 AC 119 at 132 per Lord Goff.

8. This revelation was so embarrassing that the key House of Lords judgment was modified after delivery to remove references to judicial venality. See the analysis of *Scott v Avery* (1856) 5 HL Cas 811; 10 ER 1121; and, esp 28 LTOS 208, in *Raguz v Sullivan* (2000) 50 NSWLR 236at [47]-[48].

9. See e.g. *Raguz v Sullivan* supra; *Comandate Marine Corp v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45.

10. These principles are available in a number of different locations including: *ALI/UNIDROIT Principles of Transnational Civil Procedure* Cambridge Uni Press (2006). See also the series of articles on the Model Principles in (2004) 9 *Uniform L Rev (Ref dr unif)* 811 et seq.

11. See J J Spigelman "Commercial Causes Centenary Dinner Address" at <http://www.lawlink.nsw.gov.au/sc> "speeches"; see generally V V Veeder "Mr Justice Lawrance: 'The True Begetter' of the English Commercial Court" (1994) 110 *LQR* 292.

12. See Law Commission of India *One Hundred and Eighty-Eighth Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts* New Delhi, December 2003.

13. V Adhivaram "Case Management and ADR for the Banking Sector" [http://lawcommissionofindia.nic.in/adr\\_conf/adivaram1.pdf](http://lawcommissionofindia.nic.in/adr_conf/adivaram1.pdf)

14. 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; C R Einstein and A 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 <http://www.lawlink.nsw.gov.au/sc> under "Speeches".

15. See C McLachlan "International Litigation and the Reworking of the Conflict of Laws" (2004) 120 *LQR* 580.

16. This area of disputation has attracted a growing range of specialist journal articles and books on the subject. See e.g. A S Bell *Forum Shopping and Venue in Transnational Litigation* Oxford Uni Press (2003); and see particularly the references at p2 fns 8 and 9; also M Keyes *Jurisdiction in International Litigation* Fed Press Sydney (2005).

17. See Bell *Forum Shopping* supra at Ch 4 (defendant strategies).

18. See id at [4.137]-[4.142].

19. See C Kessedjian "Dispute Resolution in a Complex International Society" (2005) 29 *Melbourne Uni R* 765 at fn 134.

20. Widespread dissatisfaction in Europe resulted in Italy adopting a new model for Company and Commercial cases. See F Capri "The Parties and the Judge in the New Commercial Proceedings in Italy and the Ideological Choices" (2006) 25 *Civil Justice Quarterly* 70.

21. See my discussion in Spigelman "Transaction Costs" supra at 442-443 of *Akai Pty Limited v People's Insurance Co Limited* (1996) 188 CLR 418 and *Akai Pty Limited v People's Insurance Co Limited* (1998) 1 Lloyd's Rep 90. See also Bell *Forum Shopping* supra at [2.50]-[2.51], [4.233] and Keyes *International Litigation* supra at 84-87.

22. See e.g. the observations of Lord Denning in *Smith Kline & French Laboratories v Bloch* [1983] 1 WLR 730 at 733 at 734.



23. See Spigelman "Transaction Costs" supra at 451-452.

24. The wide range of options is discussed in numerous places. See e.g. J P George "International Parallel Litigation – A Survey of Current Conventions and Model Laws" (2002) 37 *Tex Int'l LJ* 499. A comprehensive case book is Ray Goode et al *Transnational Commercial Law: International Instruments and Commentary* Oxford Uni Press (2004).

25. The recent Explanatory Report by the Rapporteur can be found at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3959](http://www.hcch.net/index_en.php?act=publications.details&pid=3959).

The application of the Convention to Australia is discussed in Richard Garnett "The Internationalisation of Australian jurisdiction and judgment law" (2004) 25 *Aust Bar Rev* 205.

26. See e.g. Spigelman "Transaction Costs" supra at pp450-451.

27. See J S Yackee "A Matter of Good Form: The (Downsized) Hague Judgments Convention" (2003) 53 *Duke LJ* 1179.

28. The position in each Asian nation with respect to choice of forum agreement is set out, nation by nation, in Pryles *Dispute Resolution in Asia* supra.

29. See Bank for International Settlements *OTC Derivatives Market Activity in the Second Half of 2006* BIS, Paper May 2007 at 10 [www.bis.org/publ/otc\\_hy0705.pdf](http://www.bis.org/publ/otc_hy0705.pdf); See also "At the Risky End of Finance" *The Economist* 21 April 2007.

30. See e.g. I F Fletcher *Insolvency in Private International Law* (2nd ed) Oxford Uni Press (2005); OECD *Legal and Institutional Reforms of Asian Insolvency Systems* (forthcoming) esp paper by S Oh "Comparative Overview of Asian Insolvency Reforms in the Law Decade"; J Shi "Recent Developments in Chinese Cross-Border Insolvencies"; A J Smits and I M O'Hearn "Multinational Insolvency Forum Shopping" in J R Silkenat and C D Schmerier (eds) *The Law of International Insolvencies and Debt Restructurings* Oceana Publications (2006); L M Lopucki "Universalism Unravels" (2005) 79 *Am Bankr LJ* 143; S L Bufford "Global Venue Controls are Coming: A Reply to Professor LoPucki" (2005) 79 *Am Bankr LJ* 105; C Anderson "Some Cross Border Issues under the Australian Voluntary Administration Procedure" (2004) 13 *Int'l Insolv. Rev* 137; R Mason "Local Proceedings in Multi-State Liquidation: Issues of Jurisdiction" (2006) 30 *Melb. Uni L Rev* 145.

31. See Asian Development Bank *Promoting Regional Co-Operation and Development of Insolvency Law Reforms: Final Report* (RETA) 5975 April 2005.

32. E D Flashen of R J Siberman "Cross-Border Insolvency Corporation Protocols" (1998) 33 *Tex Int'l LJ* 587 at 589 and "mini treaty" in A Slaughter "A Global Community of Courts" (2003) 44 *Har Int'l LJ* 191 at 193, 213ff.

33. See e.g. The American Law Institute in Association with the International Insolvency Institute *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* ALI (2003).

34. See *Re HIH Casualty and General Insurance Limited* (2005) 190 *FLR* 398; *In re HIH Casualty and General Insurance Limited* [2007] 1 *All ER* 177; A McKnight "A Review of Developments in Law During 2006: Part 2" (2007) 22 *J.Int'l Banking Law and Regulation* 187.

35. See e.g. Mihailis Diamantis "Arbitral Contractualism in Transnational Bankruptcy" (2006) 35 *Sw U L Rev* 327.

36. See R Tomasic et al "Insolvency Law Administration and Culture in Six Asian Legal Systems" (1996) 6 *Aust J of Corporate Law* 1.

37. See Asian Development Bank *Promoting Regional Co-operation* etc supra esp at 28ff; see also R Fisher and M Sloan "Why Asia Needs a Regional Insolvency Pact" (2004) *International Financial L Rev* 44 at 45 and c/f K Anderson "Do We Really Need an Insolvency Pact in Australasia? A Reply to an

Asian Development Bank Proposal" (2005) *LAWASIA J* 14.

38. X Zhang and C Booth "Beijing's Initiative on Cross-Border Insolvency: Reflections on a Recent Visit of Hong Kong Professionals to Beijing" (2002) 10 *Am Bankr Inst L Rev* 29 at 34; C Booth "Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam" (2004) 28 *Columbia Journal of Asian Law* 93 at 142; J Shi "Recent Developments in Chinese Cross-Border Insolvencies" at 7-8 <http://www.iiiglobal.org/country/china/060710shi-3.pdf>; See also J Shi "A Summary of the Position on Cross-Border Insolvency in China" [http://www.iiiglobal.org/country/china/China\\_on\\_Cross.pdf](http://www.iiiglobal.org/country/china/China_on_Cross.pdf); L Burton "An Overview of Insolvency Proceedings in Asia" (2000) 6 *Annual Survey of International and Comparative Law* 113 at 120; Vincent Pace "The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation Against the Chinese State and Enterprise" (2006) 27 *U.Pa.J. Int'l Econ L* 517.

39. See C Boyle "Foreword" in *The Asia-Pacific Restructuring and Insolvency Guide 2006* Globe White Page London (2006) (see <http://www.asianrestructuring.com>) at 66-78.

40. See S Batra "Insolvency Laws in South Asia: Recent Trends and Developments" Report written after the Fifth Forum for Asian Insolvency Reform (FAIR), Beijing, 27-28 April 2006.

41. See E L G Tyler "Insolvency Law in Hong Kong" at 224 in R Tomasic (ed) *Insolvency Law in East Asia* (2006) supra; C Booth "Living in Uncertain Times: The Need to Strengthen Hong Kong Transitional Insolvency Law" (1996) 34 *Columbia J of Transnational Law* 389; L Burton "An Overview of Insolvency Proceedings in Asia" supra esp at 115; J Shi "Recent Developments in China Cross-Border Insolvencies" supra at 17-18.

42. See Asian Development Bank *Promoting Regional Co-Operation* supra esp at 32-33.

43. See generally R Tomasic *Insolvency Law in East Asia* supra at 353 (Malaysia), 372 (Indonesia) and 422 (Singapore). See also the *Asia Pacific Restructuring and Insolvency Guide 2006* supra at pp79-88 (Indonesia), 107-116 (Malaysia) and 144-153 (Singapore).

44. See L Burton "An Overview of Insolvency Proceedings in Asia" supra; R Tomasic *Insolvency Law in East Asia* supra at 211; *Asia Pacific Restructuring and Insolvency Guide 2006* supra at pp154-160.

45. See L Burton "An Overview of Insolvency Proceedings in Asia" supra esp at 125; see also W Wisitsora "New Thai Statute Blends Chapter 11 with Singapore Practices" (1999) 18 *Am Bankr Inst J* 1.

46. See R Fisher and M Sloan "Why Asia Needs a Regional Insolvency Pact" supra at 44; R Tomasic *Insolvency Law in East Asia* supra at 437; L Burton "An Overview of Insolvency Proceedings in Asia" supra at 121; *The Asia Pacific Restructuring and Insolvency Guide 2006* supra at 161-171.

47. See *Asia Pacific Restructuring and Insolvency Guide 2006* at 172-181; C Booth "Drafting Bankruptcy Laws in Socialist Market Economies" supra esp at 144.

48. These problems are not new. See H L Jones "International Judicial Assistance: Procedural Chaos and a Program for Reform" (1953) 62 *Yale LJ* 517. For surveys of the field see D McClean *International Judicial Assistance* Clarendon Press (1992); B A Ristau *International Judicial Assistance (Civil and Commercial)* International Law Institute (1984) (2 vols).

49. See e.g. *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827G per Lord Justice Millett.

50. See eg. Kessedjian "Dispute Resolution in a Complex International Society" supra at fn197-203.

51. See *Siskina v Distos Compania Naviera SA (The Siskina)* [1979] AC 210.

52. See *Mercedes Benz AG v Leiduck* [1996] AC 284 at 307-308, 314; *The Civil Jurisdiction and Judgment Act 1982 (Interim Relief) Order 1995*.

53. See *Davis v Turning Properties Pty Limited* (2005) 222 ALR 676; P Biscoe *Mareva and Anton Pillar Orders: Freezing and Search Orders* Lexis Nexis Butterworths Australia (2005) Ch 5; P Biscoe "Transnational Freezing Orders" (2006) 27 *Aust Bar Rev* 161; H Tarrant "Mareva Orders: Assisting Foreign Litigants" (2006) *Aust Bar Rev* 314.

54. See e.g. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

55. See J D Maclean and C A McLachlan *The Hague Convention on the Taking of Evidence Abroad: Explanatory Documents Prepared for the Commonwealth Jurisdictions* Commonwealth Secretariat London (1985). The Convention is implemented in New South Wales by the *Evidence on Commission Act 1995* Part 4; See *British American Tobacco Australia Services Limited v Eubanks for the United States of America* (2005) 60 NSWLR 483 esp at [22]-[40].

56. See Australian Law Reform Commission *Legal Risk in International Transactions*: Report No 80 (1996) esp Recommendations 11, 13, 15, 16, 17 and 24.

57. On the developing position in China see M Zhang "International Civil Litigation in China" (2002) *Boston College Int'l Comp L Rev* 59; H Jin and D Huanfang "Chinese Practice in International Law" (2003) *Chinese J of Int'l Law* 387; F Shen "Are You Prepared for this Legal Maze? How to Serve Legal Documents, Obtain Evidence and Enforce Judgments in China" (2003-2004) 72 *UMKC L Rev* 215.

58. See *Treaty of 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 Co-Operation in Arbitration* (1998) ATS 18.

59. See Spigelman "Transactions Costs" supra at 449-450.

60. See the relevant sections in each chapter of Michael Pryles *Dispute Resolution in Asia* supra; Herbert Smith *Guide to Dispute Resolution in Asia* (4th ed) Herbert Smith in association with Gleiss Lutz and Stibbe (2006)

<http://www.herbertsmith.com/Publications/archive/2006/Asia-dispute-resolution-06.htm>

61. Anne-Marie Slaughter "Judicial Globalisation" (2000) 40 *VaJ. Int'l LJ* 1103

62. Anne-Marie Slaughter "A Global Community of Courts" (2003) supra.

63. See J L Westbrook "International Judicial Negotiation" (2003) 38 *Tex Int'l L.J* 567.

64. Slaughter "A Global Community of Courts" supra at 210ff.

65. Slaughter "A Global Community of Courts" supra at 206.

Print Page

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## The Foundation Of Western Shanghai

**THE FOUNDATION OF WESTERN SHANGHAI  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE ASIAN ARTS SOCIETY OF AUSTRALIA  
SYDNEY, 26 MAY 2007**

As soon as the formal treaty ending the first Opium war was signed at Nanjing in August 1842, the opium traders dispatched their floating opium warehouses to Wusong at the mouth of the Huangpu River. The treaty, which opened five ports, including Shanghai, to trade, failed to even mention the ostensible cause of the recent hostilities. Opium remained illegal and, therefore, unmentionable.

The British plenipotentiary, Sir Henry Pottinger, proclaimed that no trade was to be permitted at any of the new ports until the final details of access had been established by further negotiations. Captain Charles Hope, the British naval commander in charge of the squadron based at Zhoushan Island, south of the Yangzi's mouth, made the mistake of reading this proclamation too literally.

A good naval man, Hope had an instinctive aversion to pirates and smugglers. His animosity was reinforced by the entrepreneurial drive with which many naval officers supplemented their income by capturing pirate vessels as prizes, a long standing incentive which has never received sufficient weight as an explanation of British naval supremacy. Under the Navigation Acts ships without licenses for their arms or without formal port clearances were liable to seizure.

Many British naval officers had made small fortunes from wartime prize money and, during the recent hostilities, officers in the Royal Navy contingent had cast covetous eyes over the opium fleet. In November 1842 James Matheson was warned about the officers' festering invigilation by Robert Thom, a former Jardine, Matheson employee, then acting as an interpreter for Pottinger. Thom wrote:

"I have been living on board men o`war and thus being thrown into the company of Naval officers the opium trade and the ships engaged in it have of course been discussed. I have heard only one opinion expressed, which is that these vessels are navigating expressly in the teeth of the Navigation Act. What I dread is that, when the admiral is at Macao stories may be circulated about piracy, murder, cutting off of tails etc. and the old gentleman may all of a sudden give orders to have all the opium vessels detained, and this would be a calamity indeed. Be good enough, my dear Mr Matheson, not to let the contents of this letter go further, as it may compromise me in a number of ways. Let me assure you that Naval men never miss any opportunity of making prize money when they can." [1]

"Those opium gentlemen" Captain Hope later declared with a hint of sarcasm, "hitherto have been allowed to go along the coast without port clearance and no questions ever put to them. I never interfered as long as they confined their smuggling operations to the south. But when they went to the Yangzi and *above* all to Shanghai, I thought it high time to put a stop to such lawless proceedings – more especially as those vessels are manned and armed more like men of war than merchantmen and are well known to commit all kinds of irregularities and great excesses to promote their own selfish ends." [2]

In April 1843, Captain Hope tried to stop the illegal trade at Wusong. When a Jardine, Matheson & Co steamer, *The Vixen*, called at Zhoushan with formal clearance for a permissible port, Hope "strongly suspected" that the ship was bound for Shanghai. He ordered *The Vixen* to stop.

Hope forced all British shipping to leave Wusong. He wrote to the Daotai of Shanghai offering British assistance to suppress any British involvement in the illegal traffic. Regrettably, there appears to be no record of the hilarity with which this earnest proclamation must have been received.

*The Vixen* hurried south with news of Hope's action. It sped to Hong Kong, which had succeeded Lingding Island as the great toxic storehouse and as the new headquarters of Jardine Matheson & Co.

James Matheson, sole head in the East after Jardine's return home, immediately passed on *The Vixen's* report to Pottinger. Her Britannic Majesty's representative was suitably horrified. His proclamation, he vigorously insisted, "had no sort of reference to the opium trade". How could it? The trade was illegal, not mentioned in the Treaty at all.

"It has never been recognised by me". Pottinger pompously proclaimed, "nor will be so".[3] Indeed at that moment he was still negotiating a tariff which would apply to all British imports – legal imports, of course. Illegal trade, like opium, could not be "recognised" by the exaction of a tariff.

As Captain Hope later explained: "I could not for a moment suppose that a British Minister would issue proclamations unless he intended to act on them".[4] However, he had not understood that Pottinger's reference to 'no trade' meant 'no legal trade'. Hope was just a blunt naval man with an appreciation of cant quite inadequate for the specious diplomacy the circumstances required. The Admiral, based at Hong Kong, was prevailed upon to remove Hope from his command. *The Vixen* itself, was dispatched back to Zhoushan with that order.

Matheson instructed his opium commander at Wusong not to flaunt this "victory" over the Navy.

"Let every effort be made", he added, "to please the mandarins, such as moving from one anchorage to another when they require it, and not approaching too near their towns. The opium trade is now so very unpopular in England, that we cannot be too cautious in keeping it as quiet and as much out of the public eye as possible." [5]

Matheson was no stranger to hypocrisy. He once wrote to an associate in London that throughout his, then, twenty-one years in China, he had "never seen a native in the least bestialized by opium smoking". [6] On another occasion he was quick to pass on an alleged remark by a senior mandarin that: "On the swampy banks of the Yangzi and other large rivers, they would all die of fever and ague, if they had not opium to smoke." [7]

Notwithstanding Matheson's best efforts, the British public still failed to appreciate the positive public health benefits of opium addiction, even on the "swampy banks" of the Yangzi. It was obvious that the official British presence in Shanghai could not have any role in the opium trade, the core of the new commercial relationship.

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In a bland proclamation, and without fanfare, the first British consul, Captain George Balfour, formally declared Shanghai open to British trade on 17 November 1843. Amongst paternalistic warnings about the various systems of weights and measures used in Shanghai, he detailed the precise harbour location along the Huangpu River. Conspicuously, it stopped just short of the opium receiving ships' anchorage at Wusong. [8]

Balfour had been transported from Hong Kong to Zhoushan on *The Vixen* itself. There, however, he had had sufficient delicacy to change to a less obviously compromised vessel and arrived in Shanghai on a small Royal Navy steamer.

A 34 year old officer in the Madras artillery, Balfour had been in Shanghai the year before with the military expedition. As the war progressed he had graduated from purely military tasks. Pottinger selected him to serve as a financial administrator, dealing with captured public property, handling the ransom payable under the Treaty of Nanjing and its dispersal to Britain, India and to the private British firms owed debts by Guangzhou merchants. He was to have a long career as a military administrator in India and Britain: a vocation which would lead to a knighthood, a general's rank and a seat in the House of Commons.

Administrative talents such as Balfour had already displayed, were devoid of that mock glory which caused wet dreams in British boarding schools for decades to come. Nevertheless, his prosaic skills were the cement of Empire. Balfour was a pragmatist. Perfect for a trading outpost.

James Matheson wrote to Alexander Dallas who was then supervising the coastal opium traffic from Zhoushan and was deputed to be the first Jardine Matheson & Co representative in Shanghai: "Captain Balfour, the consul for Shanghai and Mr Thom, the consul for Ningbo, are particular friends of ours, and will give our vessels as little trouble as they can, but it will be advisable to keep entirely out of sight of these ports .... You will of course oblige Captain Balfour or Mr Thom by cashing their bills or otherwise." [9]

Balfour was conscious of the limited career opportunities available in the new consular service. Like the ingratiating leak Robert Thom – who had warned Matheson about the Royal Navy – he was an intruder into a diplomatic corps, jealously and frequently nepotistically protected by the Foreign Office. Balfour was determined to perform his task expeditiously, expediently and without controversy, before returning to a more clearly organised career path in India. He understood that his principal job on behalf of British commercial interests was to stay out of the way of the opium trade.

Shortly after his arrival, Balfour received an official complaint from the Daotai about the opium ships, which had already sold 8000 cases in the year before the formal opening. [10] With that studied, earnest insouciance, familiar in the late twentieth century to United States drug investigators dealing with Central and South American government officials, Balfour disclaimed any ability to act unless a regulation was clearly breached: "These vessels must be at sea outside the port and cannot yet have entered", he told the Daotai, ingenuously. "This certainly is not disobedience of the regulations." [11] He promised to act if they were disobeyed.

In February 1844 he did intervene, ordering the British navy to detain the barque *Maingay* and the brig *Amelia*. Speculative ventures of Singapore and Calcutta traders, the two ships had disposed of opium at Wusong and then entered the harbour limits to pick up 'legal' goods like tea and silk. Balfour confiscated the opium and imposed fines for irregular papers, false manifests and breaking bulk without permission.

Balfour's intervention, not coincidentally, served the commercial interests of the two dominant British firms, the Scottish dominated Jardine, Matheson & Co and the English Dent, Beale & Co. The complete separation of the legal from the smuggling trade reinforced their duopolistic control of about 90 percent of the lucrative opium trade. The duopoly was frequently manifested by actual collusion on prices, including predatory price cutting against rival Europeans and Chinese who had acquired opium supplies elsewhere, even from Jardine's and Dent's in Hong Kong, indeed perhaps especially in such cases. The cost of a rival to enter the lower Yangzi market was substantially raised by the necessity to operate two separate fleets without *any* economy from backloading Chinese exports on the same ships as carried opium to Wusong.

Balfour reported to Pottinger in Hong Kong on his dealings with the *Amelia* and *Maingay*:

"So long as the parties who are at present employed in the traffic in opium have almost the entire monopoly along the coast, I do not anticipate many cases occurring difficult of management. But I do certainly expect most serious evils to arise from other parties engaging in the traffic and not having the same inducement to carry on the traffic free from collision with the Chinese authorities." [12]

Jardine's and Dent's served their receiving ships off Wusong with a military style fleet of coastal clippers: the totally disciplined seamanship was reflected in the gleaming burnished copperwork, the precisely coiled brass-capped ropes, the neatly furled sails, the spotless, daily-scrubbed decks and the polished brass cannons. Sometimes the armament and discipline was unavailing. In 1849, for example, seven opium clippers disappeared in calm seas; captured by one of the two well organised pirate fleets that operated off the China coast. [13]

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Unlike opium, the legal trade required a permanent settlement with full official protection. It was immediately evident to Balfour, and all the other British whose indulgent standards of accommodation were set in Anglo-India, that nothing suitable was available within the existing cluttered Shanghai urban area.

Nevertheless, Balfour was determined to ensure that the British community was not forced into a separate foreign compound like that at pre-war Guangzhou, then called Canton. He insisted that accommodation be found for him in the existing city. The Daotai insisted that nothing was available.

However, a Guangzhou merchant called Yao, no doubt hoping for privileged access to the Western traders along the lines of the old Canton Cohong, offered Balfour free accommodation. With ingratitude bordering on the rude, Balfour objected to being exposed to the stream of visitors to whom the enterprising Yao had sold tickets so that they could observe the "white devils" eat, drink, wash, dress and sleep. [14]

For the Chinese mandarins, it was entirely appropriate that people from the same native place should congregate together. The existence of separate settlements for British, American and French traders and missionaries was a traditional mechanism of control.

Shanghai had already had a number of native place associations in long established guilds called *huiguan*, where persons from the same province or city would live together, eat their own cuisine, pray to their own gods and settle their own disputes. When, later, the doctrines of extra-territoriality, whereby Westerners administered their own laws in the International Settlement, was denounced as a form of colonialism, the long tradition of "using barbarians to control barbarians" was overlooked.

Balfour, described in the official reports to Beijing as "submissive" and "tremblingly obeying" [15] negotiated a zone for British settlement on an expanse of riverfront, undeveloped save for a few mud docks and timber yards, between the entry of a turbid canal, called the Yangjinbang, just north of the city, and another canal just below the hundred yard wide Wusong River which entered the Huangpu just as it takes a 90 degree right turn on its way to Wusong and the Yangzi.

The first denominated area, within which British traders were permitted to negotiate with Chinese owners for the purchase of their land – to be held under lease in perpetuity – extended back a few hundred yards, over about 43 acres of cotton fields and rice paddies dotted with conical tombs and the occasional hamlet. It was soon extended to 138 acres and then 470 acres, roughly rectangular, three quarters of a mile long and about a mile deep, bordered on the east by the Huangpu, the west and south by canals, and on the north by the Wusong River, later called Soochow (Suzhou) Creek by Western residents. These were defensible water boundaries, carefully selected for a community aware of the possibility of Chinese retaliation for their recent military humiliation. It was plainly enough room for a modest community of transient merchants and steadfast missionaries. It would soon prove too small.

Jardine's won the initial juggling for status. Alexander Dallas persuaded Balfour to grant the land Jardine acquired, situated at the northernmost section of the original area, the self-important title deed for Lot Number One. The Dent's representative, Thomas Beale, sought a reasonable distance from his archrival, at about the middle of the riverfront strip at Lot Number 8, for which, in symbolic compensation, the consul issued Title Deed Number 1.

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A number of British and American trading houses, long established at Guangzhou, with Jardine's and Dent's the largest because of their dominance of the opium trade, quickly set up branches in Shanghai, the most far flung outpost of the British mercantile diaspora.

Their business of commission agency was a relatively new commercial form. Traditionally merchants in international trade had acted as principal, buying goods and transporting them across the seas. Now the functions were split. Credit was centralised in London merchant banks who discounted bills of exchange. Shipping joint venturers leased ships by charter party. British wholesalers placed orders with local agencies to make purchases on their behalf. Manufacturers or traders from India and Britain dispatched goods on consignment.

The capital of these overseas business associates, called 'constituents', who bore most of the risk, was combined with the entrepreneurial skill of a local agency house, with the latter retaining the right to trade on its own account. The system was integrated by a series of contracts, commercial alliances and interlocking partnerships: an inverted pyramid of specialisation which, in those times of slow communications, eventually all depended on the man on the spot at places like Shanghai. His company demanded, and received, a profit incentive, usually by means of a formal partnership.

Alexander Dallas, distinguished Gold Medalist from the Inverness Academy, was brought to China as a personal protégé of James Matheson and became the first non-family partner of Jardine, Matheson & Co. A keen, shrewd, energetic trader, he built up the firm's key profit centre at Shanghai over the next decade, before he was forced to leave the East by recurrent bouts of fever. After recuperating in Scotland, he launched a second career, in what any Scot would regard as a more congenial climate:

as a Director of the Hudson's Bay Company, eventually becoming the first Governor of the Territory that became Manitoba.

Thomas Beale, his competitor, grew up with the China trade. His father had been a partner in the predecessor firm of Jardine, Matheson and Co. at Guangzhou before the war, until he went bankrupt speculating in opium. Never able to trade himself out of his difficulties, the elder Thomas Beale had created at his Macao home a magnificently eccentric garden and aviary replete with peacocks, exotic pheasants and a bird of paradise. His son negotiated a partnership with the firm which traded in Shanghai under the name Dent, Beale & Co. Like his father, Thomas Beale would die in the East, he on the verge of returning to England with his fortune.

It is noteworthy that visitors with some pretension to a life of the mind – a visiting botanist, a touring correspondent for The Times – gravitated to the sumptuous Shanghai hospitality of Thomas Beale. Men of power, like navy officers or diplomatic plenipotentiaries, called first on Jardine's.

In addition to opium, the Shanghai trade focused on tea and silk, commodities which fluctuated in price considerably depending on seasonal production conditions, stock levels and the vagaries of demand in distant markets.

Beale and Dallas, like their commercial rivals, shared an unremitting, overwhelming need for information – to know when to buy and when to sell, when to hoard and when to clear stocks, when to raise and when to lower prices. Four month old news of oversupply in the London market had to be balanced against the latest sketchy anecdotes about production conditions in the silk and tea districts. The regular, swift, express delivery of commercial intelligence by the opium fleet gave Dallas and Beale a strategic commercial advantage.

At first incoming news was rushed down from Wusong by swift opium cutters, 50 foot sloops shallow of draught, flat bottomed with centre boards, designed to negotiate the shifting sandbanks and ensure maximum time to act. Later, each new opium consignment to Wusong reverberated in the theatrical arrival at the riverfront trading establishments of a dispatch rider who galloped the twelve miles from Wusong to deliver the latest mail from Hong Kong – an event of local excitement for the isolated outpost:

"The boys who rode the pony express came yelling and shouting at headlong speed throwing off their letter bags at the door of the houses to which they were addressed." [16]

By that time, Jardine's and Dent's met the boats before they reached Wusong and carried their mail overland a day or two early, rushed with private enterprise courier urgency. Information was the life force of a trading house and for the first decade of Western Shanghai, it was hoarded by the opium dealers.

