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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2009**

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“The Father of Australia”, Sydney Morning Herald, 26 December 2009

THE MACQUARIE BICENTENNIAL

BY JAMES SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

On 28 December 1809 Lachlan Macquarie arrived in Sydney and assumed office as the fifth Governor of New South Wales on 1 January 1810. With supervisory jurisdiction over the Lieutenant Governor in Tasmania, Macquarie served as the chief political executive of modern Australia – a continent which he named by endorsing the suggestion of Matthew Flinders – for a period of twelve years. He is the second longest serving person in such office in our history, after Sir Robert Menzies.

Macquarie was the first head of the executive to strive to transform the colony from an open-air prison to a British settlement. During his period of office many of Australia’s foundational institutions, social and physical infrastructure were established or the seeds sown for their development. This included the full range of public facilities – schools, churches, hospitals, roads, lighthouses and other public buildings. Upon his retirement he was able to list 265 distinct public works constructed during his term of office.

Macquarie created a range of new institutions: for education, including aboriginal education; for social welfare – the Benevolent Society; for child protection – the Orphan School at Parramatta; as well as creating our first coinage – the “Holey Dollar” and the “Dump”; the first commercial bank – now Westpac; and supporting the development of agriculture, industry, trade and the exploration of the continent for future growth.

His most dramatic and, in the event, only partially successful political intervention, was his modification of the severity of the convict experience and his attempt to eliminate completely any permanent convict stain. His basic policy was that, subject to good behaviour, convicts who had served their terms or had been pardoned were entitled to be restored to the position in society that they had originally occupied. That policy was particularly focused on the convicts who had arrived with technical skills or manifested ability during their period in Australia. This infuriated the local elite.

The Australian social system of this era was based on castes. Different social groupings were segregated by differences of function and culture – almost as distinct as the castes of the Indian subcontinent. The castes included convicts, emancipists, free settlers, civil officials, the military, the native born and Aborigines, together with the human flotsam of a seaport in The Rocks.

In an age preoccupied by status, for those who could not rely on the presumption of respectability conferred by aristocratic birth or lesser forms of “breeding”, actual conduct alone revealed the character entitling one to gentry status. Once a person had manifested a defect in character, only his or her exclusion from polite society could restore the proper social order. This policy of social exclusion was so widely accepted that those, like Macquarie, who took a different view, could not escape censure by those whose status was thereby rendered less secure.

Macquarie’s “clean slate” policy was more meritocratic than egalitarian. It was in part a product of Enlightenment principles, in part a product of Macquarie’s own achievement as a self-made man who had risen from a family background of genteel but abject poverty in rural Scotland, and in part the pragmatism of a military man who was most concerned with what worked.

It would be wrong to cast Macquarie as a liberal democrat. He was formed by years of military training and exercise. He thought and acted as an autocrat, albeit a benevolent one at times of his choosing. He often treated disagreement as insubordination.

His outreach to the aborigines – with whom he instituted an annual gathering at Parramatta in a spirit of reconciliation which, regrettably, did not survive – did not prevent him from instituting reprisals or continuing policies of land dispossession. Nor did his liberality towards convicts – he issued a steady flow of pardons, conditional pardons and tickets of leave – impede his deployment of flogging and other harsh punishment at his discretion.

However, his general policy towards convicts was an anathema to the social exclusivists in the colony and to the Tory government in England, which was hostile to the spirit of improvement that Macquarie represented, was suffering an acute fiscal crisis and was determined to ensure that transportation to Australia again became a significant deterrent for the criminals of Great Britain. There was a widely held view amongst the lower orders in England that being sent as a convict to NSW was preferable to being unemployed in England. It probably was.

The economic depression after the final victory against Napoleon in 1815 led to a crime wave. The principal contemporary concern of the British political nation was fear of the lower orders, both in terms of criminality and also political radicalism. Dominating the intellectual mindset of this political nation was the apocalyptic experience of the French Revolution followed by two decades of almost continual warfare. There was a visceral fear of what the political elite called “the Mob” and political radicals called “the People”.

Macquarie's liberal policies were overturned by his immediate successors. The result was the enhancement of severity of punishment for serving convicts, the diminishment in the social standing of emancipated convicts and a substantial reduction in public expenditure.

Perhaps the principal reason why Governor Macquarie is remembered with a degree of fondness not afforded to any of the other early Governors is his legacy of public buildings – buildings of urbanity and gentility – which, at least over recent decades, have come to be admired as a fundamental part of our national urban heritage.

His first major public building was Sydney Hospital in Macquarie Street – of which two wings remain – Parliament House and the Mint, clearly influenced by Macquarie's time in India – with their graceful verandahs of double Tuscan-upon-Tuscan colonnades. The hospital was built by private enterprise, at a time when Macquarie had been told not to spend any money on buildings, in exchange for a three year monopoly on the import of rum.