A third significant participant in the opium trade was the American firm Russell & Co, a major contributor to a number of Boston Brahmin family fortunes, long established at Guangzhou. It obtained its opium from Turkey outside the British sphere in influence. It joined Jardine Matheson and Dent, Beale on the Shanghai waterfront. Originally, the Chinese had agreed to the establishment of a separate American settlement at Hongkew north of the point where the Wusong enters the Huangpu. However, the American firms preferred the British location and set up there, although they insisted, to the annoyance of Balfour and his successor, in flying the stars and stripes. For much of the first decade the principal of Russell & Co in Shanghai also held appointment as the US Consul in Shanghai. This official position was actively deployed in the firm's commercial interests.

The American traders found they did not need a separate settlement. However, the Land Regulations, drafted by Balfour and promulgated by the Daotai as a Chinese regulations, envisaged land being allotted by the British Consul. At first, the Americans accepted that. Eventually, they sought allotment by the American Consul and, when the British accepted the idea, the Settlement, in effect, became internationalised.

When Louis Charles Nicholas Maximillian de Montigny arrived in Shanghai in January 1848 to establish the French consulate, there was only one French resident in what was then referred to as the British Settlement. Refusing to live under the British flag, Montigny moved into a Chinese house located on a Catholic mission property near the Old City – a dilapidated building, but more consonant



with the dignity of France than even the hint of subjection to perfidious Albion. [17]

Without reference to his superiors – who in any event were preoccupied with the revolutionary developments in Paris leading to the collapse of constitutional monarchy and the emergence of the Second Republic – Montigny took the occasion of the arrival of a second French citizen, a wine merchant appropriately called Remi, to demand the allocation of a separate area between the Old City and the Yangjinbang, the canal north of the city, where the British Settlement commenced.

The Chinese authorities agreed to the creation of a French Concession in March 1849. The Concession had a narrow riverfront access just north of the crammed suburb beyond the walls of the Old City and stretched back for about two hundred yards over an area that consisted largely of undeveloped mud flats.

“A large and absurdly disproportionate tract”, Balfour’s successor Alcock fulminated. “The national vanity of the French leading them to an absurd and useless acquisition.”[18] In their vigorous, haughty, patriotic swagger, Alcock and Montigny had much in common.

Montigny built a consulate in his Concession but, by 1853 had attracted only one other foreigner: a Parisian watchmaker. [19] The major French presence in Shanghai was on the other side of the walled city: at Xujiahui, there was a small Catholic village. This was the site of the tomb of Shanghai’s most illustrious son, Xu Guangqi, also acclaimed by a ceremonial stone arch within the walled city in front of the magistrates yamen. [20] Xu had risen to the most senior positions at Beijing in the early seventeenth century at the end of the Ming dynasty. He was the most powerful Christian in Chinese history. He had worked with the extraordinary Jesuit missionaries, who had returned to establish a Jesuit outpost in Xu’s ancestral home.

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The vulturine opium receiving ships remained at Wusong, just beyond the deliberately blinkered jurisdiction of the representatives of Her Britannic Majesty. This separation of form from substance would characterise the century long Western presence in Shanghai.

Business was relatively easy as the pusher of a drug of addiction. Building up a network of suppliers of tea and silk or finding purchasers for British manufacturers, were much harder tasks.

Impermanence was the major cultural barrier to trade. It was obvious that men like Dallas and Beale came to Shanghai with the sole object of making enough money to retire home as wealthy men. They frequently proclaimed such an intention. The ensnaring mesh of mutual interdependence and reciprocal obligation that characterised all aspects of Chinese society, including commerce, allowed only a restricted role for the arms length, ad hoc contractual exchange of convenience, which the Western traders brought in their intellectual luggage as a norm of mercantile conduct.

The sense of family duty of a Chinese merchant, with obligations owed both to future generations and to the past, made him reject such desultory commercial coupling, except in a furtive cash on delivery business like opium. Driven by addiction and lubricated by greed, that trade required no cultural interaction above the level of a grunt.

Trade in the other major commodities, tea and silk, required forward orders, advances and deposits, reliance on samples, risks in transport or storage and, perhaps most significantly, such trade involved credit. All this required trust.

In Anglo-American commerce the degree of trust demanded by commercial relationships was produced by the law of contract, enforceable in independent courts. For a Chinese trader, in a society proudly governed by the rule of men not the rule of law, trust depended on family and clan loyalty.

There were no independent courts and judges looked down on merchants in accordance with the traditional Confucian formula: zhong nong bing shang – respect agriculture, despise trade. Law was not enforced to confirm the terms of commercial bargains. Law was enforced with a view to restoring social harmony, with primary emphasis on matters of status not contract, in accordance with the official Confucian ideology.

Part of the success of Dent’s and Jardine’s can be attributed to the fact that they most closely approached a Chinese model: a family succession based solely on merit – sons in the case of Dent’s, nephews in the case of Jardine’s; a suggestion of extended clan kinship – family ties linked the China

coast agency houses to their Indian associates and to London based merchant banks; a clear preference in employment and business alliances on provincial loyalties, as distinctive as the Chinese provincial divisions – English in the case of Dent's and Scottish for Jardine's. Such conduct indicated an understanding of social obligation. For Chinese merchants this offered the prospect of a stable, long term, mutually beneficial and low risk relationship.

At the outset, in the 1840's, there was no confidence on the Chinese side that the intruders, who had attained their position by violence, were capable of honourable conduct. No doubt, many long established Chinese merchants in Shanghai regarded the Western traders as little better than pirates, with reason, in the case of the opium trade. On the other hand, the Western traders could not be assured that their contractual rights would be strictly enforced.

Two great trading traditions – maritime China and Anglo-America – had been forcibly brought together by British arms. Each was faced with unusual commercial risks, risks which inhibited exchange. In short, there was a market for risk arbitrage. The way in which the free market created a new mechanism to ensure efficient exchange, was an affirmation of the dominant Western belief in free trade. However, the fact that Chinese totally dominated this essential business, was a manifestation of Chinese cultural resilience. The men who provided the service – the new mechanism to facilitate exchange – were called 'compradors'.

No Chinese tea or silk merchant would sell directly to a Western trading house. Each house had to appoint one or more Chinese to act as its agent and intermediary with local traders. To other Chinese the compradors accepted responsibility for the conduct of their Western associates. Similarly, to the Western traders, they accepted complete responsibility for the actions of other Chinese merchants, guaranteeing that they would perform their contractual obligations. In the Western manner, these duties were formalised by written third party guarantee agreements backed, not infrequently, with cash performance bonds.

The comprador prospered as a risk broker because all the transactions, both physical and monetary, passed through his hands. He kept as much as he could get away with. He could take his cut by way of commission on particular commodities or by marginal differences in rates of exchange amongst the range of currencies involved in the trade. Perhaps most significant, however, was the comprador's intermediary role in the classic form of compensation for risk: the price of money.

Traditional rates of interest in China were in the 40-80 percent per annum range: a clear manifestation of the insecurity of commerce in a hostile socio-political system and, in itself, a significant explanation of its economic stagnation. These rates were about ten times the rates of interest prevalent in contemporary Western commerce, where capital was relatively secure. A comprador entrusted with Western capital for deployment by way of advances on final payment or, as increasingly occurred, by way of formal deposit with Chinese banks controlled by him, had an enormous margin in which to profitably manoeuvre.

Dallas of Jardine's, Beale of Dent's, Griswold of Russell's and other traders, called on their firm's established contacts in the Guangzhou area for individuals who could perform this crucial intermediary role. Although their Cantonese dialect was quite different to the Wu dialect of the Shanghai region, the written form was the same. Irrespective of provincial differences, they shared the same culture and Guangzhou merchants already had a presence in Shanghai, with an established provincial guild structure, from their participation in the prewar domestic coastal trade at the port. Nevertheless, the migration from the southern coastal provinces of Guangdong and Fujien, was of a different order of magnitude, in both size and aggression, than anything in the past. Chinese Shanghai was to be transformed into a uniquely multi-provincial city. One historian described the Cantonese as "the real shock troops of the British invasion". [21]

The compradors' primary task was to establish fruitful relationships with Chinese suppliers of tea, silk and the export miscellany of Chinese porcelain, embroidery, furniture and artifacts to which the Western traders applied the demeaning collective "muck and truck", an insult which, no doubt, found its origin in the status anxieties of practical men supplying artistic appetites which they did not share and, indeed, found difficult to understand. A secondary, and more exacting, task was to obtain sales agents for Western manufactures, which the Chinese population at large regarded with either bemused suspicion or atavistic hostility.

The adjoining lower Yangzi provinces of Jiangsu and Zhejiang were the centre of Chinese sericulture: the location of the most productive mulberry trees, from which finely shredded leaves were fed to silk worms in the homes of thousands of peasants, who sold the fragile cocoons to specialist reelers who,

in turn, supplied weaving workshops in the towns and cities. The major silk market remained domestic. Indeed, from the mid eighteenth century overseas supply was rationed because of the impact foreign purchasers had had on raw silk prices. Each of the officially permitted foreign traders at Guangzhou had been allowed a fixed quota.

The pre-war trade through Guangzhou naturally shifted to Shanghai, located next to the production hub. In 1845 the pre-war level of about 12,000 bales of raw silk exports was re-established, but it was already equally divided between Guangzhou and Shanghai. In 1846 15,000 bales left Shanghai and only 3,500 left Guangzhou. The next year the numbers were 21,000 against only 1,000 bales. Thereafter Shanghai remained the dominant export point.

Shanghai had similar advantages as a location for tea exports, but it was much longer before it was able to assert itself. The pre-war tea exports of about 50 million pounds per annum doubled by 1852, in which year Shanghai finally surpassed Guangzhou as the largest export port. It was much closer to the tea producing regions of the adjoining provinces and more conveniently located, by reason of formidable mountain and river barriers, to the particularly productive region of Fujien province, known to Westerners as the Bohea hills. Nevertheless the power of the vested interests in the convoluted inland route was able to resist the natural forces of efficiency.

A small army of boatmen and porters had operated from the southern tributaries of the Yangzi and the Bohea hills, south and west to the mountain range that barred access to Guangdong province, over which another army of porters carried the tea to the rivers that flowed into the bay of Guangzhou. Hundreds of thousand of coolies and boatmen relied on this route for their livelihood. Hundred of merchants had established an interlocking network of commercial relationships between the hillside tea growers and the foreign merchants in Guangzhou. The similar interests in the silk trade were of a much smaller scale. The full force of Confucian inertia was arraigned against the profit oriented drive of the Western trading tradition, of particular urgency, in the case of tea, because delay in transportation had significant adverse effects on the quality of the product. Fresher tea was favoured and, accordingly, commanded a premium on the London market. Competitive pressures amongst the Western traders made them anxious to shift tea delivery to the speedier and cheaper route via Shanghai.

Gradually, over the continual interference of mandarins in the tea producing districts and transport routes, the locational benefits of Shanghai established its ascendancy as a port. The inertia of entrenched expectations was slowly overcome by the demands of economic efficiency.

Flotillas of round-roofed sampan lighters brought the tea out to the clippers, anchored fore and aft in the Huangpu River parallel to the shoreline. Tea was so light a cargo that each ship required considerable ballast. First a base of more than 100 tons of lumpy kentledge – scrap iron from English foundries – then bricks brought out from England in the absence of any bulk products which found a Chinese market both firmly covered with half inch boards; then 150-250 tons of clean, dry, non-porous, shingles – beach pebbles – jammed for stability into every crevice between the square tea chests and the curve of the hull. A protective layer of chests full of old tea lay immediately on top of the ballast.

Hundreds of skilled Chinese stevedores packed the ballast and tea tightly – to maximise the load and to prevent shifting during the voyage, the trim of the ship being vital to its speed. They hammered the full size chests into place, cramming smaller spaces with half chests, filling every cubic inch with perfect rows of paper and lead lined, wooden tea chests which, generally, engulfed a block of matting-covered silk bales in the driest centre of the hold.

The Western trading outpost at Shanghai grew into a village oriented around the port. At the height of the tea exporting season, two or three ships would depart per week, each laden with thousands of tea chests and hundreds of bales of silk, dropping down on the tide under sail to Wusong, with local pilots plotting a course through the beaconless, shifting silt banks. The river harbour felt the creak of timber, the strain of ropes and the smell of pitch – all more gentle than the brown, ferrous rust dominance and petroleum stench of a twentieth century port. Traffic difficulties in berthing and collisions emerged almost immediately.

Ships chandlers and general stores sprung up on the banks, serving the rotating fleet with coal tar, varnish, copper nails, rope of various thicknesses, mooring swivels, sail thimbles, turpentine, blocks, boots, pots and, according to the advertisements in the North China Herald which began publication in late 1850, sherry, port, claret, Jamaican rum, hock, French olives, wine vinegar, sardines, herrings, anchovy paste, Italian macaroni and tripe.

Particularly important were the repair yards and dry docks. Sailing ships required constant attention. Each was composed of thousands of pieces of small timber secured together with carpentry and fastenings, with miles of rope in rigging, hundreds of yards of pitch-sealed caulking forced between the planks – all needing regular replacement, bottoms sheathed in decaying copper to prevent shipworm infestation, decks kept moist to prevent planks shrinking, hundreds of blocks needing oiling.

After buffeting by wind and sea there was always wood which split, rotted or tore away, sails which stretched and split, rope that frayed, joints that leaked, to say nothing of hulls pierced on rocks and lost masts. Fixed on the run with such materials as could be carried, final repairs were made in port and replacement stores acquired.

The mid-nineteenth century witnessed an explosion of international trade; driven by spectacular increases in the productivity of shipping – first in sail and then in steam transportation. The port of Shanghai grew with this trade.

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On 1 January 1850, epicentre of a dramatic century, the 200 year old British Navigation Acts were formally repealed. The Acts had prohibited imports to England except on ships owned by Britons or by nationals of the country of origin of the goods. The Chinese had not been in a position to take advantage of the exception in favour of their own ships; their junks did not venture into the open seas.

In 1433, the very year in which Prince Henry the Navigator dispatched the first 20 metre long Portuguese caravel with instructions to travel into the Atlantic beyond the limits of the known world at Cape Bojador, a peninsula on the West African coast 300 kilometres south of the Canaries, Admiral Zheng He had returned from the last of his seven voyages around the Indian Ocean.

Over a thirty year period hundreds of junks, the largest 135 metres long and displacing 1500 tons – easily the largest vessels of their time – had travelled to India, the Arabian peninsula and West Africa to trade and exact tribute for the Emperors of the new Ming Dynasty. However the Ming court, succumbing to cultural chauvinism, destroyed Zheng's fleet on his return and permanently interred the world's foremost technology of ocean travel.

Nineteenth century Westerners, who believed passionately in the unidirectional inevitability of "progress", would not have understood, having forgotten the fragility manifest in their own cultural experience of the decline of Rome, when technologies such as concrete, water reticulation, kiln-fired bricks, glassmaking and bronze working were 'lost' in most of Europe for centuries.

The protective Navigation Acts, originally designed to destroy the seventeenth century Dutch naval dominance, had created a substantial British merchant marine. It was not, however, as globally dominant as it was to become, after the reinvigorating blast of competition that began at mid-century.

The first effect of lifting the protective barriers was the loss of custom to an aggressive competitor who did not suffer from the complacent lassitude which such barriers inevitably cause. In the China tea trade, with British consumers prepared to pay a premium for freshness, American ship designers and sailors immediately established their superiority.

As that acute observer of America, the French aristocrat Alexis de Tocqueville, had reported only a few years before: "The Americans show a sort of heroism in their trading." He added:

"The European sailor navigates with prudence; he sets sail only when the weather is favorable; if an unforeseen accident befalls him, he puts into port; at night he furls a portion of his canvas; and when the whitening billows intimate the vicinity of land, he checks his course and takes an observation of the sun. The American neglects these precautions and braves these dangers. He weighs anchor before the tempest is over; by night and by day he spreads his sails to the wind; such damage as his vessel may have sustained from the storm, he repairs as he goes along; and when he at last approaches the end of his voyages, he darts onwards to the shore as if he has already described a port. The Americans are often shipwrecked, but no trader crosses the sea so rapidly. And as they perform the same distance in a shorter time, they can perform it at a cheaper rate." [22]

As de Tocqueville intuited, the future did not belong to the sclerotic aristocracy, nor to the traders who

sought wealth only to imitate it.

Shanghai, which had just become the world's greatest tea export harbour, received the full force of the frenetic presence of American sailing captains and their crews, bound for both America and England. Speed was dominant. This was the age of the clipper.

The early steamship, dependent on scattered coaling stations and, wasting most of its cargo capacity on carrying its own fuel, could not compete with the sailing ship for long-haul voyages of bulky commodities. Because of the rapid technological improvements in sailing vessels in mid-century, it would not be able to do so for decades.

Despite the early development of opium clippers in Indian and English shipbuilding yards, the British ship designers failed to fully adapt to the new need for speed. Their design habits had not changed from the years of the Napoleonic Wars, when the compulsory convoys had sailed by the speed of the slowest vessel.

Ship design was still dominated by the distortion of a taxation system in which tonnage rates, port and light dues were all determined by a system of measuring ship size based, until 1854, on convenience rather than accuracy. Only length and breadth were actually measured, with depth assumed to be half the breadth. A fixed formula was applied to compute "tonnage" of cargo carrying capacity. Taxes were avoided by maximising actual capacity, without increasing 'measured' tonnage. Bluff, full lines, with deep, narrow, bulbous, kettle-bottomed, unstable hulls, were the result – unseaworthy, inefficient and slow. The traditional form of the old style East Indiamen had waddled across the seas.

Notwithstanding similar "tonnage" measurements, American ship designers, driven by a competitive requirement for speed, had developed the lines of the blockade-running Baltimore privateers into full size three masted ships. In accelerating sequence through each custom built ship, the features of the clipper emerged from the dockyards of New York and Boston, and later from Aberdeen and London: longer, lower, slimmer, streamlined hulls; ever sharper bows designed to cut through water rather than push it aside; taller raked-back masts, reaching as high as a fourteen story building, and then higher; additional layers of sail, revolutionising the traditional configuration of the three-masted ship – with its three large square sails on each mast – by doubling the sails on the lower and top masts, adding triangular sails to the bowsprit and behind the masts, and one, then two, levels of sail on a fourth and fifth yard at the top; then pushing out wooden yards to the sides, beyond the normal rigging, to spread even more canvas and maximise the use of the wind in a cloudy cumulus of sail.

The American sails were made of heavy cotton duck, designed for maximum efficiency by remaining as taut as possible, their presence in harbour standing out, snowy white against the greyish, baggy British sails of loosely-woven flax canvas, which stretched and changed shape when wet.

Yankee clipper captains, driving their crews unmercifully, were also the first to take advantage of the new wind and current charts, produced from the late forties at the Washington D.C. offices of the U.S. Navy's Depot of Charts and Instruments. These charts laboriously and meticulously compiled, for the first time, the reports of tens of thousands of log books: itemising precise wind and current patterns at different times of year; locating the best routes for a month, even a particular week; identifying the narrowest points of the calm belts known as "the doldrums" and directing traffic to them as if to mountain passes. This information base exploded to about one million catalogued observations by 1854, with every American ship lodging the standard form questionnaire now issued by the Navy.

As one clipper captain wrote to the head of the Depot, the pioneer oceanographer Matthew Fontaine Maury, who never rose above lieutenant: "Until I took up your work, I had been traversing the ocean blindfolded." [23]

Graceful, svelte, rakish vessels with fine, precise lines – for any seafarer still a thing of beauty – technical progress with an exceptional sense of enchanting design. Not just in the lines but in the intricately carved figureheads and gingerbread work and the craftsmanship of the brasswork in bells, gangway stanchions, belaying pins, skylights, capstan heads, compasses, binnacles, lamps, signal guns, cask hoops, hinges, ventilators, winches and the surround of the vertical, spoked steering wheels. Environmentally benign in their use of renewable energy, the construction and, even more, the captancy of the clippers evoked a spirit of competition that was propelled as much by a sense of sporting achievement as by commercial avidity.

In mid 1850 a new 1000 ton clipper, The Oriental, sped from New York to Hong Kong in a record

shattering 81 days. The premier American trading house in China, Russell and Co., immediately chartered her to take tea to London at double the usual freight rate. On 4 December 1850, she arrived after 97 days, about half the time of similar voyages only a decade before. For this voyage alone, she had earned about US\$48,000 in freight. Her total cost of construction had only been US\$70,000.

The British public thronged at the West India Dock to inspect her towering, extraordinary, unprecedented design. They reacted with excitement and apprehension, like the American reaction to Sputnik over a century later. The Times editorialised gravely, if paternalistically:

"We must run a race with our gigantic and unshackled rival. We must set our long practical skill, our steady industry and our dogged determination, against his youth ingenuity and ardor. It is a father who runs a race with his son." [24]

The Admiralty obtained permission to take off The Oriental's lines in dock.

For the next tea season The Oriental was brought to Shanghai, to collect the premium early crop. Leaving Wusong on 15 July 1851 she reached London 128 days later on 20 November. There, no doubt, her crew learned of the triumph of American seamanship and ship design on 22 August that year when, in answer to a challenge of the Royal Yacht Squadron for the contemporaneous Great Exhibition celebrating the new technology of the industrial revolution, a New York yacht, *The America*, with her radical design of a long, hollow bow and her taut sails, had beaten all British contenders in a race around the Isle of Wight. The 100 guinea silver trophy, to become known as "*The America's Cup*" was to remain at the New York Yacht Squadron for more than century, until won by an Australian yacht with an equally revolutionary winged keel.

The sporting dimension of the China trade, like the concurrent gold rush clipper voyages around Cape Horn to California, was widely publicised although, in the United States, only until the mid-fifties during the years of clear Yankee triumph. Typical was the 100 dollar bet made by the captains of two of the early English clippers – notably smaller than the 1000 ton American ships – the 672 ton ship *Joseph Fletcher* and the 478 ton *Wild Flower*, which left Shanghai together in January 1853. The bet and result was reported as far away as Auckland, New Zealand. [25] Earlier that season the owners of the newest American clipper, *Nightingale*, had failed to find anyone prepared to take up their \$10,000 challenge in a race from Shanghai to London. [26]

A competitive spirit animated the China coast for decades, as tea clippers raced each other to London, Liverpool and New York, sometimes arriving only hours apart after a voyage of three months. After the American Civil War began, when the Yankees left, the rivalry continued between British firms and captains.

The Chinese participation in international trade remained reluctant, unconvinced of its benefits, dictated in part by opportunity and in part by fear. The British `haughtily brandished the threat of violence, which had opened the port in the first place. Their principal weapon was naval superiority.

In August 1844 Balfour had threatened to close the consulate, stop the legal trade and dispatch the fastest British ship, which happened to be *The Vixen*, to Zhoushan for more troops, unless he received an apology for a minor slight. It was given.

The Shanghai authorities would have particular cause to remember the incident of March 1848, when the Royal Navy blockaded the Huangpu.

\* \* \* \* \*

In 1848, for the first time since the Grand Canal silted up in 1824, the central Beijing authorities transported part of the annual grain tribute by sea. An armada of Shanghai based junks was ready to deliver the rice with an efficiency that the ossified bureaucracy and entrenched interests of the inland route could never match: it took only one month instead of, at least, three and each sea junk had several times the carrying capacity of a canal junk.

The decision had been made two years before, after the 1845 tribute was disrupted by floods at one point and unusually low water levels at another. One of the three adjoining prefectures of Jiangsu province nominated for this experiment in liberated trade was Songjiang, immediately to the west of Shanghai. Through the dense cobweb of waterways south of the Yangzi, the tribute was carried to Shanghai where white rice was respectfully packed in bags and ordinary rice was poured into holds.

Typically, nothing was done to re-employ those who depended on the traditional route. A report from Shanghai in March 1848 described the scene:

“A part of the emperor's grain is to be carried this year in sea going junks around the promontory of Shandong; consequently those men who navigate the canal junks, to the number of 15,000 more or less – all from Shandong – have been thrown out of employment and are now adrift, prowling about like savage blood hounds. They are in the north what the Guangzhou and Fujien pirates are at the south.” [27]

At about midday on 8 March, a group of these Shandong canal boat operators set upon three British missionaries busily distributing Christian tracts in the small walled town of Qingpu, thirty miles due west of Shanghai. From the meticulous blow by blow descriptions of the three reverend gentlemen – Lockhart, Medhurst and Muirhead – printed and widely disseminated amongst the foreign community, it is clear that an unruly gang had got out of hand and, in their frustration, turned on foreigners to vent their spleen, as so many such gangs in America, Europe or China have always done. There were no reports of broken bones but, amongst the numerous bruises, the major wound was British pride.

Rutherford Alcock, who had succeeded Balfour as British consul about 18 months before, demanded immediate amends.

In a circular of 13 March, addressed portentously “To Her Britannic Majesty's Subjects at Shanghai”, Alcock proclaimed:

“The refusal of the Chinese authorities to afford redress for the murderous assault upon three British subjects by the seizure of the chief offenders, leaves H.M.'s consul no alternative but to adopt extreme measures, or permit the security of his countrymen and the interests of the nation, to be seriously compromised. Every amicable means therefore having failed, H.M.'s consul has given His Excellency the Daotai, 48 hours, from this day at noon, to produce ten of the Ringleaders in the attack; failing which, such other steps will be taken as may appear expedient to compel the reparation required. Security to life and property, and the best interests of the commerce of western nations generally, with Shanghai are at stake; and if no redress be obtained for so brutal and unprovoked an outrage upon peaceable foreigners, all the great advantages hitherto enjoyed at this port may be lost.” [28]

The absence of any reference to religion is striking. Alcock, a true son of the Enlightenment, reserved his zeal for the practical matters of this world. It was commerce, not religion, which he regarded as: “The true herald of civilization, the human agency appointed under a Divine dispensation to work out man's emancipation from the thralldom and evils of a savage isolation.” [29]

When presented with what he regarded as prevarication by the Daotai, Alcock resolved to act on his own authority. The Minister Plenipotentiary in Hong Kong was a six day journey away. Alcock's sense of urgency arose less from delay – even in England a period of one week for the apprehension of criminal suspects would not seem unreasonable – but from the imminent departure of the 1100 sea junks laden with the rice tribute. Alcock instructed British traders to stop paying customs duties and ordered the 16 gun brig HMS Childers to moor across the river downstream from the junk anchorage.

Without any authorisation in the Treaty of Nanjing – or the subsequent parallel treaties negotiated by France and the USA, whose resident Shanghai consuls backed up Alcock – British, French and American naval men-of-war routinely called at Shanghai without official permission, as if a port opened only for trade were on the high seas. The treaties only contemplated such forces as might be required to preserve order amongst the foreign community – using barbarians to control barbarians. Nothing in Western international law permitted the practice that had developed. It was disdainfully assumed that the show of force was essential to retain what had been won by force. This naval intrusion would not leave Shanghai until driven out, and fully replaced, by the Japanese in 1941.

Gunboat diplomacy was invented by Louis XIV in 1684 when he forced a humiliating apology from the Republic of Genoa for a slight to France. Alcock's mentor, Lord Palmerston, had elevated it to an art form: dispatching the Royal Navy to demand apology from lesser powers for insults to the British flag or injury to British subjects – wounded honor issuing challenges to intercontinental duels.

Alcock had served as a surgeon in a British foreign legion, patriotic mercenaries privately engaged in breach of the British Foreign Enlistment Acts, to assist the professedly "liberal", pro-British, and therefore Palmerston supported, family factions in the ongoing dynastic struggles of Portugal and Spain. When a paralytic condition of his hands forced Alcock to give up medical practice in England, the Foreign Office, like any honourable sponsor of covert operations, looked after him, eventually appointing him consul to open the new treaty port of Fuzhou, from which he was promoted to Shanghai.

From the outset he established a tenaciously fatuous norm for proper relationships: receiving calls in a cocked hat, silver laced coat with gold buttons, silver striped trousers and a full display of his Spanish and Portuguese decorations. [30] There is no record of how his Chinese callers reacted to the Order of the Tower and the Sword, the Cross of the Order of Charles III or the Cross of Isabella the Catholic. [31] Regrettably, the Chinese could not appreciate the irony of the invocation of such majesty in support of Protestant missionaries.

Alcock, one of the few British representatives who did not scatter Christian commentary through his correspondence like punctuation, was actually skeptical of the missionary effort. With five Protestant churches and a Roman Catholic cathedral, he scornfully observed:

"The spiritual wants of the Chinese population seemed to have been anticipated for a long period ahead, far in excess, indeed of all probable demand. I apprehend mischief if missionary zeal outran discretion." [32]

Even by 1853, after 11 years of divinely inspired effort, there were only 22 Chinese Protestant converts in Shanghai. [33]

It was unlikely that Alcock's headstrong action would be countermanded by the nervous diplomats in Hong Kong or the Foreign Office. The Qingpu incident had given the mildly eccentric Alcock an opportunity to prove a secular point.

The three victims were representatives of the London Missionary Society, one of six different Protestant groups – two British and four American – with a base in Shanghai. They were not the first Europeans to be assaulted, or even killed, in the region. However, they invoked more sympathy than injury to a trader or sailor.

Although their earnest, unremitting proselytising infuriated its generally courteous targets, the missionaries were making a positive humanitarian contribution from their four acre compound about four hundred yards back from the riverfront at the southern end of the Settlement area. Dr William Lockhart and Reverend Walter Medhurst had been the first to arrive, with Balfour, at the end of 1843. Since then Lockhart had selflessly conducted a hospital for the Chinese. Muirhead, who arrived in August 1847, had set up a school.

The Governor General in Nanjing, Li Hsing-yuan, who had spent the previous year clearing up pirates on the Jiangsu coast in preparation for the use of the sea route for the tribute, and who would take personal responsibility for any delay in the grain fleet, intervened immediately. Ten culprits – precisely the round number demanded by Alcock by way of an adequate sample of a mob – were duly delivered. Some of them were actually recognised by the recuperating missionaries as their assailants. HMS Childers allowed the grain fleet to sail.

By proclamation not addressed to British "Subjects at Shanghai", like his first notice, but – reflecting affinity forged in triumph over adversity – "To the British Community at Shanghai" Alcock announced:

"They will be exposed every day in the public thoroughfares, as a warning to all who are in like manner evil disposed."

The ten were paraded for a month in the traditional portable pillories, called cangues, outside the Chinese Customs House on the riverfront quay in the British Settlement.



In his use of the passive voice and the third person, Alcock's redolent smugness is overpowering a century and a half later:

“Security to Life and Property, which for a moment seemed endangered, it is hoped, is now more firmly established than before the outrage; and with prudence and forbearance, such as his countrymen have already manifested, and which he fully counts upon whenever their excursions may lead them to a distance from Shanghai, H.M.'s Consul is sanguine that they will no longer be exposed to dangers or molestation from those whom impunity might otherwise have emboldened.” [34]

A few days later, a public meeting in the Settlement carried a resolution praising Alcock's “energetic and decided policy with the Chinese authorities”. It was long to be remembered in Shanghai as a model for how to treat the Chinese.

Needless to say, the Foreign Secretary, Lord Palmerston, also approved. Indeed Palmerston only had occasion to chastise Alcock for his prolix, grandiloquent dispatches – a pet hate of the “Foreign Secretary's, whose legendary caustic remarks on handwriting, grammar, spelling, composition and, most vituperatively, the use of Gallicism's, manifested his exuberant determination to assiduously control the finest detail. “Alcock”, Palmerston once cuttingly remarked, “seemed to have a good deal of spare time on his hands to be enabled to swell out into such long detail matter which might have been comprised in a much smaller space”. [35]

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Within a decade of the Opium War, a row of distinctive Western structures lined the Huangpu River. Set back 30 metres at the Daotai's insistence – to preserve a towing track for grain barges – each trading house occupied a two or three acre, white walled compound.

Along half a mile of muddy riverfront, the swampy, low-lying, tidal-encroached, ditch-dissected, alluvial silt ground had been drained, levelled, filled and raised. Wooden piles had been driven down, to form a crude embankment against the 12 feet of tidal movement and to elevate buildings over the usual ground level of 5 to 10 feet above the water table. Each mercantile firm filled in the area in front of its compound, and the towing track took on the appearance of a road, negotiable, when muddy, only in knee boots. An Indian word for embankment – Bund – was applied to the towing track turned road, and stuck.

Spontaneously, in the absence of directive municipal regulation – except the compulsory set-back – the unswerving track of the river was emulated in a distinct building line, a parade of two storey edifices, erected without professional assistance in a style called “compradoric”.

The construction of the embankment and of roads and wharves required a degree of co-operation. The growing foreign community established a Committee on Roads and Jetties, dominated by the major trading houses, which domination continued as this Committee grew into the Shanghai Municipal Council.

Each trading house built, facing the river for prominence and prestige, a spacious combined office-residence, bedrooms upstairs, with thick walls of sun dried brick – later structures used kiln-fired British bricks brought in ballast – stuccoed to give the impression of stone, with open arcades of Portuguese-influenced Roman arches, or a Venetian loggia or the verandah of Anglo-India. Behind, through lawns and gardens were warehouses, called “godowns”, servants quarters and stables. The larger firms had separate godowns for tea, silk and cotton and a detached annex for the junior staff – sometimes above a godown – a single kitchen serving both the ‘junior mess’ and the ‘senior mess’ in the main building, where the partners lived.

There was, a sense of elegance in the refined, simple lines that characterised the entire row, bereft of the exuberant, emphatic, assertive, ornament that constituted the latest British architectural fashion, which expressed its detestation of Palladianism and neoclassicism – London's Regent Street then being regarded as abhorrent – calling it the product of a disdained “shopocracy”. The impermanence of Western architectural taste – oscillating between simplicity and ornamental exuberance – must have bemused Chinese observers who had long accepted that both approaches were valid and could co-exist.

The sense of scale of the compradoric style harks back to Portugal, from which the first Western adventurers had come to China, building on the waterfronts of Macao and Guangzhou, without the

grotesqueries of the Spanish or Dutch. The commercial decision-makers who transported this style to Shanghai were visually conservative and out of touch with the latest fashions in London. These were practical buildings, custom built for their functions, not designed to proclaim the importance of their occupants.

Such pictures of this period as survive suggest an ungainly amateur quality to many of the buildings; as if designed from memory by a person without understanding of scale or any appreciation of the interconnections of architectural elements. A number of buildings give the impression of thoughtless scaling up – buildings swollen with pride – size bursting the design interconnections that made the model so appealing to the merchant who did the rough sketch for his Chinese builder to copy, like a suit. No doubt it was he who insisted on the ubiquitous verandah, widespread in the heat of Anglo-India and appropriate at Guangzhou but inappropriate in the Shanghai climate.

Observers contrasted the neat, symmetrical European aesthetic with the expression in physical form of incomprehensible Chinese values. As early as Christmas 1847, a pompously pious British visitor was able to draw invidious contrasts:

“I emerged from the central and densely populated streets of the city and found myself among gardens and orchards approaching the western walls. On the one side, beyond the walls westward, the rich plains stretch away farther than the eye can reach; and on the other, you have first the gardens and orchards and country seats and temples, and then the dense city and suburbs, and next the forest of masts marking the course of the river, and also away in the distance northward you have a glimpse of some of the foreign residents. A contrast, Oh what a contrast. The European houses of Shanghai, together with the new Church, which have just sprung up on the consular grounds are fair specimens of what, in their kind, is everywhere to be seen in Christendom. From these residences my walk carried me through the whole eastern suburb, nearly every foot of which is covered by shops and warehouses and other buildings. What a contrast between these and those I had just left. The buildings are so ill constructed, dark and uncleanly, the streets so narrow and so filled with riffraff, rubbish, gamblers, beggars etc. that a jaunt on foot or in a sedan, through these streets is usually anything but agreeable, except one desires to witness the miseries and the degradation of his species – here also, how fallen.” [36]

In the centre of the riverfront array of buildings, next to the simple, elegant lines of the two storey, wood columned, verandah enclosed Dent, Beale & Co establishment, set in a luxuriant garden, was a single element of appealing discord. There, with its colourful tiled rooves, curving upturned corner eaves, capped with a square cupola bringing light down to the central area – its elaborate red ornamentation standing out against the straight-lined white stucco of the Western buildings – was the Imperial Customs House, which had moved out of the Old City in 1848, closer to the action.

In 1851, Jardine, Matheson & Co replaced their first ungainly structure at the northern end of the row, with the precursor of a new generation: two storeys on a high basement, with two symmetrical wings around a large skylit entrance hall, its bulk modulated by shuttered fenestration, a glassed-in verandah with a balustrade and a low pitched hipped roof. The harbinger of the future was in the monumental staircase sweeping up to a large colonnaded porch topped with a balcony. The formal Western column, symbol of the Roman Imperium, had arrived in Shanghai. Fittingly, it appeared, not at the British consulate, under construction next door in the same year, but as the imposing grand entrance of a trading house. The meaning conveyed by the Western buildings was beginning to change. The design, and especially the colonnade, proclaimed the power and wealth of the occupants.

“Fine finished buildings”, a visiting correspondent for The Times breathlessly reported in the late fifties. “Some columned like Grecian temples, some square and massive like Italian palaces.” [37]

Not all visitors found the place appealing, Garnett Wolseley, the youngest lieutenant-colonel in the British Army – later Field Marshall, Commander in Chief and Viscount – described the houses along the riverfront quay as “more like palaces than anything else”, yet he found Shanghai “a dreadful station”:

“Nothing but a desire to grow rich could induce me to reside there; one racket court, no club, a stifling hot room surrounded by bookshelves, called by the inhabitants a library, a dismal looking race course enclosed by deep and unwholesome looking ditches, are the

places of public amusement.” [38]

He had the point in his opening remark: the inhabitants, without exception, had the “desire to grow rich”. No one came to Shanghai to read books.

The lack of commitment to civic virtue was obvious. As one local put it: “It is easier to get \$5000 in Shanghai than a well attended public meeting.” [39] It was exemplified by the Anglican Trinity Church, skimpily built by private subscription on land donated by Thomas Beale at the rear of Dent's compound. The roof fell in within two years and its replacement, which opened in May 1851, was abandoned, dilapidated, a decade later. In the French area, the Roman Catholic Cathedral, which was blessed on Palm Sunday 20 March 1853, was built to last.

The first social institution, after the cemetery, created in the British Settlement was a riding circuit, to become the race track – subsequently moved westwards twice, at enormous profit, during real estate booms – a physical metaphor for the Western enclave, supplying quick, transient thrills, just like an opium fix.

Within the trading house compounds – “hongs” as they were called – a boarding school atmosphere prevailed. A group of young bachelors worked, lived and dined together in a junior-mess system dominated by a predictable daily and seasonal routine, in which the job was all encompassing and neighbouring peers were direct daily competitors.

In the early fifties there were few shops or private houses, no police, no harbour master, no wharves, no lighthouses, no buoys, no vehicles save coolie-carried sedan chairs, no street lighting, no water system, no sewerage, no roads other than mud strips, no bridges over the encircling creeks. This was a trading outpost in which seasonal frenzy, associated with the annual tea and silk crops, was interspersed with frontier boredom.

The “season” lasted for some two and a half months of frenetic activity, from mid May to late July beginning with the silk buying period – through the dramatic temperature fluctuations of late spring and the “plum rain” season of early summer – ending when the first, highest quality teas of the new crop were ready to ship. The whole staff worked twelve to fifteen hours a day, seven days a week purchasing, packing and transporting the new season's tea and silk. The crucial quality testing was done by silk experts, called “grubs” in the local argot – mock derision of the delicate silk worm – and highly paid tea tasters of acute gustatory abilities, called, with onomatopaeic emphasis, “expectorators”, which is what they did much of the time.

At other times, office hours were short. The lassitude and prickly insecurities of village life become pre-eminent through the sweltering heat of high summer, the thunderstorms and strong winds of autumn and the cold, dry, clear winter, with its prevalent north east winds from Inner Mongolia and the few days of snow brought by cold waves from the north.

There was rough exercise for the young clerks – both they and the tempestuous Mongolian ponies they raced were called “griffins”, like their peers in India – and food was consumed in ridiculous over-indulgence. One visiting doctor reported in disbelief:

“They begin dinner with rich soup, and a glass of sherry; then one or two side dishes with champagne; then some beef, mutton or fowls and bacon, with more champagne or beer; then rice and curry or ham; afterwards game; then pudding, pastry, jelly custard or blancmange, and more champagne; then cheese and salad, bread and butter and a glass of port wine; then in many cases, oranges, figs, raisins, and walnut with two or three glasses of claret.” [40]

Health problems were blamed on the weather.

The baronial establishments with their hot and cold running table boys, enabled the lower middle class bachelor community to ape the culinary rituals of the British upper classes. As The Times special correspondent reported:

“It is half past one o'clock, tiffin time at Shanghai. You have made your calls on arriving

here, and your cards have been duly returned, so you are free to go and come at tiffin time in all their hospitable hongks. No lack of good dishes or pleasant iced drinks at a Shanghai tiffin. We may enter boldly. There is no chance of finding people making shifts with small commons in China. There is this great charm in European society at all the ports. Everybody is able, and is, indeed, obliged to have a lordly indifference to expense. They cannot control it and they must let it go. There is no struggling or contriving to keep up appearances. The profits are large and the expenditure is great – *laissez aller*. Tiffin however is a bad habit.” [41]

The overwhelming preoccupation, nevertheless, was planning for that one fantastic gambler's coup, that would enable them to replicate this life style at home. In the early fifties, before the first real estate boom, making money depended on zero-sum marketplace manipulation: one person's gain from advance intelligence was another's loss. Every person in the Settlement was a rival in the great race to retire home with enough wealth to justify the deprivation of this isolation – wealth to ostentatiously brandish before friends and relatives establishing that one had left, not because one couldn't make it at home, but because the rewards were so much greater abroad. The longer the absence, the greater the fortune required.

In the Old City, for those adventurous enough to venture into it and absorb the chary, bewildered stares, and throughout the surrounding region, where at first they were only permitted to travel on one day trips, foreigners did not carry money. They paid by way of signing scraps of paper called “chits”, discharged by their firm and accepted without hesitation by Chinese shopkeepers and peasants. For decades, Shanghai was a cashless society before electronics.

The young trading house clerks were forbidden to marry by the taipan, or “head of house”, himself usually married and only in his thirties. Opportunities were few. Even in 1850, just before the first major population jump, when the official Western population of the British settlement had slowly grown to 210, only 17 were women, wives of diplomats, missionaries and taipans. Formal liaison with a Chinese woman was tantamount to resignation.

The actual numbers of men was of course much greater than the full time residents. Their numbers were swollen by visitors from the opium receiving ships and the omni-present seafaring population of a significant port. There was no shortage of women for their purposes.

Shore leave for this distinctive, international nautical community, with its unique argot and customs quite alien to landsmen, was a binge of sex and alcohol, compensatory oblivion for the deprivation and hazards of a life filled with violence – the sudden dangers of wind and sea, the merciless flogging of ship's captains, the brawling with universally armed, salt-toughened seamen, the clandestine doping by vulpine crimps, whose activities became more frenetic as sailors throughout the world deserted for the gold rushes to California and Australia and, with improving living standards at home, replacements became scarce for the poorly paid, insecure, dangerous occupation of seafaring.

As the senior American diplomat reported in early 1853, a permanent band of desperadoes had emerged in Shanghai:

“There are now in this port at least one hundred and fifty sailors ashore, men of all nations who go into the Chinese city and drink and riot and brawl, daily and nightly. They presume to defy all law, because they have tried jail and find that they cannot be confined by it. They have no money from which to collect a fine. The United States having assumed jurisdiction over their own citizens in China are expressly bound to compel them to keep the peace, and this cannot be done as long as there is no place to confine the delinquents in, except a loathsome hole inhabited by the foulest lepers, and in itself so weak that a man of American energies can kick his way out in a few minutes.” [42]

Two Western communities emerged: a respectable section, clustering around the merchant-adventurers turned merchant-entrepreneurs, and a marginal coterie of deserters, drifters, soldiers of fortune, smugglers, outlaws and pirates, the scum of the sea, so desperate and notorious that the word “shanghai” would replace the word “crimping” to describe the macabre specialisation of nautical kidnapping.

Both groups were attracted by the same condition: an absence of government authority. Both were in transit, sharing a common attitude to service in Shanghai: a place to make money in, and leave – one by trading in commodities the other by trading in violence and fear.

The universal sense of transience, to which the handful of missionaries provided the only exception, established a dominant amoral ethic. All personal relations were crassly functional. Nothing mattered but money.

“When you get to Shanghai”, Jardine, Matheson trainees were solemnly told in London, before their departure, “Remember to keep the Sabbath – and anything else you can get your hands on”.

#### End Notes

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Print Page

Close Window

## Judicial Independence: Purposes And Threats

**JUDICIAL INDEPENDENCE: PURPOSES AND THREATS  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE 7TH WORLDWIDE COMMON LAW JUDICIAL CONFERENCE  
30 APRIL 2007, LONDON**

The first of these Conferences that I attended was in Vancouver in 2001. It was held in conjunction with a conference organised by the judiciary of British Columbia to commemorate the 300th anniversary of the Act of Settlement. With the full advantage of hindsight, that 1701 legislation was a momentous step in constitutional history, entirely worthy of the major commemoration in Vancouver.

After the traumas associated with the Stuart Kings, the Act of Settlement recognised that the independence and impartiality of the judiciary could not depend simply on the personal integrity and resilience of individual judges. It was necessary for independence to be institutionalised.

The Act of Settlement created, for the first time, the basis for judicial security of tenure. It was soon reinforced by legislation guaranteeing remuneration. These statutes institutionalised judicial independence in a form hitherto unknown. They continue to serve as the foundational principles for the administration of justice in all common law jurisdictions.

Each nation has developed its own structure for maintaining judicial independence. These are sometimes constitutional, by a mixture of express language and implication (such as in the United States and Australia), or almost entirely by means of implication (as in Israel). In other nations, express recognition is contained in the form of a statute, which is theoretically capable of amendment but which has such a high degree of acceptance that its amendment is inconceivable. Accordingly, as has so often been the case in the development of British constitutional law, a mere statute acquires constitutional force. The recent United Kingdom *Constitutional Reform Act 2005* appears to me to be of this character.

### INTERNATIONAL RECOGNITION

The principles of judicial independence have received widespread recognition, indeed frequent reiteration, in a wide range of international instruments, both of a universal and a regional character. Perhaps the most well-known and basic model is Article 10 of the *Universal Declaration of Human Rights* (1948), which was expanded in Article 14 of the *International Covenant on Civil and Political Rights* (1966). Each provision proclaims that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal. This principle received considerable elaboration in the *United Nations Basic Principles on the Independence of the Judiciary* (1985).

The basic principles, at different levels of elaboration, have been reiterated on numerous occasions by countless Bar Associations, Law Societies and meetings of judges, who have produced a range of documents variously called Resolutions, Declarations, Principles, Standards and Statements. Often they carry the name of the place at which the relevant meeting occurred. This geographic pot pourri includes Syracuse, Tokyo, New Delhi, Montreal, Bangalore and Beijing. There is no need to add to this list. However, as we are now gathered in the place where the Parliament enacted the original Act of Settlement it would, but for the surfeit of such documentation that already exists, be entirely appropriate to do so.

A useful compilation of the relevant principles of institutional design, expressed so as to apply to a range of different legal systems and constitutional structures, is a document known as the *Beijing Statement of Principles of the Independence of the Judiciary*, signed by or on behalf of thirty-two Chief Justices of the Asia and Pacific region, including the President of the Supreme People's Court of China and the Chief Justices of Australia, India, Japan, Indonesia, South Korea, Malaysia, New Zealand, Pakistan, the Philippines, Fiji, Hong Kong, Singapore, Sri Lanka, Vietnam and Thailand. This statement includes the following:

- “3. Independence of the judiciary requires that:  
(a) the judiciary shall decide matters before it in accordance with its impartial

assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.  
 (b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.”

I interpolate to observe that what is to be regarded as justiciable will vary from one nation to another.

“11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

...

17. Promotion of judges must be based on an objective assessment of factors such as competence, independence and experience.

18. Judges must have security of tenure.

19. It is recognised that, in some countries, tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.

20. However it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge’s tenure must not be altered to the disadvantage of the judge during her or his term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

...

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. Remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

...

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

...

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

...

38. Executive powers which may affect judges in their office, their remuneration or conditions, or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.”

As this document illustrates, issues of judicial independence arise in a range of different contexts including:

- The appointment of judges;
- Security of tenure and remuneration;
- Institutional autonomy, especially the assignment of judges to cases;
- Judicial accountability;
- Adequacy of resources for courts;
- Attacks on the judiciary, particularly in the media;
- The scope of judicial power, particularly dispute resolution by non-judicial tribunals.

Every one of these matters can be the subject of a paper of itself. It is obviously not possible to



canvas the full range of issues in which independence questions arise in a paper such as this. I have, of necessity, focused on certain specific aspects.

### **REQUIREMENTS OF JUDICIAL INDEPENDENCE**

There is no single model for achieving judicial independence. Nevertheless, there is a clear set of essential requirements to ensure the institutional independence of courts and the institutional impartiality of judges. Such independence and impartiality must not only exist. It must also appear to exist – reflected in the aphorism that justice must not only be done but must manifestly be seen to be done. The significance of appearances creates additional institutional restraints and requirements.

As is the case with many desirable attributes of a well functioning polity and society, the attainment of judicial independence and impartiality may, on occasions, conflict with the attainment of other desirable objectives. For example, in contemporary discourse there is a need to strike a balance between the requirements of independence on the one hand and an appropriate measure of judicial accountability on the other. In this respect also there is no single model applicable to all nations or to all times. There is a range of legitimate choice, but there are also constraints on the scope of that range.

Long experience over many generations and in many different societies has established certain requirements of institutional design of the judiciary for a rule of law system. Those requirements are the same, whether the rule of law is approached from the perspective of citizen and citizen or from that of citizen and state.

I do not wish to suggest that there is any single institutional arrangement that constitutes a perfect system. Human institutions do not admit of perfection. Nevertheless, the degree of autonomy, both formal and practical, of judicial decision-making processes, is of crucial significance for any nation which wishes to operate under the rule of law.

I have been asked to discuss the reasons for judicial independence. In my opinion, the dominant reason is that such independence is a requirement of the rule of law.

### **THE RULE OF LAW**

No complex society can operate without the efficient and expeditious performance of legal functions, by means of direct enforcement of rules and by the deterrent effect of threatened or possible enforcement.

The sense of personal security of citizens, indeed the existence of social order, is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security, both of their person and of their property.

The legal system performs a critical role in the promotion of social order by the administration of the law in a manner which answers the fundamental requirements of justice namely, fair outcomes arrived at by fair procedures. The fairness of the procedures is as essential as the correctness or fairness of the outcomes. When people talk about having their “day in court” this is a matter that is of significance to their sense of freedom and of personal autonomy.

Those in society who are wealthy or powerful, including but not limited to the numerous manifestations of the executive branch of government, have other means of getting their way. What confines those with power, whether in government or commercial corporations or the media or, in some societies and contexts, social or religious groups or trade unions, is the effective operation of the rule of law.

Citizens are entitled to protection from the exercise of the power that others are able to exercise over their lives. Actual or threatened transgression of civil rights in society, notably but not limited to the exercise of the police function of government, are in large measure deterred by the very existence of an independent legal profession with access to courts consisting of independent judges. From time to time deterrence does not work and the judicial arm of government must be invoked, sometimes against other arms of government, both executive and parliamentary.

The rule of law involves a principle of universality, that is to say every person however powerful or wealthy is governed by the ordinary law and is personally liable for anything done contrary to the law.

All authority and power, including all aspects of governmental authority and power, must find an ultimate source in the law. It is this principle that ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law.

A second aspect of the rule of law is the concept of boundedness: that the law is not all encompassing. There is a substantial sphere of freedom of action. Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, so constraint ends. Judges and lawyers are boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.

Social order requires that laws which protect society, and individuals within society, are effectively enforced. It also requires that the personal autonomy and liberty of citizens is protected. Social order is not a state of quiescence. It is a state of certainty, at least to the degree that certainty is capable of attainment in a complex society.

The minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, must be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence in an environment of social order. Judicial independence ensures that any such determination is, in fact, objective.

All forms of social interaction, including economic interaction, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. A high level of predictability establishes the requisite social order and the confidence that one can act in accordance with reasonable beliefs as to one's rights and obligations and that reasonable expectations will be met.

Of course the rule of law is not simply a system that contains rules that must be obeyed. The law is a system to be used by citizens for their own protection and for their own advancement in their relations with the State and with other citizens or organisations.

None of this can happen without the active participation of lawyers both by means of advising people of their rights and obligations and by ensuring that they are enforced. However, enforcement can only be reliable if there is an independent forum for the resolution of disputes about rights and obligations.

Social order requires that the social conflict that initiated the entire process is quelled by the result, both by reason of the fairness of the outcome and the fairness of the procedure.

The adversary system developed by the common law involves procedures that are widely regarded as fair and, accordingly, those who are subject at the end of a process to adverse findings are more likely to accept their loss than if other procedures were followed. The adversary system seeks to find truth by means of the Socratic dialogue, rather than by means of a Grand High Inquisitor.

A society cannot be governed by the rule of the law without an institutionalised arrangement for the independence of the judiciary. Furthermore, democracy depends on the courts enforcing what the legislature intended, not what the Executive wants.

The form of social order which we identify with a society operating under the rule of law can only exist if laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influence, including all forms of inducement or pressure, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties of the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Any form of improper influence, incompetence, inefficiency or bias distorts each of these objectives. Without institutionalised judicial independence, such distortions are inevitable.

## **IMPARTIALITY**

As is recognised in the terms of numerous constitutional and international instruments, judicial independence is a fundamental right of citizens. It is not some kind of privilege which judges acquire as a perk of office. The reason for that is the absolute necessity for impartiality of judges, whether in civil or criminal trials.

The starting point for the impartial administration of justice is some form of institutional autonomy. An effective judiciary requires a distinct esprit de corps and its own legitimising traditions. This is often reflected in distinctive form of dress. The judiciary must be, and be seen to be, institutionalised as a distinct group performing distinct functions.

There are many choices in the institutional design of the judiciary with respect to these matters. Insofar as a polity wishes to be a society in which the rule of law operates, it is essential that the ultimate guardians of the law must have the level of integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a source of social guidance.

The judiciary must be independent of any person who may seek to exercise influence on the outcome of legal proceedings in any manner and for whatever reason. Unless that is so, the rule of law is inevitably compromised.

Obviously, parties to a dispute are the most likely persons who would seek to exercise such influence. However, persons who wish to manifest their power, or to pursue a political, religious or social agenda, are all likely to seek to have their wishes or views implemented in the course of judicial decision-making. That is, of course, particularly true with respect to judgments that have broader implications, such as Constitutional decisions, but it is a form of pressure that could arise in any kind of case.

Unless judges are hard to get at, because of institutional autonomy and personal independence, there will be no shortage of persons who try to do so. Judicial independence does not only involve freedom from direct interference. It also involves freedom from dependence of a character which may lead to actual, or even perceived, influence without the need to exert actual interference.

People who are used to getting their way do not usually take kindly to their wishes being frustrated. In the past that has included the aristocracy, when it was the centre of social and economic power. These days such centres of power include major corporations and the mass media. Throughout history, the executive branch of government has been such a centre of power.

The threat to independence from the Executive branch is, of course, particularly acute because the Executive is, in one manner or another, the ultimate source of power for the appointment of judges, for the administration of mechanisms for discipline or removal and the source of funding for all aspects of the administration of justice.

The most significant single aspect of the institutional arrangements for judicial independence, is the need to insulate, indeed to isolate, the exercise of judicial power from interference or pressure from the Executive branch of government. To a substantial degree this is simply a manifestation of the need to ensure impartiality. So far as I am aware, in all jurisdictions, the hydra-headed Executive branch is the single most frequent litigant in the courts.

Citizens confront the Executive branch in all its various capacities in the course of litigation.

- Courts are frequently called upon to determine the validity of executive action and the constitutional validity of legislation promoted by the Executive.
- Any citizen can be subject to investigation or prosecution by the various authorities that exercise the police power of the state, not only with respect to matters that involve allegations of criminal conduct, but also with respect to the full range of regulations that seek to confine or direct the personal behaviour of citizens and corporations.
- As taxpayers, citizens are engaged in disputes with revenue authorities.
- As property owners, citizens are engaged in disputes with the wide range of regulatory authorities that determine what they can do with their property, indeed whether it can be compulsorily acquired, and if so, at what price.

- As employees, citizens confront the largest single employer in the nation.
- As persons entitled to legislative benefits, citizens are confronted with the full range of bureaucratic decision-making processes.
- A significant proportion of injured persons seek compensation from government agencies such as hospitals, railways, road authorities and police.
- Governmental organisations manifest the full range of commercial interests as suppliers or purchasers of goods and services from others, which are as much prone to disputes over property rights or contractual terms as any other commercial relationship.

### **THREATS TO INDEPENDENCE**

I have been asked to discuss the threats to judicial independence. The Executive arm has always been regarded as the principal threat to judicial independence. However, it is not the only such threat. Any significant source of power in a society may constitute a threat.

Necessarily threats to judicial independence differ significantly from one jurisdiction to another. It is, accordingly, extremely difficult to generalise about this matter, although there do appear to be certain common themes in countries in similar stages of economic development.

There are nations where the enforcement of the protection of the judiciary is suspect and, in such situations, any individual or group who can threaten the personal security of a judge or a judge's family may be tempted to do. Persons of wealth, power or those with a monopoly of force, such as the police and armed forces, may constitute such a threat. In some societies social groups, notably of a fundamentalist religious character, may have similar inclinations.

Even where no issue of personal security arises, there may be the possibility of public ridicule and contempt of individual judges or of the judiciary as a whole. This may be driven by, or reflected in, the mass media, which can mount a campaign of intimidation of a character short of physical threats but nevertheless capable of interfering with the actual or perceived impartiality of judicial decision-making processes.

There are numerous decision-making processes capable of impinging on judicial independence. Judges who are selected or promoted on the basis of how they are likely to decide, rather than on the basis of their professional expertise, may not disappoint the authorities who select and promote them. Judges who may have their appointments terminated by a mechanism which does not contain real restraints, of a formal and informal character, are unlikely to be prepared to offend persons or groups capable of exercising power in their community. Courts that are continually requesting additional resources from government, in order to perform their functions effectively, may prove more likely to be subject to subtle pressures to achieve particular outcomes in matters of significance to those who control the resources. Judges who are inadequately remunerated, given the economic circumstances of their particular nation, are subject to temptations which may be difficult to resist. Similarly, in the case of judges who are not accorded the status required to ensure that the administration of the law in their society is a matter of significance. A judiciary which is accorded a low status and, accordingly, a low level of respect in its community, will be less likely to have the level of competence and impartiality required for the effective administration of justice.

At one extreme is the position of a nation which is subject to military rule, the least accountable form of executive interference with the judiciary. This year the Chief Justices of two common law nations have been deposed by military rulers.

Daniel Fatiaki, Chief Justice of Fiji, was forced to go on "voluntary leave" in January and has since been subject to a ban on travel. The administration of the Supreme Court proceeded on the basis of dubious legality, perhaps not an unexpected phenomenon in the wake of a military coup.

In March, Chief Justice Iftikhar Chaudhry of Pakistan was removed from office in circumstances which clearly indicate a political motive, not only with respect to past decisions, but also with respect to future litigation about the legality of the plan of the present President of Pakistan to seek a third term in office, notwithstanding a Constitutional prohibition. Chief Justice Chaudhry was placed under house arrest but refused to resign under pressure and the legal profession manifested its support for him in

public demonstrations.

In the case of the removal of both of these Chief Justices, a rather pathetic attempt was made to suggest that each had been guilty of some kind of impropriety in the past. Even military rulers acknowledge the force, particularly in international circles, of the principle of judicial independence. Such hypocrisy, as has often been said, is the homage that vice pays to virtue.

Most common law jurisdictions do not face challenges to judicial independence of this character. In most common law jurisdictions the challenges to judicial independence are less dramatic. The fact that there are only incremental challenges, rather than overt threats, perhaps makes them more difficult to combat.

As I have indicated above, independence issues can arise in a wide range of different aspects of the administration of justice. I have to be selective. I have chosen two topics to promote discussion at this Conference. First, attacks on the judiciary in the course of public debate. Second, the removal of dispute resolution from judicial determination.

### **PUBLIC PRESSURE**

Often the most significant point of pressure on members of the judiciary comes from public pressure, particularly as reflected in the media which, in turn, influences politicians. Objectivity, impartiality, adherence to legal principle and precedent, maintenance of equality before the law can all be compromised by the extent to which judges respond to actual or anticipated pressure.

In many nations respect for authority has diminished over recent decades to a significant degree. Judges are not alone in this. There are, however, developments that particularly impinge on the judiciary.

The traditional media are faced with declining readership or audiences, indeed are threatened with technological obsolescence. Their defensive reaction has been to increase their noise level, notably by conducting campaigns and, generally, by pandering to public prejudices and exacerbating public fears. The judiciary's traditional reticence is a soft target.

Heightened standards of accountability – with respect to both the use of public resources and the integrity of public decision-making – requires the judiciary to explain and defend itself in ways which would once have been regarded as an affront to its dignity and, perhaps, to its independence. I am not talking about that development. What concerns me is the development, discernible in many jurisdictions, that the judiciary is subject to transient rages and enthusiasms, generally ill-informed or partly informed, designed to influence judicial decision-making either on appeal or in future cases.

In many different jurisdictions, the political capacity, or the political will to resist these forces has been attenuated or has even broken down. The institutional mechanisms that protected the judiciary in the past are showing signs of strain.

Generally, the judiciary has manifested a high level of resilience in the face of ill-conceived and unsupported allegations that judges are out of touch with community values. However, personal resilience is not enough to maintain that level of impartiality and independence that the rule of law requires. We may need to develop new mechanisms to protect the integrity of judicial decision-making if those trends continue.

One of the ways in which judges in most common law jurisdictions became known to the public was through the jury system. However, summary jurisdiction has expanded in criminal justice and in most jurisdictions, other than the United States, the use of the civil jury has substantially diminished or has disappeared. This decline in public participation has reduced understanding about the courts in the community. Where this has happened, institutional design has not yet compensated for the change.

It is, of course, essential to bear in mind that fidelity to the law and to legal processes, does not permit, let alone require, that popularity be an objective of the judiciary. We must not confuse public opinion, which is fragmentary and transient, with public confidence, which is broadly based and enduring. The judiciary must tolerate a high level of public outrage when it respects the rights of unpopular people.

Nevertheless, judges are human and it is necessary to be concerned in the face of the trends to which I have referred, whether the anticipation of public hostility is adversely affecting the objectivity and neutrality of the administration of justice, even if unconsciously. Fortitude is required. A principal

source of strength is the bond of collegiality, often developed in practice at the bar. It is also necessary to understand that complaining about misreporting in the media is as pointless as complaining about the weather. However, fortitude may not be enough in the long term. We may need to look at structural issues or institutional design.

In common law nations such as Pakistan and Malaysia and, possibly, in some parts of the United States, the strength of the religious revival, particularly of a fundamentalist kind, may also exert pressure of this character on a range of social issues. In many common law nations, including Australia, a more broadly based pressure operates with respect to the administration of criminal justice. Sentencing of criminals engages the interest, and sometimes the passion, of the public to a substantial degree.

In all recorded history there has never been a time when crime and punishment has not been the subject of debate and difference of opinion. 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 subject to condign punishment. For millennia, theologians and others have been debating whether that punishment has had a deterrent affect and how to enhance mankind's prospects of rehabilitation.

The threat to judicial independence arises because of an apparent failure in our institutional mechanisms to explain what is actually done in the sentencing task and why. The media, with its understandable focus on controversy, simply fails to inform the public about what judges are actually doing in the normal line of case.

Media publicity of the usual kind has the perverse effect of convincing some potential criminals that the punishment they are likely to receive is less than it actually will be. Incorrect allegations of judicial leniency undermines general deterrence. To put this in tabloid headline form: "MEDIA BIAS CAUSES CRIME WAVE".

In view of the behaviour patterns of contemporary media, we face a challenge of a structural character.

It is, however, necessary to maintain a sense of perspective as well as of proportion about these matters. A century ago Roscoe Pound delivered a lecture entitled "The Causes of Popular Dissatisfaction with the Administration of Justice" [1]. This paper commences with the sentence "Dissatisfaction with the administration of justice is as old as law". It still is. Much of what Pound said a century ago is still relevant. We have to accept a level of popular dissatisfaction as inevitable.

In a democratic polity there is an understandable reluctance to accept the necessity of expertise. Many approach the administration of justice on the basis that it requires an outcome that is responsive to the immediate wishes of the community. They assume that one could devise a mechanism for identifying such wishes. They also assume that these wishes are neither transitory nor likely to alter after tranquil deliberation. The common refrain is that judges are out of touch and that lawyers are at best greedy and at worst systematically deceptive.

There is nothing new in a conflict in which one side characterises the other as populist, and the latter characterises the former as elitist.

There are some voices in the community which suggest that they would never be happy unless legal decision-making occurs either by means of polls on talkback radio or by means of voting on reality television.

Ancient Greece did not have the technology that would enable citizens to sit at home, watch a trial and record a verdict by electronic communication. The reality audience of that era had to be gathered in one place. Major trials in Ancient Greece were conducted in the public agora by a jury of 500 citizens voting on guilt or acquittal and then on penalty [2].

It was one of the great Pericles' innovations that jurors were entitled to significant pay for their deliberations, hence allowing the poorest of Athenians to participate, indeed for them to do so at a profit.

Lawyers were banned. Any litigant had to speak for himself or herself. However, a class of speechwriters or logographers emerged and their drafts have come down to us as one of the major

sources of our knowledge of Athenian society. Our other major source is such of the Greek plays as have survived.

It is noteworthy that a common theme, particularly in the plays of Aristophanes, is a sustained attack on the excessive litigiousness of Athenian society. Aristophanes satirised citizens who became as obsessed with litigation as any dedicated watcher of reality television, thrilled by the power of rendering a verdict, in the same way as a reality television audience is thrilled by the power of voting for an eviction from the programme.

A principal target of the dramatists, particularly Aristophanes, was the class of litigants in person who flooded the courts with tendentious processes. This class was denounced as "sycophants". The word did not then mean a servile flatterer, as in contemporary usage, but something like a public informer, with an overtone of being a pest.

The plays of Aristophanes characterise sycophants as freelance operators out to make money, if necessary by blackmailing individuals, inventing false charges and indulging in slander.

On the two occasions when the Greek democratic system was suspended during the course of the 5th Century BC, law reform, particularly the control of sycophancy, was high on the list of changes. One of the leaders of the revolt known as "The Thirty Tyrants" was a student of the philosopher Socrates. Even Aristophanes had, before this revolt, characterised him as a subversive, when he described a gang of pro-Sparta aristocratic youths as "Socratified".

Socrates was convicted by a jury of 500 citizens, voting 280 to 220 for guilt on charges of corrupting the youth of Athens and impiety. When Socrates treated the verdict with scorn, during the hearing on sentence, the 500 jurors overwhelmingly voted for death.

Any reality television audience would have done the same. This may not be the model to pursue in response to popular dissatisfaction.

### **THE SCOPE OF JUDICIAL DECISIONS**

It is important that the principle of judicial independence is not stated too widely. Not every aspect of the administration of justice can be encompassed within the concept of independence. Not every matter which impinges upon access to justice or the quality and fairness of adjudication or operates as a restraint on judicial conduct constitutes a threat to independence. Relevantly, there is no single model for delineating the range of matters which ought to be decided by means of judicial decision-making processes.

Executive and quasi-judicial mechanisms for determining rights and obligations are, of course, perfectly acceptable. Generally, this matter does not raise an independence issue. It is usually a matter of the quality, including the efficiency, of the process.

However, it is possible that the continued expansion in the use of non-judicial decision-making processes to resolve disputes and to determine rights can become so significant as to deprive the idea of judicial independence of a great deal of its practical content. We may not have given sufficient attention to this aspect of independence.

This is a matter that can only be assessed in the context of a specific jurisdiction to another. One cannot determine any clear line between what must be judicial decision-making and what may be properly regarded as administrative or quasi-judicial decision-making. Nevertheless, the extent to which matters capable of judicial determination are in fact removed to tribunals, often called courts, which do not have the benefit of the minimum requirements of traditional sections of the independence of the judiciary, then there may be a cause for concern.

Where the line is to be drawn may, in nations with a written Constitution, raise important constitutional issues. In Australia, this has been a common issue in the High Court over recent decades.

That Court's interpretation of the requirements of the separation of powers under Chapter 3 of the Australian Constitution appears to be more rigorous in this respect than the jurisprudence of the Supreme Court of the United States' Article III of the Constitution of the United States. There are a wide range of approaches to this matter in the different jurisdictions. This is a topic that is beyond the scope of this paper. An exercise in comparative constitutional law would be particularly revealing in this respect. When determining whether to confer dispute resolution functions on non-judicial tribunals,

there are issues of principle as to where the line can permissibly be drawn. The minimum requirements of independence and impartiality should be met in any context in which the rights and obligations of individuals are to be determined in accordance with law.

Although it is difficult to be sure about this, there does appear to be a drift in many jurisdictions to expand the scope and range of matters determined by courts and tribunals that do not have the traditional protection. The reasons for this will obviously differ from one nation to another. For example, in the United States the difficulty of obtaining Congressional approval to the appointment of Article III judges is, no doubt, one reason why the jurisdiction and the size of non Article III courts appears to have grown.

In some nations a significant range of matters is determined by religious courts. This was, of course, once the case in England. However, in English history, ecclesiastical courts were kept within appropriate confines by the supervisory jurisdiction of the common law courts. In Malaysia, supervisory jurisdiction over sharia courts have been abrogated by the Malaysian Constitution. This has created a situation of acute conflict between the common law courts and sharia courts. The latter determine for themselves what constitutes a matter for religious determination. This institutional design does raise issues of judicial independence.

In many jurisdictions, concern about the costs and delays associated with judicial processes is often expressed as the reason for developing alternative forms of tribunals. There are, however, occasions when specialist courts or tribunals have been created, or had their jurisdiction expanded, at the behest of specific interest groups, including lawyers with specialist practices, to bring what is regarded as particular expertise, namely their own, to the decision-making process. They develop a self-regarding jurisprudence, often oblivious to developments in the law by courts of general jurisdiction.

Trends of this character can pose dangers, especially when supervision of these tribunals is prevented by privative clauses. The political lobbying force of special interest groups or their lawyers, and the close personal relationships that have existed amongst parties, lawyers and judges, may inappropriately expand the scope of the jurisdiction of specialist tribunals, at the expense of courts of general jurisdiction. The principles of independence and impartiality may be attenuated in such a context.

In Australia the most significant controversies that have arisen about judicial independence have been in the context of whether or not judges will be reappointed when such a specialist court or tribunal is abolished or reconstituted. Inevitably, the highly political process that created the specialist regime changes with the political tides in a manner that does not affect the structure of general courts. Such failure to reappoint has occurred in Australia, particularly with the abolition and recreation of specialist courts dealing with industrial matters and also, in one State, in the case of a specialist tribunal dealing with motor accidents.

It may be that we have given insufficient attention to the independence issues that arise from the expansion in the number and jurisdiction of specialist courts and tribunals which do not have the traditional protections of judicial independence and impartiality. This is a matter that receives express attention in the relevant international instruments.

For example, Article 14 of the *International Covenant on Civil and Political Rights* is not directed only at courts. It states:

“Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Similarly, the 1985 United Nations Basic Principles provides in Article 3:

“The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its confidence as defined by law.”

Finally, the Beijing Principles provides in Article 33:

“The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.” (And see Article 3(b) quoted above.)



The principles reflected in these statements do not appear to have engendered much debate. However, if I am correct and there is a distinct trend to remove disputes from judicial determination by courts of general jurisdiction, greater attention may need to be given to this aspect of judicial independence.

To the extent that this trend is of concern, then it should raise the priority to be given to measures which contain the costs of judicial determination of disputes. Cost is often the reason for taking matters away from courts.

The one thing we cannot do is to rely on the traditional lawyer's instinct that nothing must ever be done for the first time.

Giuseppe di Lampedusa, in his great novel, *The Leopard*, had a perceptive aristocrat, facing the oblivion of the Sicilian aristocracy, say:

"If you want things to stay the same, you have to change."

Not all societies or social groups prove capable of changing their practices, often with disastrous results. As Jared Diamond noted in his recent book *Collapse: How Societies Choose to Fail or Survive*, a form of intellectual paralysis may emerge which leads to doom. What, he legitimately asked, was in the mind of the Easter Islander, when he chopped down the last tree on that island upon which the whole society had long depended? A similar question could be asked of some legal practitioners and of judges.

Ours is a profession that values stability, with reason. However, the one thing that is a constant in legal history is the omnipresence of continuity and change. As Aharon Barak, the recently retired Chief Justice of Israel once put it:

"Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving." [3]

During the Second World War, the British pressed into service for home defence whatever armaments they had available, including artillery of great vintage. Mobile units were deployed up and down the coast and trained in the traditional manner of the Royal Artillery. Concern developed about the apparent lack of efficiency of the processes. The methods which the soldiers had been trained to perform in the loading, aiming and firing routines was subject to careful study. Something was extremely odd. A moment before firing, two members of the gun crew ceased all activity, stepped back from the piece during its entire firing sequence and stood to attention. The investigator called in an old retired Colonel of artillery to ask him why all this energy and time was being wasted. The Colonel knew where these practices had come from. He said: "They are holding the horses" .

Judges and lawyers have to understand why we do the things that we do and the reasons why we do them in the particular way that they are done, in order to ensure that we are not just holding imaginary horses. Unless the judicial process continues to adapt, the pressures to bypass it may prevail.

#### END NOTES

1. (1906) 29 ABA Rep 395; accessible in full at <http://www.answers.com/topic/the-causes-of-popular-dissatisfaction-with-the-administration-of-justice>.

2. The following analysis is based in large measure on Matthew R Christ *The Litigious Athenian* John Hopkins Uni Press, Baltimore (1998).

3. Aharon Barak "A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) 116 *Harvard L Rev* 16 at 29.

4. Elting E Morison *Men, Machines and Modern Times* MIT Press, Cambridge Mass. (1966) at 17-18.

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

## Access To Justice And Access To Lawyers

**ACCESS TO JUSTICE AND ACCESS TO LAWYERS  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE 35TH AUSTRALIAN LEGAL CONVENTION  
SYDNEY, 24 MARCH 2007**

The wide range of issues often discussed under the heading of Access to Justice can be divided into two categories. First, access to the law, which, in matters of any complexity or significance, requires access to lawyers. Secondly, access to legal decision-making processes. From this range of issues I wish to concentrate today on two matters.

The first is access to lawyers and the positive social, economic and political contribution made by the legal profession. It is my view that the profession as a whole has not sought to articulate with sufficient force, indeed hardly at all, the scope and significance of that contribution, other than to each other.

The second matter upon which I wish to focus is the costs involved in legal decision-making processes. I am not concerned primarily with legal costs although, of course, they are a significant component. I am concerned with the overall costs imposed by the system upon parties, not simply legal costs which, of course, from a different perspective, lawyers usually call income.

### POPULAR DISSATISFACTION

It is necessary to maintain a sense of perspective as well as of proportion about these matters. A century ago Roscoe Pound delivered a lecture entitled "The Causes of Popular Dissatisfaction with the Administration of Justice" [1]. This paper commences with the sentence "Dissatisfaction with the administration of justice is as old as law". It still is. Much of what Pound said a century ago is still relevant. We have to accept a level of popular dissatisfaction as inevitable.

In a democratic polity such as our own there is an understandable reluctance to accept the necessity of expertise. Many approach the administration of justice on the basis that it requires an outcome that is responsive to the immediate wishes of the community. They assume that one could devise a mechanism for identifying such wishes. They also assume that these wishes are neither transitory nor likely to alter after tranquil deliberation. The common refrain is that judges are out of touch and that lawyers are at best greedy and at worst systematically deceptive.

There is nothing new in a conflict in which one side characterises the other as populist, and the latter characterises the former as elitist.

There are some voices in the community which suggest that they would never be happy unless legal decision-making occurs either by means of polls on talkback radio or by means of voting on reality television.

### REALITY LAW

Ancient Greece did not have the technology that would enable citizens to sit at home, watch a trial and record a verdict by electronic communication. The reality audience of that era had to be gathered in one place. Major trials in Ancient Greece were conducted in the public agora by a jury of 500 citizens voting on guilt or acquittal and then on penalty [2].

It was one of the great Pericles' innovations that jurors were entitled to significant pay for their deliberations, hence allowing the poorest of Athenians to participate, indeed for them to do so at a profit.

Lawyers were banned. Any litigant had to speak for himself or herself. However, a class of speech writers or logographers emerged and their drafts have come down to us as one of the major sources of our knowledge of Athenian society. Our other major source is such of the Greek plays as have survived.

It is noteworthy that a common theme, particularly in the plays of Aristophanes, is a sustained attack on

the excessive litigiousness of Athenian society. Aristophanes satirised citizens who became as obsessed with litigation as any dedicated watcher of reality television, thrilled by the power of rendering a verdict, in the same way as a reality television audience is thrilled by the power of voting for an eviction from the programme.

A principal target of the dramatists, particularly Aristophanes, was the class of litigants in person who flooded the courts with tendentious processes. This class was denounced as "sycophants". The word did not then mean a servile flatterer, as in contemporary usage, but something like a public informer, with an overtone of being a pest.

The plays of Aristophanes characterise sycophants as freelance operators out to make money, if necessary by blackmailing individuals, inventing false charges and indulging in slander.

On the two occasions when the Greek democratic system was suspended during the course of the 5th Century BC, law reform, particularly the control of sycophancy, was high on the list of changes. One of the leaders of the revolt known as "The Thirty Tyrants" was a student of the philosopher Socrates. Even Aristophanes had, before this revolt, characterised him as a subversive, when he described a gang of pro-Sparta aristocratic youths as "Socratified".

Socrates was convicted by a jury of 500 citizens, voting 280 to 220 for guilt on charges of corrupting the youth of Athens and impiety. When Socrates treated the verdict with scorn, during the hearing on sentence, the 500 jurors overwhelmingly voted for death.

Any reality television audience would have done the same. This may not be the model to pursue in response to popular dissatisfaction.

### **THE CONTRIBUTION OF LAWYERS**

As members of this audience are well aware the lack of understanding, let alone appreciation, of the functions performed by lawyers is widespread. It is one manifestation of the general deficiency in civic education. Remedying this situation should be a major, indeed a central, task of the institutions that represent the profession, both at a State and national level.

So far as I am aware, there has been no systematic effort by the profession to articulate for the benefit of the public, in a comprehensive form, the positive contribution made by the legal profession to our economic, social and political life. We lawyers simply take for granted that the public at large understand what it is we do and why. That assumption is not justified.

We have all heard the array of jokes about lawyers, usually based on the proposition that lawyers are greedy and expendable. In fact, there do not seem to be many lawyer jokes, only multiple variations of the same joke or two. The late Chief Justice Rehnquist said, when opening a new building for the University of Virginia Law School, that he had once had the practice, when addressing a mixed audience of lawyers and non-lawyers, to tell the usual kind of lawyer joke about lawyers who are nasty, greedy and unethical. He said he had stopped that practice because the lawyers in the audience didn't think the jokes were funny and the non-lawyers didn't realise that they were jokes See Mark Gallanter *Lowering the Bar: Lawyer Jokes and Legal Culture* University of Wisconsin Press, Madison (2005) at 3.

In a complex society such as ours, individuals and corporations interact with each other in a wide range of different ways. The harmony of our society, and therefore its economic prosperity, depends to an overwhelming degree on the operation of a vast network of rules and upon their effective enforcement. Almost every aspect of the life of an individual in a society as large and complex as ours is affected in some way by rules which are reflected in laws.

By and large we Australians take these rules for granted. We tend to take a lot of things for granted. When we flick a switch we expect electricity to be immediately available. When we turn a tap we expect clean water to instantly flow. We give no thought to the sophisticated infrastructure that makes these simple actions possible.

The same is true of the legal system.

Behind most everyday activities in which we engage, there is an invisible infrastructure of laws and mechanisms for their application and enforcement which Australians take for granted. The legal profession, in its many different manifestations and roles, is a critical part of this social infrastructure. Without lawyers this sophisticated system simply would not work. We need to convince other

Australians that that is the case.

Let me just take the two examples I gave, flicking a switch to receive electricity and turning a tap to receive water. There is a legal infrastructure underpinning these actions, as well as a physical infrastructure.

No one would have built the electricity generating plants or the dams and the distribution systems for either electricity or water, nor would anyone pay for the costs involved in running the plants, such as employing the people required for operations or buying the fuel for electricity generation or pumping water through the reticulation system, if there was not a high level of certainty about both the existence and the enforcement of the contractual rights and obligations embedded in a network of exchanges in which many different parties buy and sell a wide range of services and goods culminating, of course, in the ultimate consumer paying the bills.

The legal infrastructure is at least as sophisticated, and definitely as necessary, as the physical infrastructure involved. There are other ways these services could be provided, but not in a way which preserves a wide sphere of personal freedom.

All of this is really quite obvious. At least it is obvious to a lawyer. It is almost embarrassing to say that matters of this character require articulation, particularly to an audience such as this. It should go without saying and it does. It is not said often enough. However, it needs to be said, at least sometimes.

The sorry state of civic education in our school curriculum is such that this is one of the many aspects of our social and political infrastructure that is not widely understood. It is, I believe, necessary for the profession to get on the front foot on this matter.

### **SOCIAL ORDER**

No complex society can operate without the efficient and expeditious performance of legal functions, by means of direct enforcement of rules and by the deterrent effect of threatened or possible enforcement.

The sense of personal security and the existence of social order is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security both of their person and of their property.

This is not possible without the active involvement of lawyers. Lawyers perform a critical role in the promotion of social order by the administration of the law in a manner which answers the fundamental requirements of justice namely, fair outcomes arrived at by fair procedures. The fairness of the procedures is as essential as the correctness or fairness of the outcomes. When people talk about having their "day in court" this is a matter that is of significance to their sense of freedom and personal autonomy. In all these respects the contribution made by lawyers is fundamental.

Those in society who are wealthy or powerful, including but not limited to the numerous manifestations of the hydra-headed executive branch of government, have other means of getting their way. What confines those with power, whether in government or commercial corporations or the media or, in some societies and contexts, social or religious groups or trade unions, is the effective operation of the rule of law.

A complex, large society necessarily creates a body of rules both judge made and statutory, that regulate contracts, property, trusts, estates, corporations, partnerships, family relationships, etc. The role of the lawyer commences at the outset of any relationship. Much law should be regarded as the equivalent of preventative medicine.

Lawyers perform tasks which enable individuals and corporations to create obligations on the part of others towards their clients, by invoking the rights and powers created by this body of law. Furthermore, lawyers are often essential to ensuring that individuals and corporations understand what it is that they must do to comply with the duties imposed upon them by the law and to identify the boundaries of those duties, in order to establish what it is not necessary to do. Furthermore, when others, whether governmental authorities or private individuals or corporations, act contrary to their obligations or otherwise infringe the rights and expectations of persons and corporations, then lawyers

are usually essential to enforce the law by advice and, if necessary, by litigation, to keep the actions of others within proper bounds.

### **THE RULE OF LAW**

The form of social order which we identify with a society operating under the rule of law can only exist if laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influence, including all forms of inducement or pressure, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties of the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Any form of improper influence or incompetence or inefficiency distorts each of these objectives.

The rule of law involves a principle of universality, that is to say every person however powerful or wealthy is governed by the ordinary law and is personally liable for anything done contrary to the law. All authority and power, including all aspects of governmental authority and power, must find an ultimate source in the law. It is this principle that ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law.

A second aspect of the rule of law is the concept of boundedness: that the law is not all encompassing. There is a substantial sphere of freedom of action. Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, so constraint ends. Lawyers are important boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.

Social order requires that laws which protect society, and individuals within society, are effectively enforced. It also requires that the personal autonomy and liberty of citizens is protected.

Social order is not a state of quiescence. It is a state of certainty, at least to the degree that certainty is capable of attainment in a complex society.

The minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, must be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence in an environment of social order.

All forms of social interaction, including economic interaction, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. It is a high level of predictability that establishes the requisite social order and the confidence to act in accordance with reasonable beliefs as to one's rights and obligations and that reasonable expectations will be met.

Of course the rule of law is not simply a system that contains rules that must be obeyed. The law is a system to be used by citizens for their own protection and for their own advancement in their relations with the State and with other citizens or organisations.

None of this can happen without the active participation of lawyers both by means of advising people of their rights and obligations and by ensuring that issues are pursued, before an appropriate forum for resolution, when necessary.

Actual or threatened transgression of civil rights in society, notably but not limited to the exercise of the police function of government, are in large measure deterred by the very existence of an independent legal profession, with access to courts consisting of independent judges. From time to time deterrence may not work and the judicial arm of government must be invoked, sometimes against other arms of government, both executive and parliamentary. Traditional protections, such as the writ of habeas corpus, can only function if lawyers are prepared to bring cases before courts, often without instructions because individuals who are detained may not be contactable.

Of particular significance is the considerable expertise that lawyers acquire for the purpose of finding

facts. Knowledge of the law is often treated as a higher order of attainment of legal skills and, accordingly, appellate courts are given higher status than trial courts. However, the overwhelming preponderance of decision-making processes that really matter are done by those trial courts in the course of the finding of facts. This role, which extends to investigatory tribunals such as coroners courts or royal commissions, requires the traditional lawyers' skills to be deployed.

Social order requires that the social conflict that initiated the entire process is quelled by the result, both by reason of the fairness of the outcome and the fairness of the procedure.

Of course, an adversary system is not the only means for finding facts. However, it involves procedures that are widely regarded as fair and, accordingly, those who are subject at the end of a process to adverse findings are more likely to accept their loss, than if other procedures were followed. The adversary system seeks to find truth by means of the Socratic dialogue, rather than by means of a Grand High Inquisitor.

The benefits of the rule of law are not capable of attainment without the active involvement of lawyers in the context of established institutions for the administration of the law based on a high level of interdependence. There is a symbiotic relationship between the judiciary and the profession, so that the performance and the functions of each depends to a substantial degree on the capacity and integrity of the other. If the functions and powers of any participant in the process are abused, by reason of corruption or bias or to serve the interests of those who wield power, the whole system becomes distorted, indeed perverted.

The contribution of the legal profession to the maintenance of social order in the course of the resolution of the conflicts that inevitably arise in our society is a matter of the highest significance for our social cohesion and our economic prosperity. In the latter respect, the contribution of lawyers is not often emphasised.

### **ECONOMIC PROSPERITY**

It is a fundamental error to suggest, as many lawyer jokes suggest, that lawyers do not really "produce" anything. A lawyer's contribution may be intangible, as most contributions are in a service economy, but it is fundamental. The services that lawyers perform both directly, with respect to economic transactions and indirectly, with respect to the maintenance of freedoms and the maintenance of a sense of fairness in our society, constitute a vital contribution to the economic prosperity, as well as to the social welfare, of the nation. An advanced economy is not feasible without lawyers. This is something that needs to be more widely understood.

There is widespread acceptance in the community of the importance of a free market economy for our economic prosperity. There is, however, only a limited understanding of how this market economy has been created. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy.

A successful market economy is not – as economists are inclined to assume – some kind of force of nature. It is the direct product of good government and of the law. The "market" in a complex economy is not a bazaar or a row of stalls offering face to face exchanges. The contemporary market is a dense network of rights and obligations, generally in writing. Economists who promote market solutions do not usually acknowledge that the market of which they are so enamoured cannot operate without lawyers.

The founding tract of free enterprise ideology, Adam Smith's *The Wealth of Nations* put the proposition directly:

"Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the State is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government." [4]

It is only if individuals and corporations believe that they can transact business with a high degree of assurance that promises will be kept and debts paid, that a market economy can effectively operate.

One commentator has described a business lawyer as a “transaction cost engineer” who facilitates commercial intercourse by reducing future transaction costs [5]. Well-drafted commercial arrangements avoid conflict with regulatory regimes, anticipate and therefore avoid disputes and create structures for dealing with the unknown or the unanticipated. By their involvement business lawyers add value to commercial transactions. Legal devices minimise transaction costs in the future, circumvent constraints on conduct, avoid liabilities, pursue strategic objectives and allocate the risks associated with commercial transactions.

All of this, of course, requires a facility with words. Indeed, we lawyers, both practitioners and judges, are traffickers in words. Words are the vehicle by which the law and legal relationships are necessarily conveyed. Words are our basic tools of trade.

All lawyers who draft texts attempt to be as clear and comprehensive as they can be. We try to anticipate the kinds of issues that may arise, to which the verbal formulae we devise, have to be applied. As Sir James Fitzjames Stephen put it:

“It is not enough to attain to a degree of precision which a person reading in good faith can understand. It is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.” [6]

Of course this objective can never be completely achieved. Hence disputes and litigation about what words mean. Nevertheless, the range of possible disputes that would arise in the absence of the enormous amount of experience and thought that goes into determining the content of written agreements, would be extraordinarily debilitating. This is just another one of those things that we take for granted. If nothing goes wrong, no one notices.

There are many nations in the world in which property rights are ill defined and legal assistance for constructing relationships and resolving disputes are not generally available. Those nations are driven by social and political factionalism and by poverty or are organised on authoritarian lives. Lawyers and legal decision-making processes, together with the effective operation of governmental institutions, constitute the principal difference between that situation and ours. From time to time, it is necessary to point that out. I regret to say that, in my opinion, the legal profession in Australia has not done so often enough.

## **COSTS**

For some decades one of the principal access to justice issues involving the administration of courts has been the problem of delay. Even two decades ago delays of five or more years were common. That is, generally, no longer the case. It is too early to declare victory, but by reason of inter alia the provision of additional resources and the widespread adoption of case management techniques, the problem of delay has been significantly attenuated. Of course delay must remain a priority. However, the principal focus of attention for those of us involved in the administration of justice must now be the costs of the process.

By costs I do not refer to legal costs in the sense of the system of billing. What I am concerned with is the overall costs imposed upon the parties by the entire process of dispute resolution. That is a matter influenced by, but not determined by, the system of billable hours or the rates at which hours are billed. We must be concerned with the entire range of what is required or permitted to be done, by whom and when, over the course of civil dispute resolution. The cost of lawyers is an important component part, but it cannot be the only matter to be considered.

Often enough what lawyers are required or permitted to do is determined by statute or court rules and practices and directions. We must continually re-engineer the process of dispute resolution because the pressures on the process are in a continual state of flux.

Some call this process “reform”. That is not always an accurate word because it suggests that what had been done before was in some way defective. The need to change is often driven by new pressures that have emerged, particularly in recent times with the acceleration of technological innovation.

A good example of this is the considerable expansion in the cost of discovery that has been occasioned by the explosion in the facility of the photocopier, the word processor, the computer and the internet. Telephone conversations which may never have been recorded in the past have now been replaced by emails which are either available on a hard drive or, with a sufficient expenditure of time,

effort and energy, can be recovered from a hard drive. Disputes about what should be required to be done by way of recovery from databases are not easy to resolve. Many of these issues are new. What is required is not accurately called reform. We simply need to find ways to meet new challenges.

The scope and speed of changes in the economy and society which the law is designed to serve, will never permit us to declare victory and sit back content. Nor is it of much use to resist change on the basis that any form of new rule constitutes a threat to the adversary system because it inhibits the freedom of lawyers to act in their client's interests in any way they see fit. There has never been a time when that freedom was not regulated by court rules and practices.

These issues are not new. In 16th Century England when legal fees and court fees were determined by the volume of documentation lodged with the court, prolixity became an art form. In response there were rules of court which required a minimum number of words per sheet in order to minimise the degree to which clients could be exploited by their lawyers. In the Court of Kings Bench every sheet had to have at least 72 words on it, in the Court of Exchequer, doing one better, every sheet had to have at least 78 words. But in Chancery, always more sensitive to matters of conscience, every sheet had to have 90 words on it.

Sometimes more dramatic measures were called for. In 1566 in a case when the plaintiff's replication had been stretched from an adequate 16 pages to 120 pages, the Law Reports report:

"It is therefore ordered that the Warden of the Fleet shall take the said Richard Milward ... into his custody, and shall bring him unto Westminster Hall on Saturday next ... and there and then shall cut a hole in the midst of the same engrossed replication ... and put the said Richard's head through the same hole, and so let the same reproduction hang about his shoulders with the written side outwards and then ... shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting and shall show him at the bar of the three courts within the Hall." [7]

Milward, I hasten to add, was the plaintiff not the lawyer. Nevertheless, in days gone by, interrogatories and, in the present day, affidavits and bundles of documents, could be subject to similar acts of public shaming. However, nothing that could conceivably adorn a person could be done with the contemporary agreed bundle. Perhaps we could order abusers of the system to be pushed around outside the court on a trolley.

However it is to be done, it must be recognised there was simply never a time in the history of the English common law when legal practitioners were able to do whatever they liked in the interests of their clients without any form of regulation by court rules and directions.

The new focus on costs must be borne in mind by proponents of statutory change, including law reform commissions. I had occasion to inquire what happened in New South Wales when the new code of evidence enacted by the *Evidence Act* 1995 went to Cabinet. I thought it likely that the compulsory item for any Cabinet paper – to specify the financial implications of the proposal – was filled out as "nil". I was right.

In the decade or so since its implementation, the abolition of the well established and well known rules of evidence, with which the profession and judges had considerable familiarity, was such that, after being ignored for the first few years, a great deal of disputation emerged. It took up an enormous amount of time, both out of court and in the courts, and led to a substantial number of retrials. We have now returned to the pre-Act level of disputation about evidence. However, far from nil, I would confidently estimate that the *Evidence Act* 1995 has cost the taxpayers of New South Wales some tens of millions of dollars. It may have been worth it. But it was not costless.

Proponents of statutory changes must take the costs of change into account. New requirements, new procedures and new rules are not self-executing. They require detailed attention, personal reskilling and their adoption is never frictionless. All of this means additional cost.

Changes in court processes have been underway for some time and will continue for as long as one can foresee. The primary target has been delay. However, control of costs has also been a focus. For example, there have been significant attempts to control discovery. There have also been major changes in the procedures for taking expert evidence. Recently, we have adopted in the New South Wales Commercial List, a stopwatch system for the conduct of trials in which the parties agree on a total amount of time that a trial will take and allocate it amongst themselves. It is not possible in a



lecture of this character to review the numerous ways in which the profession and the courts have attempted to control costs by changing the structural requirements of the dispute resolution process.

The task is, in large measure, still ahead of us. It requires reconsideration of many case management practices adopted at a time when delay was the principal concern. Case management may impose disproportionate, indeed even unnecessary, costs on the parties. From the outset of modern case management, concerns were expressed that the effect would be to frontload costs by bringing forward costs, including in many matters that would in the normal course have settled without incurring any such costs at all. The new focus of attention must make us more sensitive to these concerns.

This would, for example, require a diminution in the number of times a matter is brought before the court, particularly in the form of requiring attendance by lawyers at courts, often in long lists where a substantial amount of the costs are incurred in just waiting to get on. Extensive use of telephone directions hearings and electronic communications must be given a higher priority than in the past.

These are examples of how the focus on costs requires us to continually review our practices. One of the matters to which it is particularly important to have regard is the tendency of any rational participant in the process to shift costs from themselves to other participants. This is true of courts as well as parties.

A good example is the practice of overlisting which enables a court to make full use of its resources despite the occurrence of last minute settlements. However, when matters are not reached, the costs imposed on the parties may well be greater than any cost savings to the court. As we shift focus from delay to costs, matters of this character should receive greater salience.

### **PROPORTIONALITY**

There is now a widespread recognition that some sort of test of proportionality is required. The cost of dispute resolution must in some manner be proportionate to what is in dispute. That is difficult to achieve, particularly in circumstances where a civil dispute involves matters that are not able to be computed in terms of money, at least on any objective basis likely to be accepted by all parties. Nevertheless, the principle is a valid one.

Following the English lead [8], New South Wales has expressly adopted, in s60 of the *Civil Procedure Act 2005*, a requirement that the practices and procedures of courts should be implemented with a view to resolving disputes "in such a way that the costs to the parties is proportionate to the importance and complexity of the subject-matter in dispute". I accept this is a statement of ambition, rather than a description of what occurs.

There is, of course, a great deal of flexibility in the words "importance and complexity". This objective, which I know is accepted in many jurisdictions which do not have the statutory mandate found in New South Wales, requires a continual process of collaboration between the profession and the courts in determining how the process of dispute resolution is to occur.

The first step must be to review areas of practice in which the costs involved in the process sometimes bear no rational, let alone a proportionate, relationship to what is involved. This occurs more frequently than we care to admit.

A classic case was the dispute over a property settlement following a divorce in an English case which went on appeal as far as the House of Lords. The total value of the property in issue was £127,400. The legal costs incurred by the English Legal Aid system, which assisted both parties about the how the property should be divided, was estimated to exceed £128,000. As Lord Hoffmann said:

"If one includes applications for leave, the facts of this case, by the time it reached the Court of Appeal had been considered by five differently constituted tribunals. This cannot be right. To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness." [9]

Lord Hoffmann's reference to the "quest for perfect justice" reminds us that, neither in result nor in process, does the word "justice" refer to an absolute. The objective of attaining fair outcomes arrived at by fair procedures does not require identical conduct in every conceivable kind of case. What is required is "appropriate" rather than "perfect" justice. The concept of "proportionality" is probably as good as we are able to do in terms of identifying a relevant qualification. We simply have to stop killing

litigants with kindness.

There are, of course, a significant number of cases which conclude with an identifiable dollar amount. Not all cases are like that but a substantial proportion are. It is at least theoretically possible to adopt rules, which must necessarily be flexible because of the contingencies of the litigation process, that operate as a default in such a manner as to control the costs recoverable by reference to the amount ultimately awarded. This is a matter that can be done in the exercise of the discretion to award costs.

I am not directing attention to the costs chargeable to the client. I am referring to costs awarded to a successful litigant. The objective is to create cost incentives for parties to narrow the scope of disputation and to make serious attempts to settle, in the same way as the regime that has already been developed for recognising offers of compromise, including by way of indemnity costs, creates such incentives.

There may be a case for adopting, perhaps arbitrary but definite, amounts or proportions of an award to be recovered as costs, by way of a table or formula which gives results capable of being computed in advance [10].

There may also be a role for identifying, in a separate way, proportionate recovery for matters of particular significance in specific areas of jurisdiction, such as the costs of discovery in commercial litigation.

Plainly there is a range of relevant considerations which can qualify the effect of any presumptive rules that are developed in this respect. The exercise of a discretion can be affected by the manner in which parties conduct proceedings, such as the extent of discovery upon which one party may have insisted, or the degree to which a party has made a serious effort to confine the issues and other such matters.

It is, however, essential to ensure that we do not excite a wave of satellite litigation. Disputes about such matters have to be decided quickly and without excessive refinement. The English experience is salutary in this respect. The attempt to control and regulate proceedings by means of costs sanctions has spawned an enormous amount of disputation. This can only be controlled by summary disposition.

There has been a growing literature on proportionality and many minds have been applied to this issue. The process of adaptation is underway, but without any definite resolution. Nevertheless, proportionality must be pursued as a matter of priority. If the legal profession does not do so, it is quite likely that the resolution of the issues will simply be taken out of its hands as has happened in other areas of practice.

To the extent that the legal profession does not succeed in achieving the objective of proportionality, then it is likely that more areas of disputation will simply be taken away from legal decision-making processes. Over recent decades there have been a number of major changes, notably in personal injury litigation, which have been driven to a substantial degree by what had come to be regarded as an unacceptable proportion of compensation awards that were taken up by the decision-making process. This has sometimes taken the form of no fault liability schemes. On other occasions it has taken the form of detailed requirements, including the exhaustion of alternative dispute resolution mechanisms, prior to the institution of proceedings. On other occasions it has taken the form of substituting comparatively informal arbitral mechanisms for the more formal hearing process of court adjudication.

No one should be at all sanguine that this kind of intervention will be limited to personal injury cases reflected in what had come to be regarded as an unacceptably higher level of insurance premiums borne by the community. Such a reaction is capable of being implemented in any area of legal disputation.

For example, I know that concern has been expressed about the costs of many *Family Provision Act* disputes, which appear to consume a significant proportion of the assets to be distributed. Similarly, in the area of commercial disputation, the costs of discovery are more than the commercial community is likely to tolerate. When senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often \$2 million, the position is simply not sustainable.

### **COMMERCIAL DISPUTES**

The cost structure of Australian commerce has been transformed over recent years by new management techniques, by technology and by the full gamut of micro-economic reform. The contemporary commercial community has an expectation that all areas of its cost structure are subject

to similar review. Lawyers are not immune to this expectation. Commercial decision-makers are conscious that one of the few areas of business expenditure that has not diminished over recent decades is the cost of dispute resolution. Unless business lawyers are seen to deliver a cost-effective service, they may very well find themselves bypassed in the same way as some other sections of our profession have come to be bypassed.

If the costs of commercial litigation are to be controlled, to be made proportionate to what is in dispute, and preferably to be minimised, the principal role in achieving that must be played by members of the profession. Judges are able to contribute to that process and, particularly in commercial litigation, there is a recognition that that must occur.

As this audience is well aware, the time billing system, appropriate as it may be in many contexts, has been questioned because of its virtually universal adoption. It creates a perverse incentive for lawyers to resist time saving measures. That incentive can be controlled by maintaining high standards of professionalism.

The costs and delay of commercial litigation and corporate insolvency should be regarded as a drag on the economy. The amounts in dispute are, in effect, dead capital. Neither party to a commercial dispute can treat the amount in dispute, with confidence, as either working capital or for purposes of investment or for distribution to investors. Nor can a creditor with a claim on a company in liquidation.

The longer a commercial dispute continues, or the longer a corporate liquidation continues, the greater the loss to the community in terms of dead capital. At any point of time there are literally thousands of such commercial disputes and hundreds, perhaps thousands, of liquidations under way. It is impossible to compute, but if these processes could be reduced across the board by, say, one year, it would probably liberate hundreds of millions of dollars of capital into the Australian economy. This is capital that could be effectively deployed, rather than remain frozen. If we wish to maximise the positive social contribution of the legal profession, we must all seek to resolve commercial disputes and liquidations expeditiously.

In this respect the two sub-themes that I have discussed come together. If we can restrict delays and costs in the commercial litigation process then we will make an even greater contribution to the society in which we live than we now make. It is a worthy objective. It will not occur unless the profession as a whole determines that it should occur.

## **CONCLUSION**

The way we conduct ourselves in legal advice and in commercial arbitration and litigation has developed over long periods of time. There is much of value to be preserved. However, we must be able to stand back and assess the reasons why it is we do what we do, so that we can articulate the case for their preservation. Fair outcomes arrived at by fair procedures is a worthy objective. However, the pressures, especially in the commercial field but not so limited, to minimise the costs of the process as a whole are particularly acute under contemporary conditions.

The one thing we cannot do is to rely on the traditional lawyer's instinct that nothing must ever be done for the first time.

Giuseppe di Lampedusa, in his great novel, *The Leopard*, had a perceptive aristocrat, facing the oblivion of the Sicilian aristocracy, say:

“If you want things to stay the same, you have to change.”

Not all societies or social groups prove capable of changing their practices, often with disastrous results. As Jared Diamond noted in his recent book *Collapse: How Societies Choose to Fail or Survive*, a form of intellectual paralysis may emerge which leads to doom. What, he legitimately asked, was in the mind of the Easter Islander, when he chopped down the last tree on that island upon which the whole society had long depended? A similar question could be asked of some legal practitioners, particularly in some specialist jurisdictions.

Ours is a profession that values stability with reason. However, the one thing that is a constant in legal history is the omnipresence of continuity and change. As Aharon Barak, the recently retired Chief Justice of Israel once put it:

“Like the eagle in the sky that maintains its stability only when it is moving, so too is the

law stable only when it is moving.” [11]

During the Second World War, the British pressed into service for home defence whatever armaments they had available, including artillery of great vintage. Mobile units were deployed up and down the coast and trained in the traditional manner of the Royal Artillery. Concern developed about the apparent lack of efficiency of the processes. The methods which the soldiers had been trained to perform in the loading, aiming and firing routines was subject to careful study. Something was extremely odd. A moment before firing, two members of the gun crew ceased all activity, stepped back from the piece during its entire firing sequence and stood to attention. The investigator called in an old retired Colonel of artillery to ask him why all this energy and time was being wasted. The Colonel knew where these practices had come from. He said: “They are holding the horses” [12].

We in the law have to understand why we do the things that we do and the reasons why we do them in the particular way that they are done, in order to ensure that we are not just holding imaginary horses.

#### END NOTES

1. (1906) 29 ABA Rep 395; accessible in full at <http://www.answers.com/topic/the-causes-of-popular-dissatisfaction-with-the-administration-of-justice>.
2. The following analysis is based in large measure on Matthew R Christ *The Litigious Athenian* John Hopkins Uni Press, Baltimore (1998).
3. See Mark Gallanter *Lowering the Bar: Lawyer Jokes and Legal Culture* University of Wisconsin Press, Madison (2005) at 3.
4. Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* Encyclopaedia Britannica edition (1952) Vol 5 at 403.
5. Robert Gilson “Value Creation by Business Lawyers: Legal Skills and Asset Pricing” (1984) 94 *Yale L J* 239; Lisa Bernstein “The Silicon Valley Lawyer as Transaction Costs Engineer” (1995) 74 *University of Oregon L Rev* 239; See also David Driesen and Shubha Ghosh “The Functions of Transaction Costs: Rethinking Transaction Costs Minimization in a World of Friction” (2005) 47 *Ariz L Rev* 61.
6. In *Re Castioni* [1891] 1 QB 149 at 167 per Stephen J.
7. *Milward v Weldon* (1566) quoted in 5 Holdsworth *A History of English Law* 233 note 7.
8. *Civil Procedure Rules* r 1.1(2)(c).
9. *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1373.
10. See e.g. Bret Walker “Proportionality and Cost Shifting” (2004) 27 *UNSW L J* 214.
11. Aharon Barak “A Judge on Judging: The Role of the Supreme Court in a Democracy” (2002) 116 *Harvard L Rev* 16 at 29.
12. Elting E Morison *Men, Machines and Modern Times* MIT Press, Cambridge Mass. (1966) at 17-18.

## From Text To Context: Contemporary Contractual Interpretation

**FROM TEXT TO CONTEXT: CONTEMPORARY CONTRACTUAL INTERPRETATION  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE RISKY BUSINESS CONFERENCE  
SYDNEY, 21 MARCH 2007**

Law is a fashion industry. Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the plain or ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now. However, as one English judge put it, sometimes it becomes necessary to “separate the purposive sheep from the literalist goats” [1].

In constitutional, statutory and contractual interpretation there does appear to have been a paradigm shift from text to context. In contractual discourse, the focus on the commercial purposes of a transaction is often referred to as commercial interpretation or commercial construction [2].

All lawyers, both practitioners and judges, are traffickers in words. Words are the vehicle by which the law and legal relationships must be conveyed. Words are our basic tools of trade. Interpreting words is a large part of what we do.

The focus of this conference is on commercial arrangements. However, the task of drafting or interpreting commercial contracts is not, in principle, different to the drafting and interpreting of other legal texts. Ideas which have found their origin in statutory interpretation have come to be applied in the interpretation of contracts. Such convergence in approach also reflects changes in the broader intellectual milieu [3].

Of course, many of the principles which have developed with respect to specific kinds of documents cannot be transposed to the interpretation of other documents. The starting point for the interpretation of any text must be the nature of the document.

Accordingly, a quite different approach is appropriate for the interpretation of a Constitution, intended by its framers to adapt to changing social conditions, to that which is appropriate for the interpretation of an ordinary statute.

Similarly, many principles, often referred to as presumptions, which are applicable to the interpretation of a statute derive from the nature of the political system. An example is the principle of legality, encompassing a range of rebuttal presumptions that Parliament did not, in the absence of a clear statement of intention, intend to affect fundamental rights and freedoms, or restrict access to the courts, or abrogate legal professional privilege, or the privilege against self-incrimination, or to interfere with vested property rights, etc [4]. Such principles turn on the nature of the statute as a product of democratic Parliament. They do not apply to commercial contracts although, if the corporate social responsibility idea gathers momentum, it may well be that something similar develops in the context of commercial arrangements.

Nevertheless, over the course of some three decades, there does appear to have been a change in the basic approach to interpretation which has affected all categories of legal texts in a broadly similar way. A significant concern is whether the change in the general style of contractual interpretation – from text to context – has undermined the desirable objective of ensuring commercial certainty.

Certainty is significant, not only between the parties to the contract, but also for third parties who deal with one or other of parties to a contract on the basis of those contractual rights and obligations. There is a real question whether the expanded scope of matters to which consideration can be given in the course of interpretation has so decreased the capacity of all relevant parties to rely on the words as to raise the level of uncertainty about the obligation to deliver the relevant bucket of money or of monies worth. There can be no doubt that the expanded scope has significantly increased the cost of legal dispute resolution.

A principal purpose of the detail found in commercial agreements, as well as a significant purpose of contract law, is to allocate risks between the parties, often enough with respect to contingencies that cannot be anticipated. Interpretation is the necessary means of determining how those risks were in fact allocated. Anything which increases the level of uncertainty about how words have performed that task, itself increases risk. There is a certain cannibalistic quality about that proposition, but I think I will keep it.

Drafters of contracts are no less prone than parliamentary draftsmen to express exasperation about how their carefully crafted words are misunderstood by others, not least by judges. All lawyers who draft texts attempt to be as clear and comprehensive as they can. We try to anticipate the kinds of issues that may arise, to which the verbal formulae we devise have to be stretched. As Sir James Fitzjames Stephen put it:

“It is not enough to attain to a degree of precision which a person reading in good faith can understand. It is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.” [5]

This objective is never capable of complete achievement. Hence disputes and litigation about what words mean. In this process the principles of contractual interpretation constitute a distinct body of law reflecting, in large measure, a general body of principles applicable to the interpretation of all legal texts, albeit with numerous principles specifically applicable to contracts or to particular kinds of contracts.

The principles applicable to the interpretation of contracts constitute a discrete area of legal discourse. When Lewison’s book appeared in 1989 I found it to be the most practical of additions to the armoury of a commercial barrister. Now in its third edition, it remains an essential reference [6]. All commercial practitioners would benefit from either an Australian edition or an Australian equivalent.

In a commercial context where almost all commercial transactions of substantial size are contained in detailed written form, it would be reasonable to expect that the task of interpretation would receive considerable attention in contract law courses and texts. That does not seem to be the case.

### **CODELFA**

Consideration of the contemporary Australian approach to contractual interpretation must commence with the judgment of Justice Mason in the well-known case of *Codelfa* where, relevantly, his Honour said:

“ ... There is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning ... This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of contract ... “

And

“ ... Evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract where it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although ... if the facts are notorious knowledge of them will be presumed.

It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But insofar as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable.” [7]

What Sir Anthony Mason referred to, in accordance with practice in the area of contractual interpretation, as “surrounding circumstances” was generally referred to in the cognate area of statutory interpretation as “extrinsic materials”. At about the same time as Sir Anthony adopted what

was understood to be a restrictive approach to the kinds of surrounding circumstances to which it was permissible to have regard for the purposes of interpretation, he was establishing a much wider scope for matters to which regard may permissibly be had in the context of statutory interpretation.

In what was to become a particularly influential passage, Justice Mason said in *K & S Lake City Freighters*:

“Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise ...” [8].

This passage reflects a longstanding approach to interpretation which was, it appears, for some time lost sight of in a focus on the literal meaning of words. However, even Sir Owen Dixon, whom many would identify with a literal approach, said in a statutory interpretation context:

“The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the object it seeks to achieve, so as to arrive at the meaning attached to them by those who must use them.” [9]

The High Court has authoritatively adopted Sir Anthony Mason’s approach in *K & S Lake City Freighters* in a manner which employs a broader scope for reference to surrounding circumstances than that which Sir Anthony had identified in *Codelfa* as appropriate for contractual interpretation. The Court has said:

“The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its wider sense for the existing state of the law and the mischief ... one may discern the statute was intended to remedy.” [10]

The contrast between this approach and that adumbrated in *Codelfa* is, at first sight, quite stark. *Codelfa* appears to require the identification of ambiguity before looking at surrounding circumstances. Furthermore, it appears to take a narrow, rather than an expansive, approach to the scope of circumstances that are permissible to be considered.

## CONTEXT

It has long been accepted that words do not exist in limbo [11]. Words never stand by themselves. It remains of significance for the drafters of contracts to take into account as wide a range of contingencies as they are capable of predicting. Nevertheless, not everything can be predicted. Nor are all of the assumptions, practices and facts about the background circumstances or, manner in which a contract will operate, set out in writing. We do what we can.

Justice Learned Hand put the need to place words and sentences in their context particularly well. He said:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indices of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” [12]

The same, of course, is true of the commercial purposes of a contractual relationship.

Justice Learned Hand also said:

“The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.”[13]

No one doubts that recourse must be had to the whole of a written contract. The issue is how far beyond that it is necessary or desirable, and hence permissible, to go.

Nothing in Justice Mason’s observations in *Codelfa* cast any doubt on the need to read the whole of a contractual text. When his Honour was referring to “surrounding circumstances” he was not intending to encompass in that context the contractual document as a whole, nor any interrelated contractual documentation. By “surrounding circumstances”, he was referring to matters extrinsic to the contractual documentation.

It is quite clear from the way that the High Court has approached contractual documents that it begins with an analysis of the overall relationship reflected in the contractual documentation and sets out so much of the structure and content of the document as a whole which may illuminate the particular clause or clauses in dispute.

Nevertheless, the task remains one of interpreting words that are in issue. Context, even the internal context of the whole of the instrument, cannot be used to distort the language. As Felix Frankfurter once put it:

“While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen ...” [14]

### **AMBIGUITY**

There is an apparent contrast between the reference in *Codelfa* to taking into account surrounding circumstances “if the language is ambiguous” and the subsequent authority involving statutory interpretation, to which I have referred, which emphasises that the range of relevant context that can be taken into account, even before the determination of “ambiguity”, is broad.

In large measure, this may simply be a reflection of the fact that the word “ambiguity” itself has a number of different meanings. The word is not limited to a situation in which a word has more than one meaning by reason of lexical or verbal ambiguity or a sentence or phrase has more than one meaning by reason of grammatical or syntactical ambiguity. The word “ambiguity” is often used in the more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful [15].

I have expressed the view [16] that this is precisely what Justice Mason had in mind when, in *Codelfa*, he extended the relevant reference beyond “ambiguity” in the phrase: “If the language is ambiguous or susceptible of more than one meaning”. Subsequent authority, to which I will refer, would suggest that that is how his Honour’s reasons should be understood.

I have expressed a preference for confining the word “ambiguity” to its more usual meaning of verbal or grammatical ambiguity. Another word is required to consider the case where a word or phrase is “susceptible of more than one meaning”, i.e. any situation in which the scope and applicability of the particular clause in issue is doubtful. I prefer to describe the range of issues arising in this respect, i.e. beyond the scope of verbal or grammatical ambiguity, as raising a problem of “inexplicitness”[17].

The circumstances in which such an issue of interpretation can arise include the following:

- Deciding whether to read down general words;
- Deciding whether to imply a term;
- Deciding whether to depart from the natural and ordinary meaning of words;
- Deciding whether or not the contractual definition of a particular word does in fact apply to its use in the particular clause;
- Deciding whether or not to give qualificatory words an ambulatory meaning.



All of these issues arise in the course of interpreting legal texts. In the broad sense of “ambiguity”, they could be so described.

A large part of our problem, of course, is the richness of our language. As Lord Simon of Glaisdale, a master of statutory interpretation, with a fascination with the English language – he was both an officer of the Simplified Spelling Society and a Scrabble tragic – once put it:

“Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities) but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law).” [18]

Nevertheless, in a legal text, it is usually the case that one can clearly identify which of the range of meanings is intended. However, over recent decades the shift in jurisprudential fashion to which I have referred has called into question the resort to what has traditionally been called the “plain meaning” or the “natural and ordinary meaning” of words.

As Lord Hoffmann once put it:

“I think in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus the statement that words have a particular meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.”

Lord Hoffmann has been responsible for a significant turn in the approach to contractual interpretation which, in large measure, reflects in this sphere of legal discourse, the movement from text to context that I have identified.

#### **LORD HOFFMAN’S RESTATEMENT**

As I am sure this audience is well aware, Lord Hoffmann outlined a five-point scheme for contractual interpretation in the *Investors Compensation Scheme* case. It has proven to be a particularly influential formulation that led Lewison in the 3rd edition of his work on the *Interpretation of Contracts* to introduce a new Chapter 1 entitled “An Overview”.

Lord Hoffmann’s five points are:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a

reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words of syntax ...

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not readily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had." [19]

Subsequently, his Lordship clarified his reference in proposition (2) to "absolutely anything":

"... [W]hen ... I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

A difference of views has been expressed as to whether his Lordship's approach was new, on the one hand, and whether it went too far on the other hand. The editors of the Authorised Law Reports did not think much of it, as it appeared only in Vol 1 of the *Weekly Law Reports*. However, it has proven to be a particularly influential exposition [20], expressly adopted in subsequent judgments of the House of Lords and by other common law jurisdictions, but not in its entirety, in the cases to which I will refer, by the High Court [21].

As can readily be seen, Lord Hoffmann's approach has a closer similarity to that which the High Court has adopted for purposes of statutory interpretation, than the reasoning in *Codelfa*. In particular, he expressed no need to identify an ambiguity before taking into account surrounding circumstances. The High Court has either abandoned that part of *Codelfa* or acknowledged that it should never have been understood as so confined. Nevertheless, the High Court has not adopted Lord Hoffmann's expression of the scope of matters to which regard may be had, expressed in terms such as "absolutely anything", even as subsequently qualified.

### THE AUSTRALIAN REACTION

The tension between Lord Hoffmann's analysis and *Codelfa* was recognised immediately after the *Investors Compensation Scheme* case was handed down [22].

The applicability of Lord Hoffman's approach and its consistency with *Codelfa* was raised but not decided in the High Court in the *Royal Botanic Gardens* case. The Court expressly stated that, in case there was a difference, lower courts should continue to follow *Codelfa*[23]:

"It is unnecessary to determine whether their Lordships there took a broader view of the admissible 'background' than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*."

Shortly thereafter Justice Warren (as the Chief Justice of Victoria then was) had to interpret a pension scheme trust deed and to determine what was the permissible scope of surrounding circumstances, including in that case, whether conduct under the deed in its administration could be taken into account. English authority, to which her Honour referred with approval, adopted a broad view of this matter based on the authority of the *Investors Compensation Scheme* case. Notwithstanding the warning in *Royal Botanical Gardens Trust*, her Honour concluded that the pension scheme deed had to be given a “practical and purposive” interpretation [24]. Accordingly, her Honour adopted the approach of the English authorities on the basis that the factual matrix of the relationship “cannot be ignored” [25].

A clear indication of the likely development of the High Court approach had been given by Chief Justice Gleeson two years before *Royal Botanic Gardens in McCann v Switzerland Insurance* when he said:

“[22] A policy of insurance, even one required by statute, is a commercial contract and should be given a business like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.” [26]

Furthermore, in a joint judgment in 2001, Gleeson CJ, Gummow and Hayne JJ had expressly adopted Lord Hoffmann’s first proposition, i.e. that “interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge ... etc.” [27]

What has been characterised as a shift from the approach in *Codelfa* to an approach said to be similar to that of Lord Hoffman, commenced with the joint judgment in *Pacific Carriers Limited v BNP Paribas*:

“The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP and the purpose and object of the transaction.” [28]

The authority given for the last sentence of this passage is *Investors Compensation Scheme*. It remains, however, unclear as to how much of Lord Hoffmann’s five point scheme, other than the first, has been approved.

The joint judgment in *Pacific Carriers* went on to refer to *Codelfa* but only the passage in which Justice Mason referred with approval to a statement of Lord Wilberforce about the significance of knowing the commercial purpose of a contract.

*Pacific Carriers* was confirmed by the High Court in *Toll (FGCR) Pty Ltd v Alphapharm Pty Ltd* where the Court said:

“[40] ... The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.” [29]

It does appear that, at least in the form in which it has been stated by the High Court in both these two recent judgments and in *Maggbury*, *Codelfa* has been superseded, without being overruled. The High Court has not expressly adopted the whole of Lord Hoffmann’s five point scheme. However, the general approach in Australia to contractual interpretation is to be found in these judgments.

Contrary to the suggestion in *Codelfa*, if it be such, there is no need to find an “ambiguity” before looking at “surrounding circumstances known to the parties”. However, the Court has not yet

addressed the scope of the “surrounding circumstances” to which regard may permissibly be had. In particular, the Court has not adopted Lord Hoffmann’s suggestion, as subsequently qualified, that “absolutely anything”, which could affect the way a reasonable man understood a document can be taken into account.

The recent authorities were considered by Justice Finn in *Lion Nathan v Coopers Brewery*. His Honour determined, particularly on the basis of the footnote reliance on *Investments Compensation Scheme*, that the requirement to show ambiguity in advance, suggested on one view of *Codelfa*, was no longer authoritative. His Honour was upheld in the Full Court on appeal [30]. I think they are right, if perhaps a little bold.

When the New South Wales Court of Appeal had determined that an old decision of the High Court was no longer applicable, the High Court reminded all intermediate courts of appeal, in forceful terms, that it was up to the High Court to decide whether that was so or not [31]. *Royal Botanic Gardens* reflected this position.

One of the problems that arise from time to time is that the High Court does not always tell you that it is in fact departing from its earlier judgments. This may well have occurred in this context with respect to *Codelfa*. In any event, I remain of the view that Mason J was not intending to use “ambiguity” in a narrow sense.

In *Lion Nathan* Justice Finn noted that the analysis in *Pacific Carriers* was a step in the convergence of the principles governing the construction of contracts and the construction of statutes [32]. Upon this basis it is a little difficult to hail the new approach as a dramatic change and to give it a new label such as “commercial construction”, which I presume is intended to distinguish earlier approaches to interpretation which were somehow other than “commercial” [33]. One could cite dozens of judgments over the course of a century which emphasised how the commercial nature of contracts must affect their interpretation.

Nevertheless, over the course of the last few decades the movement from textualism to contextualism in all kinds of interpretation, does represent a significant change. The emphasis now given to the commercial purpose of a contractual arrangement is, if not new, of a different order of significance.

Lewison in his most recent edition referred to:

“ ... [T]he attitude of the court in discerning (or attempting to discern) the commercial purpose of a particular transaction, and construing the contract in the light of that commercial purpose. This attitude has grown remarkably in recent years, and is perhaps the single most important change in the construction of all classes of written instruments this century.” [34]

I refer also to the observation of Lord Diplock in 1985 in *The Antaios*[35]:

“ ... If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

There can be no doubt that a “business-like” interpretation or reliance on “business commonsense” is an acceptable constraint on contractual interpretation. The only difficulty is that, at least when the matter comes to the level of litigation, each party remains convinced that “a business like” interpretation or “business commonsense” happens to coincide with its own commercial interests. This is not always easy to resolve.

### **OBJECTIVE INTERPRETATION**

Both *Pacific Carriers* and *Alphapharm* affirm the longstanding view, also expressed in *Codelfa*, that the orthodox approach to interpretation is objective. The purpose is to ascertain the intentions of the parties in an objective sense. It is not to determine the subjective intention of the parties. This is a longstanding principle in contractual interpretation [36]. As long ago as 1925, Justice Isaacs described it in the following words “Few principles are more firmly entrenched in the law” [37].

In this regard, the law of statutory interpretation and that of contractual interpretation are the same. Accordingly, if a Minister in a Second Reading speech has expressed the intention of the legislation that is not determinative. The task of the courts in statutory interpretation is to determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say [38].

The same is true for contractual interpretation. The subjective intentions of the parties are not admissible but, even if admitted on some other basis, e.g. as revealing the “factual matrix” or commercial purpose or as relevant to a case based on misrepresentation, estoppel or rectification, the courts will not have regard to any such subjective statements on an issue of interpretation.

In this regard the common law has developed in a different way to the civil law. Article 1156 of the *French Civil Code* proclaims:

“In interpreting the contract, one should seek the joint intent of the parties communicating through the contract and not stop at the literal meaning of the terms.”

The civil law tradition has significantly influenced international statements of the law. For example, the UNIDROIT *Principles of International Commercial Contract* state:

“4.1(1) A contract shall be interpreted according to the common intention of the parties;  
(2) If such intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.”

Chapter 5.101 of the *Principles of European Contract Law* adopt the same approach and this will unquestionably influence English decisions in the future.

Notwithstanding the new influence of European law on the common law of England, Lord Hoffmann retains the traditional objective approach to determining the intention of parties to a contract. Nevertheless, he noted in his proposition (3) in *Investors Compensation Scheme* that the exclusion of any declaration of subjective intent was an exception to the basic rule and that “the boundaries of this exception are in some respects unclear” [39]. Lord Bingham of Cornwall in re-expressing Lord Hoffmann’s judgment in *Investors Compensation Scheme* appeared to indicate a firm view that the necessity of ascertaining the party’s intentions is an objective one and did not suggest any change was likely [40]. In this respect Australian authority is quite emphatic [41].

### **GOING FURTHER THAN LORD HOFFMANN**

Nevertheless, there have been suggestions that the well established exceptions to the scope of the new contextualism, of the exclusion of evidence of pre-contractual negotiations and of subsequent conduct, is not consistent with the principles which have now found favour [42]. The scope of the “surrounding circumstances” to which regard may be had, so it is said, should be as broad as Lord Hoffmann’s formulation – “absolutely everything” – suggests, including precontractual negotiations and subsequent conduct.

The case for abolishing the rule which excludes evidence of pre-contractual negotiations has been made forcefully by Lord Nicholls of Birkenhead who advanced four reasons why the rule should not be regarded as absolute:

- 1 “This would introduce much needed coherence into this area of the law.”
- 2 “This would make the law more transparent.”
- 3 “This would conform to the current international trend.”
- 4 “The exclusion of relevant evidence means that at times justice may not be done.”

As to the first of the reasons given by his Lordship about the need for “coherence” in this area of the law, his Lordship is referring to those who advocate taking the analysis of Lord Hoffmann in *Investment Compensation Scheme* to its logical conclusion.

The basic thrust of this approach has been that there is no logical reason why the new emphasis on

the significance of context for the task of interpretation should be confined by boundaries such as the exclusion of pre-contractual negotiations and subsequent conduct. Lord Hoffmann's exceptions to the general rule are said to render the law incoherent and the means for escaping from the current rule, such as an action for rectification or by the assertion of estoppel, including particularly an estoppel by convention, manifest that incoherence [43].

However, as Oliver Wendell Holmes famously said: "The life of the law has not been logic but experience" [44].

Furthermore, as Justice Kitto said, lawyers must resist:

" ... the temptation, which is so apt to assail us, to import a meretricious symmetry into the law." [45]

I do not invoke the unkind remark of Ralph Waldo Emerson that: "A foolish consistency is the hobgoblin of little minds", because the adjective "foolish" leaves matters at large [46].

Coherence in the law is unquestionably desirable. However, it is not the only value. I see no particular difficulty in the traditional approach accepted by Lord Hoffmann of having a general rule subject to exceptions. The common law has managed to accommodate such a mental exercise as does, I venture to suggest, the majority of statutes and a substantial number of written contracts. If there are good policy reasons for adopting an exception, as Lord Hoffmann himself suggests, there is nothing illogical, let alone incoherent, in doing so.

The common law has never had the fascination for consistency apparent in the civil law, which operates on the assumption that all relevant legal rules can be written down in a comprehensive manner. We have to be aware that English lawyers are now subject to civil law influences which are of no relevance to us.

The second reason given by Lord Nicholls is the desirability of making the law "more transparent". This appears to be a reference to the fact that so much evidence about pre-contractual negotiations in fact gets into evidence as part of the factual matrix or by reason of some other cause of action, such as estoppel or misrepresentation or rectification, so that the evidence does in fact have an influence on trial judges' approach to interpretation albeit an unacknowledged one.

I can see no particular purpose in allowing the fashionable concept of "transparency" to qualify appropriate legal doctrine. When the United States Tammany Hall politician, Senator Roscoe Conkling, proclaimed that when Samuel Johnson said that patriotism was the last refuge of the scoundrel, he had not thought of the possibilities of the word "reform", one could today add the word "transparency" to that list.

Indeed, if there is a case for transparency in this respect, it is a case for reducing the amount of documentation that comes before a court under the rubric of the "factual matrix" or in barely arguable cases for an estoppel by convention or a suit for rectification.

The third reason to which his Honour refers as "the current international trend", is the permeation into international arrangements of the European civil law. This is particularly true of the *Principles of European Contract Law* and also the UNIDROIT *Principles of International Commercial Contracts*. This is one of the many respects in which English law is likely to diverge from the common law of Australia, by reason of the influence upon English lawyers of the progressive integration of the United Kingdom into the European economic and political communities. For this reason alone it is necessary in the future for Australian lawyers to treat English authorities on such matters with caution.

Lord Nicholls asserts that the *Restatement (Second) Contracts* the United States also conformed with what his Lordship calls "the current international trend" [47]. The recently retired Chief Justice of Israel, in a comprehensive analysis of purposive interpretation in which he advocates contextualism against textualism, has also asserted that the American *Restatement* has gone in the direction of the European approach to the interpretation of all legal texts and that the American *Restatement* has adopted a subjective approach to interpretation [48].

Generalisation about American case law is difficult because the matter of contractual interpretation

arises under both State and Federal law and there is no single common law of the United States. Accordingly, there is a great divergence in approaches within the United States. As one commentator has noted:

“[The Courts] vary from the intensely objective approach of the New York Court of Appeals to the subjective ‘knowing and voluntary’ test imposed by the Federal courts for the surrender of federal rights enacted for the protection of employees against various forms of discrimination.” [49]

Of the standard texts, Williston has no doubt that “it is the objective intent, not the subjective intent that controls” [50]; whereas Corbin states that “Interpretation of contracts is neither wholly objective nor wholly subjective” [51]. It is not correct to simply place the United States in the same category as the civil law influenced international texts. Retention of the objective approach may well be an advantage of the common law from a commercial perspective.

Lord Nicholls final reason is that sometimes “justice” may not be done. This is the ultimate Chancellors’ foot approach to the law. It is not an approach which has ever attained much traction in Australian jurisprudence, let alone in Australian commercial law. The implications of such an approach were analysed some years ago by Chief Justice Gleeson in a paper entitled “Individualised Justice – The Holy Grail” [52]. His Honour summarised the constraints on the ability of the law to “provide a form of justice that responds to the peculiarities of every individual case” as follows:

“First, people look to a system of justice to function in an even handed and consistent manner. The extent to which the results of cases depend upon the personal and subjective evaluation of situations by individual judges, especially when discretionary remedies are available, this expectation is disappointed ...

Secondly, there is an abiding need for predictability and certainty in any system of law. The willingness of people to engage in commercial transactions, for example, depends upon confidence in their ability to know the way in which the law will assign rights and obligations to their conduct and their relationships. There are still many areas of law in which people accept, and clearly prefer, certainty to an assessment of individual merits. The value of reasonable certainty, and the demoralising consequences of unpredictability in the law, should not be underestimated.

Thirdly ... the procedures by which justice is administered involve their own constraints upon the available degree of flexibility in the law ...

Fourthly, it is expected of judges that they will apply neutral and general principles to the resolution of individual disputes; they have no mandate to act as ad hoc legislators who, by decree, determine an appropriate outcome on a case by case basis. The legitimacy of judges depends upon the nature of the function that is assigned to them, and upon the manner in which they perform that function ...

Fifthly, it is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case. ... The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law.”

## **COST**

A significant reason for resisting the expansion of the scope of surrounding circumstances, indeed for restricting the extent to which this approach has already developed, is the increased cost imposed on commerce including, but not limited to, the cost of litigation.

The first step by Lord Wilberforce – taking into account the whole of the “factual matrix” – unquestionably expanded to a substantial degree the costs of litigation starting, perhaps, most significantly, with the enormous cost of the discovery process and, thereafter, the cost of the compilation of the “agreed bundle of documents”, the proliferation of disputes about what is admissible and what isn’t and the enormous burden imposed on all involved in litigation, including solicitors, barristers and the judge, in getting on top of an enormous body of material. As one former English

judge said of Lord Hoffmann's "absolutely everything" dictum:

"It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation." [53]

By the time I came to the Bar commercial briefs were no longer delivered tied in pink ribbon. For much of my time at the Bar cases would be described as one or two folder cases. Subsequently, they came to be described in terms of the multiple number of trolleys involved. No doubt this is in part driven by the technology of word processing and photocopying, but it is also driven by the movement from text to context as an approach to contractual interpretation [54].

### THIRD PARTIES

The law of contractual interpretation focuses almost exclusively, as does the law on contract, on the parties to the contract. Contract law has not given effective consideration to the significance of contracts to others. Where one party to a contract wishes to deal with its interest in the contract that this issue becomes critical. That is so, in my opinion, whether both parties are aware of the intention to so deal at the outset or not.

Lord Nicholls acknowledges that one of the defects in his proposed approach may be the impact on third parties who are unlikely to know anything about pre-contractual negotiations. He accepts that that is so. However, he adds:

"When interpreting contracts courts already take into account 'objective' background matters known to the contracting parties but not necessarily known to others.

Furthermore, when interpreting a document intended for commercial circulation it may be reasonable to attach added weight to the meaning the words bear on their face. The context afforded by the nature of the document is one of the matters the notional reasonable reader will take into account."

The impact on and the import to third parties is, in my opinion, significantly understated in this analysis. The effect on the uncertainty of commercial relationships, and the considerably increased costs of dispute resolution, whether by commercial arbitration or in the courts, is such that this is a matter entitled to considerable weight in determining the basic rule. It is not a consideration which is somehow to be flung into the balance as to how much "weight" the expression of a subjective intention is to be given by the judge or arbitrator who has to determine the true construction of the contractual provision in issue. When rules of exclusion are transmogrified into matters of "weight", the predictability of the process of decision making is attenuated. A solid foundation is replaced by shifting sands.

In a forceful reply to Lord Nicholls' article in the *Law Quarterly Review*, the author referred to an observation by Lord Hoffmann in another case, which expressed an unstated assumption in his five point schema in the *Investors Compensation Scheme* case as follows:

"The interpretation of a legal document involves ascertaining what meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed. A written contract is addressed to the parties." [55]

The author notes that this passage:

"Does not reflect the present writer's experience. A lawyer does not do the job he is retained to do if he drafts the contract so that it is intelligible to the original parties, and then only for as long as they can recall all the background knowledge that they had at the time of the signing.

It is not suggested there should be a retreat to literalism. However, the fiction that contracts are addressed to the original parties should be abandoned. Most professionally drafted commercial contracts are intended to be used by, and are therefore addressed to, people who will know the basic background to the deal, but no more than that." [56]



This highlights a basic defect in Lord Hoffmann's five point schema. It is not a scheme that can be applied to a substantial range of commercial contractual relationships.

It has always been the case that third parties have dealt with one or other of the parties to a contract with respect to their contractual rights and obligations under commercial contracts. That has always been so for financiers and indeed, more often than not in large commercial transactions, loan agreements are interrelated with an underlying basic contract between parties in a direct commercial relationship. The financier is never far removed, usually to the knowledge of both parties to a contract. However, in contemporary circumstances, most parties would assume that there was a financier involved for many transactions. More significantly, it would also be assumed that a financier may become involved after the contract has been executed.

Similarly, there have always been forms of dealing with contractual rights and obligations. One thinks of dealings with book debts by way of factoring and the like. However, in contemporary circumstances, virtually anything seems to be able to be securitised and subsequently made the subject of derivatives of a character only a mathematician can understand.

Such contemporary developments strongly suggest that third party involvement in commercial transactions is now of a considerably different order to the past. This challenges the general idea that a contract of commercial significance consists only of a relationship between two parties. As I have indicated, Lord Hoffmann's schema appears to be based on this assumption. At least it makes no express exclusion for a different kind of commercial relationship.

In this regard, the focus of contract law may need to change. The traditional language is increasingly irrelevant. As has often been noted, it is no longer always useful to analyse relationships in terms of an "offer" and an "acceptance". Nor is there usually much point in identifying with precision the way in which it is said that "consideration" can, in the traditional animated metaphor, be seen to "move" from the promisee to the promisor. Such difficulties are manifestations of the proposition that Lord Hoffmann's assertion that "a written contract is addressed to the parties" is, today, a significant oversimplification.

The interests of third parties can be accommodated in Lord Hoffmann's scheme. Either or both parties to a contract may know that third parties will, or will probably, or may become involved and that they would know little or nothing about the factual matrix or the surrounding circumstances, let alone about the subjective intention of the parties. However, it is, in my opinion, a significant defect in Lord Hoffmann's schema that no express provision is made in this regard.

The scope of contemporary involvement by third parties with one or other of the parties to a contract, on the basis of the performance by the other party of its obligations, at least in commercial contracts of any size or longevity, is such that it should now be assumed that both parties are aware that the other party to the contract will, or may, (the test is yet to be determined) deal with its contractual rights with third parties, whether as lenders or as assignees or in some other capacity. On that basis both parties should be aware that any such a third party would rely on, and usually rely only on, the text of the agreement. Where a text purports or appears to be comprehensive in such a context, resort to the factual matrix could well be restricted and any suggestion of an expansion in the scope of "surrounding circumstance" in the direction of "absolutely everything" should be resisted.

There is a line of authority which restricts reliance on surrounding circumstances in a manner consistent with this approach. Investors were held to be entitled to rely solely on the statutory contract constituted by the memorandum and articles of association of a corporation [57]. The abolition by statute of the significance of ultra vires conduct by corporations has lessened the significance of a memorandum and articles of association [58]. However, this line of authority does restrict the scope for relying on surrounding circumstances in a context where third parties are known to be involved and where only the text of a contract is known, or likely to be or become known, to them.

#### **RESTRICTING THE "ABSOLUTELY ANYTHING" TEST**

The movement from text to context emphasises the importance in a commercial contract of including an entire agreement clause. They have, in part, been designed to combat claims for collateral oral contracts or the implication of terms and to provide some protection against alleged reliance on representations. However, as one observer has commented, without approval, entire agreement clauses are a means of "contracting out of contextualism" [59]. Drafters of commercial contracts should bear this in mind.

Such clauses are simply a means by which parties express their freedom to contract, by modifying the otherwise applicable common law rule of contractual interpretation. It is by no means clear whether these clauses will always be found to be conclusive. Their significance in many commercial contexts will be such, however, that a strong argument can be made that such a clause precludes consideration of “surrounding circumstances” external to the document, on the basis that parties have agreed to do just that.

Recent High Court authority in *Pacific Carriers* and *Alphapharm* has been careful not to accede to the whole of Lord Hoffmann’s schema. In particular, the confinement of the Australian formulation appears to be narrower than the “absolutely anything” test, even as qualified by Lord Hoffmann. When the Federal Court recently determined that these cases qualify the *Codelfa* requirement, if it were such, to first find “ambiguity”, their Honours restricted the scope of “surrounding circumstances” to which regard may permissibly be had [60].

There is authority in England which expresses dissatisfaction with the state of the law brought about by the shift to contextualism in interpretation of contracts. It is an approach which, to some degree, remains open for Australian courts to adopt. It is a long extract which is worth reproducing in full. Lord Justice Saville, in *National Bank of Sharjah v Dellborg*, an appeal from a case in the Commercial Court said:

“The law as it presently seems to be stated would appear to be that if the circumstances surrounding the making of the agreement showed to a reasonable man that to read paragraph 8 as covering only the amounts actually credited to the deposit accounts would produce a result which the parties clearly could not have intended, the court would (notwithstanding the meaning which the words bear as a matter of ordinary language) interpret the paragraph so as to accord with what a reasonable man, knowing of those circumstances, would understand it to mean. This is said to be justified on the basis that to do otherwise would result in the court interpreting the agreement in a way which in the light of the surrounding circumstances, simply offended common sense.

It is difficult to quarrel with the general proposition that when interpreting an agreement the court is trying to work out what the parties intended to agree, rather than analysing words in a vacuum. Thus where the words the parties have used are ambiguous or, read literally, are meaningless or nonsensical, the surrounding circumstances must be considered in order to select the appropriate meaning or to try to give the words meaning or sense. However, where the words used have an unambiguous and sensible meaning as a matter of ordinary language, I see serious objections in an approach which would permit the surrounding circumstances to alter that meaning.

Firstly, such an approach would seem to entail that even where the words that the parties have chosen to use have only one meaning; and that meaning (bearing in mind the aim or purpose of the agreement) is not self-evidently nonsensical, the Court will not be allowed to adopt that meaning without an explanation of the surrounding circumstances which would involve discovery, interrogatories, cross-examination and the like; for a party seeking to challenge that could assert with great force that until the circumstances are fully examined, it is impossible to decide whether or not they should override the plain words of the agreement. This would do nothing but add to the costs and delays of litigation and indeed of arbitration, much of which is concerned with interpreting agreements.

Secondly, the position of third parties (which would include assignees of contractual rights) does not seem to have been considered at all. They are unlikely in the nature of things to be aware of the surrounding circumstances. Where the words of the agreement have only one meaning, and that meaning is not self-evidently nonsensical, is the third party justified in taking that to be the agreement that was made, or unable to rely on the words used without examining (which is likely to be difficult or impossible for third parties to do) all the surrounding circumstances? If the former is the case, the law would have to treat the agreement as meaning one thing to the parties and another to third parties, hardly a satisfactory state of affairs. If the latter is the case, then unless third parties can discover all the surrounding circumstances and are satisfied that they make no difference, they cannot safely proceed to act on the basis of what the agreement actually says. This again would seem to be highly unsatisfactory.

To my mind there is much to be said for the simple rule that where the words the parties have chosen to use have only one meaning, and that meaning (bearing in mind the aim or purpose of the agreement) is not self evidently nonsensical, the law should take that to be their intended agreement, and should not allow the surrounding circumstances to override what (*ex hypothesi*) is clear and obvious. This would enable all to know where they stand without the need for further investigations; and for the court to provide the answer, where the point is contested, without undue delay or expense. The law of rectification provides the means for correcting the agreement where the parties have made a mistake in writing it down. To my mind what appears to be present law does no service to the international or domestic commercial community, let alone others, such as those entering into leases and the like.

For these reasons it seems to me that what appears to be the latest approach requires qualification, if not reconsideration. Be that that as it may, I shall proceed on the basis that it is this approach that should be applied to the present case. Accordingly, the question is whether, from the surrounding circumstances that can legitimately be taken into account, it can be demonstrated that the parties cannot have intended to limit paragraph 8 as its language dictates and must have intended that amounts other than those actually credited to the deposit accounts should be included.” [61]

This case is not merely “unreported”. In this electronic age when there is no such thing as an unreported case, it is difficult to find it in England at all. The database called *Current Legal Information*, a Sweet & Maxwell resource available on *Westlaw*, does not refer to the case in any way. Three other English databases *Justis*, *Justcite* and *Caselaw (Lexis Nexis)* mention the case by reason of its citation in two English cases, but each citation is limited to the fact that it was relied upon in argument, and it was not applied in any way. Furthermore, none of these three sites actually provide access to the full text of the judgment. Indeed, the only place to obtain the full text of the judgment is on BAILLI, the British version of the Australian site AUSTLII.

I have a great deal of sympathy with the approach of Lord Justice Saville. I believe many Australian judges will also. It does not appear to me to be inconsistent with the extent to which the High Court in *Maggbury*, *Pacific Carriers* and *Alphapharm* has accepted part of Lord Hoffman’s five point schema. Australian Courts may be able to adopt a similar but not identical approach. There remains an opportunity to restrict the scope of “surrounding circumstances” which are pertinent for the task of contractual interpretation in Australian law more narrowly than in England.

#### END NOTES

1. *Summit Investment Inc v British Steel Corporation (The Sounion)* (1987) 1 Lloyds Rep 230 at 235 per Lloyd LJ.
2. See Gerard McMeel “The Rise of Commercial Construction in Contract Law” (1998) *Lloyds Maritime & Commercial Law* 382; Elisabeth Peden and J W Carter “Taking Stock: The High Court and Commercial Construction” (2005) 21 *Journal of Contract Law* 172; J W Carter and Elisabeth Peden “The ‘Natural Meaning’ of Contracts” (2005) 21 *Journal of Contract Law* 277.
3. See Gerard McMeel “Language and the Law Revisited: An Intellectual History of Contractual Interpretation” (2005) 34 *Common Law World Review* 256.
4. See generally J J Spigelman “The Principle of Legality and the Clear Statement Principles” (2005) 79 *ALJ* 769 at 774ff.
5. *Re Castioni* (1891) 1QB149 at 167-168 per Stephen J.
6. Kim Lewison *The Interpretation of Contracts* (3rd ed) Sweet & Maxwell, London (2004).
7. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348 at 352.
8. *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315.
9. *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 at 244. The *Kisch* case raised particular difficult issues, discussed in J J Spigelman “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Aust Bar Rev* 224 at 227-230.

10. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 affirmed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 280-281.

11. See e.g. *Morris v Beardmore* [1981] AC 446 at 459.

12. *Cabell v Markham* 148 F.2d 737, C.C.A.2(NY) at 739 (1945).

13. *Helvering v Gregory* 69 F.2d 809, C.C.A.2 at 810-811 (1934).

14. See Felix Frankfurter "Some Reflections on the Reading of Statutes" (1947) 47 *Columbia Law Rev* 527 at 543.

15. *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444 at 456-457; *Repatriation Commission v Vietnam Veterans' Association of Australia (NSW Branch)* (2000) 48 NSWLR 548 at [116]; R Cross *Statutory Interpretation* (3rd ed) Butterworths, London (1995) at 83-84.

16. See *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478 at [35].

17. See *Repatriation Commission v Vietnam Veterans Association of Australia (NSW Branch)* (2000) 48 NSWLR 548 at [116].

18. *Stock v Frank Jones (Tipton) Ltd* (1978) 1 WLR 231 at 236.

19. *Investors Compensation Scheme Limited v West Bromwich Building Society* (1998) 1 WLR 903 at 912-913.

20. See Ewan McKendrick "The Interpretation of Contracts: Lord Hoffman's Restatement" in S Worthington (ed) *Commercial Law and Commercial Practice* Hart, Oxford, 2003.

21. See Lewison *supra* at 3-4.

22. See e.g. *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* [1999] 21 WAR 425; WASC 218 at [40].

23. See *Royal Botanic Gardens & Domain Trust v South Sydney Council* (2002) at 76 ALJR 436 at [39].

24. See *Ansett Australian Ground Staff Superannuation Plan Pty Ltd v Ansett Australian Limited* (2002) 174 FLR 1; [2002] VSC 576; at [213] and [232].

25. *Ibid* at [232].

26. See *McCann v Switzerland Insurance Ltd* (2000) 203 CLR 579 at [22]. The authority on which Chief Justice Gleeson relied was *Lake v Simmon* [1927] AC 487 at 509.

27. *Magbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 216 CLR 181 at [11].

28. *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 at 461-462.

29. See *Toll (FGCR) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179. The authority relied on for this proposition was *Pacific Carriers* at [22].

30. See *Lion Nathan Australia Pty Ltd v Coopers Brewery Limited* (2005) 223 ALR 560 esp at 78-79 and on appeal [2007] 59 ACSR 444 esp at 45-52, 98, 101 and 254.

31. See *Garcia v National Australian Bank Ltd* (1998) 194 CLR 395 at [17].

32. *Ibid* at [79].

33. See Butterworths *Carter on Contracts*, Vol 1 esp at [12-040]; J. W. Carter, Elisabeth Peden & G J Tolhurst *Contract Law in Australia* (5th ed) Butterworths, Australia (2007) at [12-010]; Elisabeth Peden & J W Carter "Taking Stock: The High Court on Contract Construction" (2005) 21 *Journal of Contract Law* 172 esp at 178.

34. Lewison *supra* at 236, [7.15].

35. *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 199.

36. See *Money Penny v Money Penny* (1861) 9 HLC 114; 11 ER 671 at 684; *Rickman v Carstairs* (1833) 5 B & Ad 651; 110 ER 931; *Smith v Lucas* (1881) 18 Ch D 531 at 543; *Drughorn v Moore* [1924] AC 53 at 57; Joseph M Perillo "The Origins of the Objective Theory of Contract Formation and Interpretation" (2000) 69 *Fordham L Rev* 427.

37. *Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60 at 76.

38. See *Nolan v Clifford* (1904) 1 CLR 429 at 449; *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-168; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10] and see the authorities discussed in *R v Young* (1999) 46 NSWLR 681 at [5].

39. For an analysis of the distinction between subjective and objective purposes in different jurisdictions see Aharon Barak *Purposive Interpretation in Law*, Princeton Uni Press, Princeton NJ (2005) at 336ff.

40. See *Bank of Credit & Commerce International SA v Ali* [2002] 1 AC 251 at [8].

41. See, e.g. *Codelfa* *supra* at 351-352 and 406; *Pacific Carriers* *supra* at 461, and *Alphapharm* *supra* at 179.

42. See, e.g. Gerard McMeel "Prior Negotiations and Subsequent Conduct – the Next Step Forward for Contractual Interpretation" (2003) 119 *LQR* 272; Lord Nicholls of Birkenhead "My Kingdom for a Horse: the Meaning of Words" (2005) 121 *LQR* 577.

43. In Australia there are conflicting authorities on a "convention" that precedes a contract. See cases listed by K R Handley *Estoppel by Conduct and Election*, Sweet & Maxwell, London 2006 at 8-012.

44. Oliver Wendell Holmes *The Common Law*, Maxmillan, London (1882) at 1.

45. *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285.

46. Ralph Waldo Emerson essay on "Self Reliance". See <http://www.emersoncentral.com/selfreliance.htm>

47. See Lord Nicholls of Birkenhead *supra* at 586.

48. See Barak *supra*.

49. Perillo *supra* at 466-467.

50. Samuel Williston *A Treatise on the Law of Contracts* (4th ed), West Group (1999) Vol 11 §31:4 at 280, 283.

51. *Corbin on Contracts* Vol 5 (Revised ed) Lexis, 1998 §24.6 at 25-28.

52. A M Gleeson "Individualised Justice – The Holy Grail" (1995) 69 *ALJ* 421 at 431-432.

53. Sir Christopher Staughton "How Do Courts Interpret Commercial Contracts" (1999) 58 *Cambridge LJ* 303 at 307.

54. Catherine Mitchell "Entire Agreement Clauses: Contracting Out of Contextualism" (2006) 22

*Journal of Contract Law* 222.

55. See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at [73].

56. Alan Berg "Thrashing through the Undergrowth" (2006) 122 *LQR* 354 at 359.

57. See *Egyptian Salt and Soda Company Ltd v Port Said Salt Association Ltd* [1931] AC 677 at 682; *National Roads and Motor Association Ltd v Pakim* (2004) 60 *NSWLR* 224 at [81]-[86].

58. This was in issue in *Lion Nathan v Coopers* supra.

59. Mitchell supra; see also Elisabeth Peden and J W Carter "Entire Agreement – and Similar – Clauses" (2006) 22 *Journal of Contract Law* 1.

60. *Lion Nathan v Coopers* supra per Finn J at [79] and, on appeal, per Weinberg J at [48].

61. *National Bank of Sharjah v Dellborg* (unreported, 9 July 1997).

## **Words, Words, Words - Address By The Honourable J J Spigelman AC Chief Justice Of New South Wales To The Conference Celebrating 80 Years Of The Australian Law Journal**

### **WORDS, WORDS, WORDS ADDRESS BY THE HONOURABLE J J SPIGELMAN AC CHIEF JUSTICE OF NEW SOUTH WALES TO THE CONFERENCE CELEBRATING 80 YEARS OF THE AUSTRALIAN LAW JOURNAL 16 MARCH 2007, SYDNEY**

I join with other speakers in congratulating the Australian Law Journal on the outstanding contribution it has made to Australian law over the course of 80 years. Throughout my career the Journal has been an essential reference, indeed my most frequently used single source of detailed commentary on the law. It seems likely to remain such. I do not believe that it will be replaced by legal blogs, unless the jurisprudentially omnivorous Peter Young decides to compile one. [1]

The Journal commenced life as the only national voice of the State legal professions. It is now, and remains, the principal voice of the national legal profession.

I am acutely conscious of the fact that I have been invited to deliver the luncheon address. You have already been exposed to half a dozen learned papers by the most distinguished of speakers. Another half dozen learned papers on an equally forbidding range of subjects awaits you this afternoon. In the middle of this formidable array of intellectual stimulation I think I should confine myself to a topic more congenial to the process of physical digestion.

I want to talk about words and their significance for law. Words are the vehicle by which the law must necessarily be conveyed.

This topic featured also in another repast, quite dissimilar to today's earnest affair: Lewis Carroll's Mad Hatter's Tea Party, where the following exchange occurred:

“Then you should say what you mean’ the March Hare went on.  
‘I do’, Alice hastily replied; ‘At least, I mean what I say - - that’s the same thing, you know.’  
‘Not the same thing a bit!’ said the Hatter. ‘You might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see!’”

Much of the law turns on whether lawyers “say what they mean.” The obverse – “to mean what they say” – is not a requirement of the adversary system.

Our adversary system was, perhaps, never more pointedly described than it was by Eliza Doolittle in *My Fair Lady*:

“Words! Words! Words! I’m so sick of words.  
I get words all day through, first from him, then from you.  
Is that all you blighters can do.”

All judges understand her exasperation.

Lawyers express their craft through words: writing letters, formulating contracts, requesting particulars, making requisitions, drafting statutes, writing opinions, delivering submissions or crafting judgments.

Lawyers are traffickers in words. Words are our basic tools of trade.

Wittgenstein perhaps put this best when he said:

“Think of words as instruments characterised by their use and then think of the use of a hammer, the use of a chisel, the use of a square, of a glue pot and of the glue.”[2]

Not only are words what we do, in large measure words constitute the occasion upon which we are called to do it. As long ago as 1773, Lord Mansfield said:

“Most of the disputes in the world arise from words.” [3]

We try to be as clear as we can. We try to anticipate the kinds of issues that may arise, to which the verbal formulae we devise may have to be stretched. As Sir James Fitzjames Stephen put it:

“It is not enough to attain to a degree of precision which a person reading in good faith can understand; it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.” [4]

This objective is never capable of complete achievement. Hence litigation about what words mean. As Lord McMillan once put it:

“One of the chief functions of our courts is to act as an animated and authoritative dictionary.” [5]

Felicity with words is a requirement of success in any aspect of legal practice. This requirement is hard to describe. Perhaps the best definition is that of Hilaire Belloc who once said that a person can only be regarded as a master of the English language if s/he can explain how to tie a knot without resort to a diagram.

However, in English, as in French, in the words of Joseph Joubert:

“Words are like eyeglasses, they blur everything which they do not make more clear.” [6]

The ultimate source of difficulty is the very richness of our language. Lord Simon of Glaisdale, a master of statutory interpretation, President of the Simplified Spelling Society and a Scrabble tragic, [7] once said:

“Words and phrases of the English language have an extraordinary range of meanings. This has been a rich resource in the English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law).” [8]

It is this richness of our language, giving rise to the indeterminacy or inexplicitness sometimes referred as ambiguity, which is at the core of much legal practice. To some degree ambiguity in language performs the same role for the legal profession as physical illness performs for the medical profession. It is the source of much of our work, both as practitioners and as judges. Accordingly felicity and precision in expression should be regarded as the equivalent of preventative medicine.

One does not have to move too far from the dining table to relish our profession’s preoccupation with words.

In 1898 it fell to a judge of the Supreme Court of New South Wales to decide whether or not an oyster was a wild animal. Three men were caught with several bags of oysters in the then new National Park south of Sydney, contrary to notices which said that individuals could take oysters from the park, but only for their own consumption. The issue was whether or not they could be prosecuted for larceny of the oysters, being the property of the trustees of the National Park.

“This is an important matter”, Mr Justice O’Connor sternly commenced his judgment. He decided that,



like fish, oysters could not be property at common law before capture. They were *ferae naturae* and, accordingly, could not be the subject of larceny. His Honour set aside the conviction. [9]

Cases arising under sales tax legislation have proven to be a particularly fruitful source of semantic pyrotechnics about food. So it was that the High Court in 1949 had to determine whether food for fish was exempt from sales tax, on the basis that fish answered the statutory description of “livestock”. [10]

The case is a classic example of context determining the meaning of words. On a dictionary definition “livestock” could extend far enough for the taxpayer to have succeeded. Over the strenuous resistance of the sole dissentient, Chief Justice Latham, the Court upheld the levy of sales tax.

Latham CJ was simply not impressed by the fact that most of the words in the schedule appeared to relate to “four footed livestock”, extending as they did to matters not usually associated with fish such as: “[b]ullnose punches”, “[d]ips and washes for cattle or sheep”, “[d]renching guns and syringes”, “[m]arking and branding oils”, “[s]heep and stock feeders”, “brands, ear pliers, ear tags and ear markers” and “[v]eterinary instruments”. [11]

Mr Justice Dixon, as his Honour was then somewhat redundantly known, concluded that “this context is anything but aquatic or ichthyological” – although he preferred words with Greek to those with Latin roots. He went on to conclude that the legislative context “suggests broad acres and rural pursuits”. [12]

Mr Justice Williams characterised the item in the schedule referring to “veterinary instruments” as “perhaps an unlucky one for the fish”, because:

“Veterinary surgeons would not, I should think, ordinarily include fish amongst their patients. The context of the paragraph brands, I think, the livestock intended to benefit. Fish have a natural aversion to being caught. In the present case it is desired to catch the fish in the network of exemptions, but in my opinion the attempt fails.” [13]

It was again in a taxation context that, in 1932, the High Court had to grapple with the difficult issue of whether or not a “sponge” was a “pastry”, and thereby exempt from sales tax, or a “cake” where, together with the equally unlucky “biscuit”, it would not be exempt. To the consternation of a number of High Court judges, including Justices Starke and Dixon, who initially found it difficult to believe that the word “pastry” could ever apply to “cakes” or “biscuits”, the trade manuals, trade witnesses, the catalogues and advertisements were overwhelmingly in favour of the proposition that a “sponge” fell within the area of expertise of a pastry cook. However Dixon J concluded that the trade evidence was not sufficiently overwhelming and felt compelled to call a “sponge” a “cake”.

Mr Justice Evatt, agreeing, was content to observe:

“Perhaps this is one of the few things that every schoolboy knows.” [14]

No doubt school girls were then regarded only as cooks of, rather than as consumers of, sponge cakes.

To return to the rigours of criminal jurisprudence, in 1926 the High Court found that it was not an offence under s19 of the *Newcastle District Abattoir and Saleyards Act 1912*, to bring into the Newcastle area some sausages made from pork and beef which had been slaughtered at the Maitland Abattoirs. Such sausages, the Court solemnly held, were not a “portion of a carcass”. [15]

Mr Justice Isaacs, dissenting, described the proceedings as:

“A test case involving serious consequences, affecting not merely the health but even the lives of a very large portion of the population of the State of New South Wales.” [16]

He rejected as “technical” the proposed “distinction between a sausage and the component parts of a

sausage". He said:

"... If the internal portion of the sausage is itself, before envelopment portion of a carcass, I utterly fail to see how the mere fact that it is covered with an intestine makes it cease to be what it was immediately before it was covered. Its identity remains, just as much as the identity of a man remains whether he is called a soldier in uniform, a barrister in robes or a cricketer in flannels." [17]

Mr Justice Isaacs would have none of the excuse that the relevant meat had passed all inspections in the Maitland district from whence it came. That would not justify its sale in a Newcastle shop.

Whilst, as you see, the semantic jurisprudence of the High Court is of the highest possible order, it has not grappled with the sublime issues that have come before the Supreme Court of the United States.

In 1893 it fell to that Court to determine whether a tomato was a "vegetable" or a fruit. A unanimous Supreme Court, ignoring unanimous scientific opinion that a tomato is a fruit, held:

"Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people ... all these are vegetables ... and which, either eaten cooked or raw, are ... served at dinner in, with, or after the soup, fish or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert." [18]

Context is, in matters of interpretation, everything. As the case shows, context is not always confined to the text.

A review of authorities on what some describe as "the law of food" [19] invokes a sense of nostalgia. So it is with a judgment in 1941 of the Supreme Court of California which had to determine whether a sandwich was a "meal". If it was, then it was subject to State sales tax.

In more recent times no one who has visited the United States and witnessed the dimensions of the typical American sandwich would doubt the answer. Nevertheless, in an unanimous judgment, the Court found that the patrons who purchased sandwiches from booths at the Golden Gate International Exhibition of 1939, did not subject the vendors to the imposition of the Californian sales tax regime.

The Court declared:

"The generally accepted concept of a meal is that it not only consists of a larger quantity of food than that which ordinarily comprises a single sandwich, but that it usually consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which would not conveniently be consumed while one was standing or walking about. A 'hot dog' or hamburger sandwich is the type of food frequently offered for sale to and desired by persons who wish to eat something while walking about. It is not the type of food generally ordered by a person who patronizes a hotel, restaurant or other public eating establishment with the intention of securing a 'meal'." [20]

Nostalgic indeed.

The English Court of Appeal was faced with a similar issue only a few years later in 1956 but, perhaps reflecting the rapid decline in culinary standards or alternatively the poverty of the English population, the Court determined that a raw kipper was a "meal".

The prohibition in the *Shops Act* 1950 on Sunday trading, exempted the serving of "meals or refreshments", unless they happened to be fish and chips. Why that staple was impermissible on a Sunday does not appear. Although stating that the Act was plainly "unworkable" and noting that both a former Lord Chancellor and a former Lord Chief Justice had admitted that they couldn't understand it, the Court was influenced by the fact that "This is an Act which small shopkeepers are supposed to understand". [21]

Lord Goddard was moved to an eloquent exposition of the facts:

“Why cannot a kipper be a meal or refreshment? For the life of me I cannot see why, except that some people do not eat raw kippers; but some people do. A kipper is partly cooked, or at any rate it is smoked, and think of the absurdity when one can sell smoked salmon... smoked trout, smoked eel... Yet it is said that one cannot sell a smoked herring namely, a kipper. In my opinion, it is impossible to say that a kipper cannot be a meal... A person comes home unexpectedly and sends out for a meal, and is brought back a kipper, and what better meal can one have if one likes kippers, and most people do.” [22]

So there you have it, the typical Englishman, unlike the American who eats when s/he walks, “sends out for a meal”.

Mr Justice Cassells adopted a purposive approach and also drew on his extensive knowledge of human affairs to reach the same conclusion. He noted:

“...[T]he object of these provisions ... is to provide that on a Sunday people cannot do the extensive shopping you can do on a Saturday. One may happen to find oneself in such a position that a rapid meal or refreshment may be required; an example would be, the sudden arrival home of a man who finds that his housekeeper has not prepared a meal, and she is sent out to find what she can ...” [23]

Mr Justice Donovan who, having been informed for the first time that some people eat raw kippers, simply observed that: “there really is no accounting for taste”, and accordingly, “I find it impossible to distinguish between the raw kipper and the smoked salmon or trout except on the grounds of attractiveness.” [24]

Whilst no one should understate the degree of earnestness manifest in some of these judgments, nevertheless, from time to time, one can discern an element of a tongue sticking into a cheek. There is of course ample opportunity in legal discourse, including in judgments, for the display of wit, that form of humour that illuminates the truth.

I do not wish to engage in the debate as to the permissible scope for judicial humour. It is necessary to bear in mind the warning issued to the bench by Sir William Gilbert, expressed in the libretto of *The Mikado*, when the Lord High Executioner set out his list of targets for execution – in much the same way as Don Giovanni listed his conquests. High on the list was “that Nisi Prius Nuisance ... the Judicial Humorist”. Gilbert, no doubt, never lost the pain of his failure at the bar, having obtained no more than five briefs a year. This simply indicates that a facility for words is no guarantee of success in our profession.

There are of course significant differences in the ability of judges to deploy wit in judgments. It is always best to obey Shakespeare’s characterisation – as Polonius put it “brevity is the soul of wit”. [25] However, that does not purport to be a comprehensive description. Somerset Maugham came closer to a full characterisation when, in conscious imitation of Shakespeare, he said “impropriety is the soul of wit” [26]. Impropriety ought to be less frequently on display in a judgment than brevity, and usually is.

Nevertheless, all judges should start from the proposition that it is not absolutely essential for a judgment to be incomprehensible. Nor, on the other hand, is it mandatory to adopt the somewhat folksy writing style of Lord Denning. It is, however, always appropriate to have pride in the clarity and felicity of the expression in a judgment.

Judicial styles vary considerably. The most useful taxonomy remains that of Benjamin Cardozo when he was Chief Judge of the Court of Appeals of New York. [27] He gave us a six-fold characterisation of judicial writing styles:

1. “The type magisterial or imperative ... It eschews ornament. It is meagre in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned. We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of the sense of mastery and power ...”

2. "The type laconic or sententious..."
3. "The type conversational or homely".

Cardozo deals with these together:

"The Year Books are full of wise stores and homely illustrations, the epigram, the quip, the jest ... Is there any armour proof against the thrust of the dictum of Lord Bowen's: 'the state of a man's mind is as much a fact as the state of his digestion?' Next door to the epigram is the homely illustration which makes its way and sinks deep by its appeal to everyday experience ... "

4. "The type refined or artificial, smelling of the lamp ... With its merits it has its dangers, for unless well kept in hand, it verges at times upon preciosity and euphuism. Held in due restraint, it lends itself admirably to cases where there is need of delicate precision".

5. "The type demonstrative or persuasive ... It is not unlike the magisterial or imperative, yet it differs in a certain amplitude of development, and freer use of the resources of illustration and analogy and history and precedent, in brief, a tone more suggestive of the scientific seeker for the truth and less reminiscent of the priestess on the tripod ... Such a method, well pursued, has a sanity and a clarity that make it an admirable medium for the declaration of considered judgment."

6. "The type tonsorial or agglutinative, so called from the shears and the paste pot which are its implements and emblem ... I will not expatiate upon its horrors. They are known but too well. The dreary succession of quotations closes with a brief paragraph expressing a firm conviction that judgment for plaintiff or defendant, as the case may be, follows as an inevitable conclusion. The writer having delivered himself of this expression of the perfect faith, commits the product of his hand to the files of the court and the judgment of the ages with all the pride of authorship. I am happy to be able to report that this type is slowly but steadily disappearing."

As for humour in judgments, Cardozo made the following observation:

"My summary of styles may leave a cheerless impression of the solemn and the ponderous. Flashes of humour are not unknown, yet the form of opinion which aims at humour from beginning to end is a perilous adventure, which can be justified only by success, even then is likely to find its critics almost as many as its eulogists."

Judicial humour is a subject to be approached with trepidation. Humour is, so often, quickly obsolete. Sir Frederick Jordan gave an address on that subject at the Jubilee of the Law School of the University of Sydney. His examples now appear to be, at best, only faintly amusing [28]. Roddy Meagher's brief excursus on Australian judicial humour has lasted somewhat better, not least because of the examples of Sir Frederick Jordan's wit. [29]

The Australian Law Journal over its 80 years has often sparkled with wit. Indeed the very first item under the very first Current Topics in the very first volume manifested the particular twinkle of which Sir Bernard Suger was capable. In the very first sentence, Sir Bernard referred to W S Gilbert as possibly being attracted to an event that had recently occurred in the Supreme Court of Victoria.

A liquidator of a company had written to himself, to inform himself that he had resigned his office. However that letter had, unfathomably, not reached its destination. The liquidator had to seek judicial advice, to use Sir Bernard's description, about "whether he had sufficiently informed himself of his own resignation or not". [30]

Sir Bernard set out another incident about the tribulations of service. A firm of Melbourne solicitors wished to make a claim against a company for professional costs. They realised that the registered office of the company was situated at their very own offices.

Suger explained the consequences of this startling revelation:

“Whereupon the clerk in charge of the matter, after applying himself with a screwdriver to the affixing of the company’s nameplate to the exterior of the office, went for a walk around the block and returned to serve the summons upon the company by leaving it at the office of his own firm which had issued it.” [31]

It is not possible to recount in any detail the wonderful array of wit on display in the Australian Law Journal and the numerous manifestations of the fascination of our profession with words. Permit me simply to mention one favourite.

After his retirement as Chief Justice, the Journal published a hitherto anonymous poem by Sir Frank Gavin Duffy, which imitated a verse of Tennyson. [32] He described the swearing-in of a new judge in the following terms:

“And then me thought I sat enthroned afar,  
Among my peers in scarlet ermine bound.  
Remote from the base rabble of the bar,  
That stood expectant around.”

He went on to describe the variety of judges that he joined on the bench. One was nostalgic, bordering on the maudlin, of his past glories at the bar:

“I drank delight of battle with my peers,  
My name was once the people’s battle cry,  
Alas, what is the end of hopes and fears –  
Splendid obscurity!”

And then there was the judge with disappointed expectations:

“I am cut off from hope in dull despair,  
A wretched puisne who should be a chief,  
My father suffered so, and now I bear,  
Hereditary grief.”

But there were those who remained cheerful:

“I am that happy judge who men call fair,  
Take comfort then from me.  
I work, I play, I let the mad world rail,  
I never lose my temper or my time,  
My judgment and digestion never fail,  
From merry chime to chime.”

Sir Frank went on to describe the full panoply of judicial types.

There have been a number of judges in our legal history who have expressed themselves particularly well. They remain a source of delight to us all. If I had to choose a single favourite it would be the judgment of Sir George Rich in *James v Cowan*. [33] This was known as *The Dried Fruits Case* and is an appropriate note on which to leave you for what would, in the normal course, have been dessert, of which I am informed there is none.

The passage is too long to quote in full. Once, I managed to sneak it into a judgment and do not apologise for doing so, although it may not be obvious why reasoning on s92 of the *Constitution* was applicable to the implied freedom of political discourse. [34]

To give you a taste, his Honour said:

“The rhetorical affirmation of sec. 92, that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure”. [35]

He went on:

“As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution”. [36]

Rich was rarely stirred to depart at such length from his usual consummate indolence. It is a pity. We have lost the benefit of his prose which, on all accounts, would have entertained generations of lawyers.

That he felt the necessity to actually write at length was the product of his own long struggle with the words of s92. Economy, indeed terseness, of expression is not always a source of certainty. In 1916 Rich expressed one view of s92, in a judgment which he said was wrong six months later, only to affirm, with a new majority, four years later that he had been right the first time. [37]

By the time of the *Dried Fruits Case*, to steal a phrase from David Mamet, his semantic chickens had come home to roost.[38] It can happen to any of us.

So I leave you to your just desserts, which on this occasion is six more speeches which, no doubt, will be sweet enough.

#### END NOTES

1. Tung Yin “The Blogosphere and the Law” (2006) 11 *Nexus* 79.
2. Ludwig Wittgenstein “The Blue Book in *The Blue and Brown Books*, Harper and Row, New York (1958) at 67.
3. *Morgan v Jones* (1773) Lofft 176; 98 ER 587 at 596 referring to John Locke’s *Essay on Human Understanding* particularly Chs 9, 10 and 11.
4. *Re Castioni* (1891) 1QB149 at 167-168 per Stephen J.
5. Quoted by Lord McMillan in *Law and Other Things*, Cambridge Uni P, Cambridge (1937) at 163.
6. Joseph Joubert *Pensées* (1842) Sect. 21 Part 15.
7. His love of language is manifest in his series “English Idioms from the Law” (1960) 76 *LQR* 283, 429; (1962) 79 *LQR* 245; (1965) 81 *LQR* 52.
8. *Stock v Frank Jones (Tipton) Limited* (1978) 1 WLR 231 at 236.
9. *Ex parte Emmerson* (1898) XV WN (NSW) 101 at 102.
10. *Deputy Commissioner of Taxation (NSW) v Zest Manufacturing Company Pty Ltd* (1949) 79 CLR 166.
11. *Id* at 173.
12. *Ibid*.
13. *Id* at 175.
14. *Herbert Adams Pty Ltd v Federal Commissioner of Taxation* (1932) 47 CLR 222 at 230.

15. *Matthews v Foggitt Jones Ltd* (1926) 37 CLR 455 at 459.
16. *Id* at 458.
17. *Id* at 459.
18. *Nix v Hedden* 149 US 304 (1892) at 307.
19. Barry M. Levenson *Habeas Codfish: Reflections on Food and the Law* University of Wisconsin Press, Madison (2001).
20. *Treasure Island Catering Co Inc v State Board of Equalisation* 19 Cal (2d) 181 at 186 (1941).
21. *Newberry v Cohen's (Smoked Salmon) Limited* (1956) 54 LGR 343 at 344.
22. *Id* at 345.
23. *Id* at 347.
24. *Newberry v Cohen's (Smoked Salmon) Limited* (1956) 54 LGR 343 at 347.
25. Hamlet II.ii. 91.
26. W Somerset Maugham *The Moon and Sixpence*, Penguin Classics (1993) at 17.
27. Benjamin N Cardozo *Law and Literature and other Essays* Harcourt, New York (1931) at 10-32.
28. Sir Frederick Jordan "An Article on a Legal Topic" in Sir Thomas Bavin (ed) *The Jubilee Book of the Law School of the University of Sydney 1890-1940* Sydney (1940) at 49ff.
29. R P Meagher "Australian Judicial Humour" (1990) *Blackacre* at 77-79.
30. 1 *ALJ* 1.
31. See 1 *ALJ* 2.
32. "A Dream of Fair Judges" (1945) 19 *ALJ* 43.
33. *James v Cowan* (1930) 43 CLR 386 at 422ff.
34. *John Fairfax Publications Pty Ltd v Attorney General (NSW)* [2000] NSWCA 198, 18 ALR 94; 158 FLR 81 at [77].
35. *James v Cowan supra* at 422.
36. *Id* at 422-423.
37. See *Foggitt, James & Co Ltd v NSW* (1916) 21 CLR 357 at 365; *Duncan v Queensland* (1916) 22 CLR 556 638-639; *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530 at 569-570.
38. David Mamet "Semantic Chickens" in his *Writing in Restaurants*, Penguin, New York (1987).

## Address On The Occasion Of The Retirement Of The Honourable Justice John Bryson

**ADDRESS ON THE OCCASION OF THE RETIREMENT  
OF THE HONOURABLE JUSTICE JOHN BRYSON  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES  
SYDNEY, 28 FEBRUARY 2007**

Almost 21 years ago your Honour was sworn in as a judge of this Court. You sat in the Equity Division for about 18 years and in the Court of Appeal for three years. This is a record of service to the administration of justice that few can equal. It is fitting that so many of us are gathered here today to honour it.

Being in your Honour's presence has always been, even from the bar table on the losing side, a delight of the first order. Appearing before you was always a pleasure. However, what transformed pleasure into delight was your Honour's personal style – in essence, a black letter lawyer with élan – which style was, quite simply, inimitable, in the strict sense that it defies imitation.

Your Honour has an inexhaustible supply of arcane anecdote, informed by a wide ranging intellectual curiosity, a keen eye for the ribald and the ridiculous and a fascination, bordering at times on the world weary, for human fallibility.

Everyone in this room has relished your Honour's mode of expression: cliché free, pregnant with insight, deliciously unpredictable, devoid of malice, uncluttered by excessive verbiage, manifesting a love of language and exuberantly sprinkled with wit – that form of humour which illuminates the truth. Often your expression was self-consciously old fashioned. However, as the English essayist, drama critic, caricaturist and parodist Max Beerbohm once put it: "To be outmoded is to be a classic, if one has written well." You are a classic.

For those of us who have had the pleasure of interacting with you frequently, we enjoyed examples of your facility with words on a daily basis. You are, so far as I am aware, the only judge of this Court, perhaps of any Australian court, who has ever had the privilege of a personal column in the journal of the Bar Association. Entitled "Brysonalia", the column set out quotable quotes from your early cases. Regrettably, your Honour's prolific output of such quotes has, by and large, not been recorded. On this occasion I wish to place two examples from my time at the bar on the record.

I once attended a conference on "Law and Literature" at a time when, from my ignorance, I thought that this sphere of discourse had something to do with "literature" rather than, in the post modernist fashion, a preoccupation with something called "texts".

I was sitting next to your Honour during an address by a feminist scholar – it was early days in the process of gender sensitising lawyers. The scholar announced to the assembled audience that it was essential that in the future all lawyers should be "femocrats". Immediately, your Honour put your head in your hands and said: "How can she mix those Latin and Greek roots like that? The correct word, if any, is 'gynaecrat'."

I give one other example of your Honour's style. An issue arose in a case as to whether or not certain water licences fell within the extent of the security under a mortgage of rural properties. I handed to your Honour an extract from the 9th edition of the English text Fisher & Lightwood on *Mortgages* which stated, without citation of any authority, that "all incidental rights ... will follow the security" [1]. I then handed to your Honour an unreported judgment of your brother Mr Justice Young, who quoted that sentence and applied it to conclude that a licence for an abattoir was within the mortgage [2]. Finally, I handed to your Honour the 10th edition of Fisher & Lightwood on *Mortgages* which contained exactly the same sentence but, on this occasion, had a footnote attached to the words "all incidental rights", namely a reference to the unreported judgment of Mr Justice Young [3].



Your Honour inspected each of the three documents, looked up and said: "This is going to be very difficult to stop".

Your principal contribution to this Court is, of course, in the judgments you have delivered over some 21 years. According to a computer search you have sat on about 2,600 cases. They cover the full range of equity jurisprudence in this State and, in recent years, the even broader range of the civil appellate jurisdiction.

You brought to the judicial task a profound understanding of, and empathy for, the role of legal practitioners, which you had acquired over many years of practice both as a solicitor and as a barrister. You were always aware that matters are not always as they appear to be, particularly by the time a dispute reaches an appellate court.

Your Honour's insight in that respect was no doubt informed by your role as instructing solicitor for the State Crown, appearing for the GIO, in the classic case of *Jones v Dunkel* when the High Court, somewhat scornfully, commented on the failure of counsel to call or explain the absence of the defendant and crucial witness, being the truck driver accused of negligent driving. You maintain to this day that the High Court should have taken into account the possibility that there may have been such an explanation that could not have been safely adduced before a jury. Indeed there was. In that case, it was difficult to explain to the jury that had to decide whether the defendant had been driving negligently, that he could not be called as a witness, because he was in prison interstate having been convicted on a charge of culpable driving causing death.

Your Honour always approached each individual case without preconceptions and with a willingness to hear the facts and arguments as they evolved in the course of a traditional common law trial.

Those appearing before you never had a sense that you had already formed a view or that you intended to determine the matter in accordance with some pre-existing philosophy of the law, let alone any pre-existing social philosophy. Your focus was always on what the law and the facts required in the individual case. This approach made your Honour frustratingly difficult to predict in prospect. No one left your Honour's court without the complete conviction that they had had a fair hearing according to law.

In words with which you may agree and in a style not dissimilar to your own, Max Beerbohm, the foremost drama critic of his day, expressed a preference for attending trials over the theatre and, whilst preferring the Kings Bench, said this of Chancery cases:

"There is a certain intellectual pleasure in hearing a mass of facts subtly wrangled over. The mind derives therefrom something of the satisfaction that the eye has in watching acrobats in a music-hall. One wonders at the ingenuity, the agility, the perfect training. Like acrobats, these Chancery lawyers are a relief from the average troupe of actors and actresses, by reason of their exquisite alertness, their thorough mastery (seemingly exquisite and thorough, at any rate, to the dazzled layman). And they have a further advantage in their material. The facts they deal with are usually dull, but seldom so dull as facts become through the fancies of the average playwright. It is seldom that an evening in a theatre can be so pleasantly and profitably spent as a day in a Chancery court." [4]

Your Honour also always evinced a great love for the theatre of the law, albeit with a more discerning eye for the verbal and tactical gymnastics of counsel.

Your Honour's long service as a judge of the Equity Division has meant that your Honour's judgments cover the entire range of that diverse jurisdiction. You have delivered judgments on patents and trademarks, company takeovers, special investigators, disclaimers by liquidators, the disqualification of company directors, the validity of meetings, the efficacy of a deed of charge, the interpretation of contracts, the incidents of a joint venture, the interpretation of wills, the fiduciary obligations of solicitors and partners, the law of landlord and tenant, the role of equitable rights under the Torrens system, the interpretation of superannuation trust deeds, the law of estoppel by convention, the rights of patients to access their medical records, the requirements for the admission of documents into evidence, too many permutations of Family Provision Act conflicts to mention and numerous other matters covering the full panoply of equity jurisprudence.

Your Honour brought to the appellate process your long experience as a trial judge and emphasised the respect required of an appellate court for judicial discretion. However, your elevation was accompanied by a noticeable restriction on your Honour's usual list of conversation topics. We all lost the benefit of your running commentary on the inadequacies of the Court of Appeal.

This appointment broadened your Honour's caseload: returning to an early practice with personal injury law, where your Honour displayed a compassion for plaintiffs that few had predicted. In your three years on the Court you delivered judgments of significance on such matters as the law of defamation, the liability of public authorities and the law of fiduciaries, notably observations about the threat to proper principle occasioned by the restitution industry.

"Designation of a relationship as fiduciary", you said, "is not a signal for exercise of judicial bounty" [5]. No one else has put it quite like that.

In similar style, your Honour rejected the proposition that it was negligent for two parents to go to sleep at midnight on the basis that it was not reasonably foreseeable that the guests at their teenage son's party would attempt to reignite a barbeque at 2.00am and proceed to douse it in methylated spirits. Your Honour produced the definitive judgment on what was reasonably foreseeable conduct by teenage males in such circumstances. You identified as foreseeable: "Horseplay, leapfrogging, dancing on tables, swinging on tree branches and arm wrestling" [6] but not throwing metho on a barbeque.

I know that all the judges of the Court and the profession as a whole are grateful that your contribution is to continue. I could not be more pleased personally that your Honour has agreed to return as an acting judge of the Court, to sit both at first instance and on appeal. Your continued presence will maintain the strength of this Court.

As is reasonably well known, I have more than a passing interest in legal history. I have, accordingly, particularly appreciated our own exchanges on historical matters. Your Honour's breadth and depth of knowledge in this regard is awe inspiring. You are able to summon from your prodigious memory a broad range of anecdote and information about British and Australian legal history, usually replete with full quotation.

In this, as in so many respects, the entertainment and educational value of interaction with your Honour has always been of the highest order. Inevitably, in the future, that interaction will be less frequent, albeit not absent. Insofar as it is reduced I, like all your colleagues, will miss, to that extent, the way that your joy for language, for history and for the law has enriched all of our lives.

#### END NOTES

[1] Fisher & Lightwood's *Law of Mortgages* 9th ed London Butterworths 1977 at p37.

[2] *Daniels v Pynbland Pty Ltd* NSW Supreme Court, unreported, 12 April 1985.

[3] Fisher & Lightwood's *Law of Mortgages* 10th ed London Butterworths 1988 p57 fn(m).

[4] Max Beerbohm *Yet Again*, William Heinemann, London, 1951, "Dulcedo Judicorum", pp275-276 accessible at <http://www.worldwideschool.org>.

[5] *Blythe v Northwood* [2005] 63 NSWLR 531 at [211].

[6] *Parissis v Bourke* [2004] NSWCA 373 at [52].

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

## Opening Of Law Term Dinner, 2007

**OPENING OF LAW TERM DINNER, 2007  
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 29 JANUARY 2007**

On this occasion last year my address focused primarily on the sesquicentenary of responsible government in this State. I emphasised, as I have on many other occasions, the significance for our society of the longevity of our fundamental institutions of governance, both of parliamentary democracy and the rule of the law. This year I wish to concentrate on the latter and in particular on the institutional arrangements for the independence of the judiciary.

We Australians tend to take many important things for granted. When we flick a switch we expect electricity to be available. When we turn a tap we expect clean water to be available. We rarely give any thought to the complex infrastructure that makes these every day events possible.

The same is true of our mechanisms of governance. We have every right to take these mechanisms for granted, because the institutional infrastructure is effective and robust. Nevertheless, these institutions are capable of being undermined and rendered less effective over time, not only by intentional attack but by inadvertence and indifference.

The significance of the independence of the judiciary is not always fully appreciated, particularly and understandably, by those of whom the judiciary must be independent. Indeed, some sections of our polity, and of our media, appear to resent judicial authority. Some appear to believe that there may be advantage to their own reputation by being seen to be 'tough on the judges'. This is fraught with danger for our freedoms and social stability.

There is a discernable tendency to treat judges as if they were public servants, subject to bureaucratic criteria of performance. This approach fails to recognise the constitutional role of the judiciary as a distinct arm of government. This is also fraught with danger for our freedoms and social stability.

The white heat of an election campaign is not a propitious time to debate matters of principle. Nevertheless, it is appropriate for me to state the case, at least in outline form, for judicial independence.

Judicial independence is not a privilege of judges which we acquire as a perk of office. Judicial independence is a fundamental right of citizens. It is one of the rights that is enshrined in Australia as a Constitutional principle.

Citizens are entitled to protection from the exercise of the power that others are able to exercise over their lives. Our society cannot be governed by the rule of the law without an institutionalised arrangement for the independence of the judiciary. Furthermore, democracy depends on the courts enforcing what the Parliament intended, not what the Executive wants.

We tinker with this institutional arrangement, developed over the centuries, at our peril. Today, this tinkering is often expressed in terms of judges being "out of touch". However, as Chief Justice Gleeson has observed, the real complaint often is not that judges are "out of touch" but that they are "out of reach."

I adopt entirely the observations of Chief Justice Gleeson when he said:

"Some claims that judges are out of touch are based on the flimsiest of evidence, and some are based on no evidence at all. Sometimes the real grievance being expressed is not that judges are out of touch, but that they are out of reach. Those who, in different ways, and in different circumstances, seek to influence opinions, and decision-making,

often find the judiciary frustratingly unresponsive. That frustration reveals itself in a search for ways to make judges more accountable. Judges regard judicial independence, not as a personal benefit, but as a constitutional principle that exists for the good of the community. It would be naive to think that everybody sees it in that light. Those who want to influence judicial decision-making, and regret their lack of capacity to do so, may regard the independence of judges as evidence of inappropriate isolation from the rest of the community. But judges are meant to be hard to get at. The reason for that should be obvious. If the idea that judges are easy to influence were to gain currency, there would be plenty of people exerting influence."

I repeat: judges are meant to be hard to get at.

It is essential to understand that the most frequent litigant in the courts of this State is the Executive branch of government. Citizens confront the Executive branch in all its various capacities in the course of litigation.

- As taxpayers, citizens are engaged in disputes with revenue authorities.
- As property owners, citizens are engaged in disputes with the wide range of regulatory authorities that determine what they can do with their property, indeed whether it can be compulsorily acquired, and if so, at what price.
- As employees, citizens confront the largest single employer in the State.
- As persons entitled to legislative benefits, citizens are confronted with the full range of bureaucratic decision-making processes.
- A significant proportion of injured persons seek compensation from government agencies such as hospitals, railways, road authorities and police.
- Any citizen can be subject to investigation or prosecution by the various authorities that exercise the police power of the state, not only with respect to matters that involve allegations of criminal conduct, but also with respect to the full range of regulations that seek to confine or direct the personal behaviour of citizens and corporations.
- Courts are frequently called upon to determine the validity of executive action and the constitutional validity of legislation promoted by the Executive.

People who are used to getting their way do not usually take kindly to their wishes being frustrated. In the past that has included the aristocracy, when it was the centre of social and economic power. These days such centres of power include major corporations and the mass media. Throughout history the executive branch of government has been such a centre of power.

Since the development of representative and responsible government, the 150th Anniversary of which we commemorated last year, itself building on an inherited tradition at least another 150 years before that, this nation and this State has entrenched a system in which governmental power is divided. This division was, and remains, essential to the maintenance of a society which maximises personal freedom in a stable and ordered society.

It is vital that the independence of the judiciary does not depend solely on the personal integrity and resilience of individual judges. Independence has been institutionalised.

It is more than 300 years since the English system for the administration of justice which we have inherited implemented permanent institutional arrangements for the protection of judicial independence and judicial impartiality. These arrangements are Constitutional in their character, whether contained in a written Constitution, in legislation or in unwritten practices.

Perhaps the most significant aspect of these institutional arrangements, confirmed over more than three centuries of history, is that the exercise of judicial power must be insulated, indeed isolated, from

pressure or interference by the Executive branch of government.

There is no single model for achieving this objective. Nevertheless there is a clear set of essential requirements to ensure the institutional independence of courts and the institutional impartiality of judges. Such independence and impartiality must not only exist. It must also appear to exist – reflected in the aphorism that justice must not only be done but must manifestly be seen to be done. The significance of appearances creates additional institutional restraints and requirements.

As is the case with many desirable attributes of a well functioning polity and society, the attainment of judicial independence and impartiality may, on occasions, conflict with the attainment of other desirable objectives. In contemporary discourse there is a need to strike a balance between the requirements of independence on the one hand and an appropriate measure of judicial accountability on the other. In this respect also there is no single model applicable to all nations or to all times. There is a range of legitimate choice, but there are also constraints on the scope of that range.

Our long tradition of institutional independence has been reaffirmed by the people of this State quite recently. In the early to mid 1990's, unusually, this State had minority governments of both political persuasions when independent members of Parliament held the balance of power. In 1992, on the initiative of the independents, Pt 9 was added to the *New South Wales Constitution* for the express purpose of guaranteeing the independence of the Judiciary. Subsequently the people of the State voted to entrench this provision so that it can only be altered by a referendum. The question asked of the voters at the time that the people approved the entrenchment of Pt 9 of the *Constitution* was whether they approved of an act "to prevent Parliament from changing laws about the independence of judges and magistrates without a referendum". The people of this State resoundingly adopted such a restriction.

The fact of entrenchment by referendum manifests the significance quite recently attributed to the fundamental principle of judicial independence both by the Parliament of this State and by the people of this State.

At the very heart of the institutional arrangements for judicial independence is the process for dealing with a complaint which could lead to the Parliament considering whether a judge should be removed from office. It has always been accepted that the Executive branch of government cannot have significant influence on this process. The judiciary is accountable directly to Parliament not, either directly or indirectly, to the Executive.

A few months ago the Government of New South Wales introduced amendments to the *Judicial Officer's Act* 1986, the Act which creates and regulates the Judicial Commission. These amendments followed a review conducted after public enquiry and detailed consultation with all affected parties.

- On 5 April 2005, the Government announced a comprehensive review of the provisions of the Act constituting the Judicial Commission. The Act had been in existence for about 20 years and it was appropriate that a review occur.
- The Judicial Commission and the individual Heads of Jurisdiction, including myself, accepted and agreed to cooperate with this process, about which we had been consulted in advance.
- The Government consulted the Heads of Jurisdiction about the appropriate terms of reference of the inquiry.
- The Government published a notice announcing the review and calling for public submissions. The Review encompassed the entire range of the Judicial Commission's activities, including the complaints function.
- The submissions from the public, together with detailed submissions made by the Judicial Commission itself, were consolidated and made available to the Heads of Jurisdiction as part of a comprehensive consultative process.

Not all of the recommendations of the Judicial Commission, or of the judges, were accepted by the Government. Nevertheless, between the announcement by the Attorney General of the review on 5

April 2005 and the introduction of the Amendment Bill on 2 May 2006 the process of public and institutional consultation was exemplary. The independence of the judiciary was fully respected in the process and in the result.

Sunday week ago, on 21 January 2007, a News Release was issued in the name of the Premier of New South Wales announcing that the Government intended to introduce legislation for the appointment of two persons, called "community representatives", to what was described as "*the* Conduct Division of the New South Wales Judicial Commission".

A Conduct Division under the existing, recently reaffirmed, legislation is constituted by three judicial officers, one of whom may be retired. There are no standing members of a Division. The members are appointed for each reference.

No reason was given as to why, so soon after a detailed and comprehensive review of these matters, it was nevertheless necessary to make further changes.

The membership of a Conduct Division of the Judicial Commission is a critical, indeed an essential, feature of the Constitutional arrangements for judicial independence in this State. On Monday of last week I wrote to the Premier expressing my disappointment that a matter of such significance to the relationship between the Executive and the Judicial branches of Government should be announced in this manner and without any consultation with the judiciary.

The proposal contained in the News Release is that "a community representative" will become a member of any such Division. I wish to make it clear that I do not regard this aspect of the proposal to be necessarily inconsistent with the principle of independence of the judiciary. Nevertheless, if I had been consulted I would have said that in my opinion this is not a desirable development and I have not yet seen any argument advanced as to why it is so regarded.

In my opinion, the proposed Conduct Division system would not work as effectively as it has in the past. The work of such Divisions involve detailed investigation of facts, a task in which judges have special skills. Once the facts are known the result is usually quite clear. There is little room for applying values let alone "community values", however they are to be ascertained. The principal task of a Conduct Division is to present the facts, where necessary, to the Parliament. It is in the Parliament that the full range of "community values", not just the "values" of a single individual however "representative", are applied.

All of these matters could have been canvassed with the proponents of this proposal if any kind of consultation had occurred prior to its announcement.

It is important to maintain a sense of perspective about this matter. In the 20 years of the Commission's existence, it has only ever appointed Conduct Divisions on 14 occasions. On six of those occasions no report was finalised, because the judicial officer resigned or retired. On four occasions the Conduct Division dismissed the complaint and on four occasions the complaint was upheld. Three reached the stage of a report to Parliament.

When the Judicial Commission, including the provision for Conduct Divisions, was established about 20 years ago it was a highly controversial proposal amongst judges. It remains so in other States and at the Commonwealth level, which have rejected, often after detailed inquiry, adopting any such system because of the potential for an adverse effect on judicial independence and judicial impartiality.

It will be interesting to see whether this idea that a "community representative" should hear and determine serious complaints is to be applied to other bodies which deal with public complaints, e.g. in the police force.

The News Release of 21 January announced that "community representation works well in the United Kingdom". This is a surprising observation. Provision for non-judicial participation at one late stage of the process of investigating allegations of judicial misconduct was only introduced in England and Wales in April of last year. So far as I am aware, that provision has never been invoked.

The new English structure contains many closely related protections for the independence of the judiciary, including express declarations of judicial independence and the transfer of many of the

functions performed in this State by the Attorney General, from the Lord Chancellor to the Lord Chief Justice of England and Wales either in whole or by conferring a power of veto on the Chief Justice. The complaints process is jointly accountable to both the Lord Chancellor and the Lord Chief Justice. All relevant appointments are made by the Lord Chancellor with the agreement of the Lord Chief Justice.

Under the new English system the functions of a Conduct Division in this State are performed by an individual judge nominated by the Lord Chief Justice with the agreement of the Lord Chancellor. The scope for public participation is a very limited one. It exists only at the level of what is called the Review Body, which will consist of two judicial officers and two lay persons. However a Review only occurs when the Lord Chancellor and the Lord Chief Justice *jointly* agree that such a review is appropriate or, in limited circumstances, the Ombudsman refers a matter or when an affected judge appeals. Most significantly, lay members cannot be appointed by the Lord Chancellor other than with the agreement with the Lord Chief Justice. In short, the judiciary has the power of veto over any such appointment.

The English provision appears to be distinctively different from the proposal in the Premier's News Release.

The issue that has given me the greatest concern is the appointment process of the so called "community representatives". In the News Release the Premier announced that two community representatives would be appointed, but only one would sit on any particular Conduct Division inquiry. The News Release contained few details on this matter.

Some of the media reports suggested that one of the "community representatives" could be from a victims of crime group. This suggestion did not appear in the Premier's News Release. This idea should be rejected.

First, although the Judicial Commission has a role with respect to sentencing, a Conduct Division has nothing to do with sentencing and I cannot envisage a situation in which it would.

Secondly, every Conduct Division must be impartial and seen to be so. No person with any kind of agenda should be appointed to a Conduct Division.

I reiterate that, notwithstanding my opinion that no case has been made for this change, the concept of a non-lawyer participating in the decision making process of a Conduct Division, is not in itself necessarily offensive to the principle of judicial independence. Indeed such participation occurs now in the deliberations of the Judicial Commission itself with the four non-judicial representatives of the Commission.

However, in my opinion, it would be wrong and contrary to constitutional principle if an appointment to a Conduct Division were to be made by the Executive branch of government. It is important to emphasise that membership of a Conduct Division is quite different from membership of the Judicial Commission.

A Conduct Division has a distinct Constitutional role of a fundamental character for the separation of powers in this State. By s53(3) of the New South Wales *Constitution*, express provision is made that the holder of judicial office can be removed only in accordance with that section and any additional procedures and requirements contained in other legislation. Section 41 of the *Judicial Officer's Act* 1986 makes a report of a Conduct Division an *essential* requirement for the removal of a judge. In my letter to the Premier last Monday, I indicated my opinion that it was contrary to principle that the Executive determine the membership of such a body.

For over 300 years, the principle underpinning judicial independence has been that it is to the Parliament, and to the Parliament alone, that the Judiciary is accountable. Judges can only be removed by Parliament. Under our constitutional arrangements a Conduct Division report is an essential aspect of the Parliamentary process of removal. No nominee of the Executive branch of government, even if called a "community representative", should be involved in this fundamental aspect of our institutional arrangements.

I am pleased to inform you that, in response to my letter to the Premier, the Attorney General has informed me that, if re-elected, the Government will undertake consultations about the details of the proposal. The Attorney expressed his opinion that the Judicial Commission should be involved in the

selection of the two “community representatives” and in determining which should sit on a particular matter.

I trust that in the course of such consultations the judiciary of this State can rely, as we have in the past, on the support of the legal profession to maintain the principle of judicial independence.



**R Annable, *A Setting for Justice: Building for the Supreme Court of New South Wales*, Sydney, UNSW Press, 2007**

**Foreword**

**By the Honourable J J Spigelman AC  
Chief Justice of New South Wales**

The location, plan and construction of the original Supreme Court building resulted more from chance than design. On 7 October 1819 Macquarie laid the foundation stone for the court, but St James' Church was built over it. On 20 March 1829 Macquarie laid the foundation stone for the Georgian public school, which was built on the other side of Elizabeth Street.

Macquarie left in December 1821. Greenway was dismissed from government service in November 1822. The experience of Joern Utzon and the Sydney Opera House was not unprecedented. As this volume records, the construction of the courthouse was finished under contract. The result was said to be only fit for an old barn and not at all in character with the building.

No part of it was ready until August 1827. In the meantime, on 17 May 1824, the Supreme Court of New South Wales came into being and had been formally launched by Chief Justice Forbes in the Georgian School House.

On this side of the street the contract work caused constant trouble. By 1832 the Chief Justice was complaining of serious cracks in the court's partition walls and expressed the fear they would collapse. There was the constant threat of ceilings and plaster falling down. By 1838 the state of the building was perilous due to some neglect of architect or builders or both and to the weakness of the lime mortar which, having been made from sea shells in the early days, was frail and too sparingly used.

It is rare for a building of heritage significance to be recycled for its original use. This was the objective of this significant project of restoration of the original Supreme Court complex. Restoration of our heritage is food for the soul.

This has been a magnificent restoration project. The process and some of the trials and tribulations involved are here recorded. I wish to acknowledge some of the principal contributors to that process. The Honourable Simon Sheller and the other members of the Building Committee of the Court have participated in the restoration of the complex with dedication and enthusiasm over many years. The Attorney General's Department has, by various officers, supported the project throughout.

This volume contains some of the original research upon which the restoration was based and reflects the result of that research in physical form. It is a definitive and much welcome history of one aspect, but a vital aspect, of the history of the Supreme Court of New South Wales.

**STATUTORY INTERPRETATION: PRINCIPLES AND PRAGMATISM FOR A NEW AGE, (MONOGRAPH), SYDNEY, JUDICIAL COMMISSION OF NEW SOUTH WALES, 2007**

**FOREWORD**

**BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

Lawyers are traffickers in words. Words are the vehicle by which the law and legal relationships must be conveyed. Words are our basic tools of trade. Interpreting words is a large part of what we do.

Lawyers, including parliamentary draftsmen, attempt to be as precise and clear as possible and to anticipate the kinds of issues that may arise in the course of application of legislation. However, clarity and precision can never be capable of complete achievement, not least because the verbal formulae devised in legislative form often have to be stretched to factual situations that no-one could have or did anticipate.

Hence litigation about what words mean. As Lord McMillan once put it:

“One of the chief functions of our courts is to act as an animated and authoritative dictionary.”<sup>1</sup>

One of the difficulties is, of course, the richness of our language which gives rise to ambiguity, indeterminacy or inexplicitness. In English, as in French, in the words of Joseph Joubert:

“Words are like eyeglasses, they blur everything which they do not make more clear.”<sup>2</sup>

Over the last two or three decades there appears to have been a paradigm shift in all forms of interpretation of legal texts, including constitutional, statutory and contractual interpretation. The shift is from text to context. Literal interpretation – a

focus on the plain or ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now!

Of course context was always accepted as significant. Sir Owen Dixon, who many would place at the literalist end of the spectrum of judicial approaches to interpretation, said in 1934:

“The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the object it seeks to achieve, so as to arrive at the meaning attached to them by those who must use them.”<sup>3</sup>

Nevertheless, there does appear to have been a change in the emphasis given to context, by referring to it in the first instance and not simply after some verbal or grammatical ambiguity has been identified.

Justice Learned Hand explained the approach now generally applied:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, sources of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indices of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”<sup>4</sup>

However, as Felix Frankfurter once put it:

“While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature.”<sup>5</sup>

The collection of essays in this monograph is a testament to the recognition by judges and legal scholars of the central significance of statutory interpretation to contemporary legal practice, including litigation. There is now a widespread acceptance that statutory interpretation constitutes a distinct body of law. As I have said in the paper that is reprinted herein, many areas of law are entirely the creation of statute and no area of the law has escaped modification by statute, often substantial modification. It is, perhaps somewhat ironic, that one of the areas of the law that has been least modified by statute is in fact the law of statutory interpretation. Not least for that reason, the principles of statutory interpretation require the kind of detailed attention that appears in this monograph.

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<sup>1</sup> Lord McMillan *Law and Other Things* Cambridge University Press, Cambridge, 1937 at 163.

<sup>2</sup> Joseph Joubert *Pensées* 1842 Sect. 21 Part 15.

<sup>3</sup> See *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 at 244.

<sup>4</sup> *Cabell v Markham* 148 F. 2d 737 at 739 (1945).

<sup>5</sup> Felix Frankfurter "Some Reflections on the Reading of Statutes" 1947 47 *Columbia Law Review* 527 at 543.

**Philip Ayres, *Owen Dixon*, Carlton, The Miegunyah Press, 2007**

**FOREWORD**

**BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

Sir Owen Dixon possessed the most formidable legal mind in all of our history. He had a particular genius for reasoning and clarity of expression which placed him in the first rank, not only of lawyers but of philosophers.

He was one of the great common law judges of the 20<sup>th</sup> century. His reputation as such was widely acknowledged. As Lord Reid, one of the few English judges of the 20<sup>th</sup> century who could join Dixon in the first rank of common law judges, said of him: "There is no greater authority on questions of legal principle" (*R v Warner* (1969) 2 AC 256 at 274). Similarly Lord Bingham, the current Senior Law Lord, referred, in a review of the first edition of this book, to "the rare and universal regard in which Dixon was held in the common law world".

To lawyers of my generation Sir Owen Dixon was the most important single influence on the development of our own attitudes to the law. His influence today, inevitably, is not as significant as it once was, but it remains profound. As the common law continues its nine century old tradition of gradual development through the intersecting forces of continuity and change, Dixon will be one of those handful of judges in the history of the common law whose judgments are still quoted centuries after his death.

For those, like myself, who had hitherto known Dixon only from his legal writings, the publication of this biography came as a considerable revelation. By the application of the skills of the historian, whilst drawing on others with knowledge of the legal issues that arose during Dixon's legal career, Phillip Ayres has painted a broader picture of Dixon's public career, of the depth of his intellectual interests, which sometimes came at the expense of breadth, as well as a perceptive analysis of his personality and character. Drawing on an amalgam of public utterance, unpublished diaries, private correspondence and the reminiscences of friends and

acquaintances, this is a work of significant scholarship and a profound portrait of an extraordinary Australian.

The central narrative of Dixon's extraordinary contribution to the law is supplemented by the detail of his other contributions to public service, particularly during the Second World War. His personal background and family life, together with a rich vein of anecdote, is set forth, illustrating his strength of character, particularly the high standards of personal conduct and the ethical principles that he applied with rigour, not only to himself but in his judgment of others

Of course some of the values that he held so firmly, which were in large measure Victorian values, are no longer widely held. In many respects his beliefs would, today, be characterised as prejudices of an unacceptable character. He frequently expressed sentiments that would now be regarded as anti-semitic and racist. This biography, which does not try to hide any of these blemishes, accurately depicts Dixon as representative of his time. In this, as in so many other respects, Phillip Ayres presents the facts sympathetically to his subject, with no suggestion of hagiography, but in such a way as to permit any reader to make an independent assessment.

As Samuel Johnson, a biographer of note and the subject of one of the greatest biographies of all time, said:

“No species of writing seems more worthy of cultivation than biography, since none can be more delightful or more useful, none can more certainly enchain the heart by irresistible interest, or more widely diffuse instruction to every diversity of condition.”

This book is a fine example of the genre and serves these purposes well.