It was, like many of Macquarie's projects, open to criticism – it was too big, there were no kitchens or lavatories – but it is a precious inheritance. The “Rum Hospital”, as it became known, was Australia's first private/public partnership and, in many respects, is the model for the construction of most of the tunnels and expressways that have been built in this city in the last two decades. Only the unnecessary step of charging the public through the intermediation of alcohol has been superseded.

[Macquarie managed to ignore or evade most attempts to constrain his public works programme. At the time he was appointed in 1810, Macquarie was told by the then Secretary for the Colonies to restrain any extravagance in public works and not to build anything without prior approval. He never obeyed. Furthermore, he regularly deceived London

by delaying dispatches until any reply could not interfere with the building work which he had commenced without prior approval.]

Macquarie has left us, amongst numerous public buildings, some of our most graceful churches, an obelisk, the Government House stables, now occupied by the Conservatorium of Music, the Female Factory at Parramatta, the Hyde Park Barracks, the South Head Lighthouse – the present structure being a replica when the unsafe original had to be torn down. There is a striking photograph of the two lighthouses side by side. Some of Macquarie’s public works have not survived. I particularly regret the loss of the folly that was the Newcastle lighthouse in the shape of a Chinese pagoda.

Macquarie has left an indelible imprint on the physical structure of Sydney and its immediate region. He brought a vision to the structure of the township and to its infrastructure and built form which has rarely been equalled, let alone surpassed. In all of this his wife Elizabeth made a critical contribution. It was she who brought a book of building and town designs. Her role is recognised in the title of the road and point, Mrs Macquarie’s Chair, and in the not well remembered facts that Elizabeth Street is named after her and Campbelltown bears her maiden name.

One of Macquarie’s first acts was to organise and plan the roads – so that they would be at least 50 feet wide – which required some houses to be removed and to build new roads. Macquarie brought a sense of civic order to a streetscape where before, as one historian has put it: “no honest man could fall drunk without fear of being savaged by foraging pigs or trampled by straying cattle.”

Macquarie gave our principal streets their names; changing the name of High Street to George, after the King, naming the parallel streets after the King’s sons, the Dukes of York, Clarence, Kent and Sussex, or

after the principal political figures of the day, Pitt and Castlereagh, and other streets after his predecessors – Phillip, King and Bligh, whilst naming the putative principal official thoroughfare on the eastern ridge of the town after himself.

His urban planning extended to the location and development of the regional towns of Liverpool, Windsor, Richmond, Castlereagh, Wilberforce and Pitt Town. One of his most important public works, of vital economic significance, was the construction of the road over the Blue Mountains, establishing and naming the first town over the ranges, Bathurst.

Macquarie made a major contribution to Australia. That his influence could have been greater if his liberal policies towards convicts and his public works programme had not been overturned by the Imperial government, does not detract from his status in the first rank of Australian statesmen. His tomb in Scotland, with only some exaggeration and inadequate recognition of the critical role of Elizabeth, bears the inscription “The Father of Australia”. His bicentennial is worthy of commemoration.

THE FORGOTTEN FREEDOM: FREEDOM FROM FEAR

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The second recital of the Preamble to the *Universal Declaration of Human Rights* of 1948 identifies “as the highest aspiration of the common people” four specified freedoms of which one is freedom from fear. When the Declaration came to be implemented in 1966, in the form of treaties to which states could accede, by the *International Covenant on Civil and Political Rights* (“ICCPR”) and the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), a recital to each Covenant confirmed that freedom from fear could only be achieved if conditions were created in which every person could enjoy the rights in both Covenants.

The source of the four freedoms identified in the *Universal Declaration* – freedom of speech, freedom of religion, freedom

from fear and freedom from want – is the rhetoric of President Franklin Roosevelt in his annual State of the Union Address to Congress on 6 January 1941. Roosevelt’s “Four Freedoms” were in part addressed to the United States experience during the Great Depression and in part addressed to American support, albeit not then military, for the people of Europe against Nazi aggression. Eventually, the objective of ensuring freedom from fear and from want would be incorporated in the official statement of war aims issued by Roosevelt and Churchill, which became known as the Atlantic Charter.¹

The centrality of fear to Roosevelt’s discourse commenced with his first inaugural, addressed to the economic emergency that he faced immediately upon assuming office. The most memorable line was: “We have nothing to fear but fear itself”, a line stolen from Montaigne via Thoreau, but still memorable. This response to the collapse in public confidence, gave economic and social content to the idea of freedom from fear. Originally it was expressed in terms of securing the employment and social welfare of citizens.² Later, in his 1941 Address to Congress and in the Atlantic Charter, an international dimension was added in terms of protection from physical aggression.³

Eleanor Roosevelt served as chair of the Human Rights Commission of the United Nations, which drew up the *Universal Declaration*. Because of her influence, President Roosevelt's Four Freedoms became enshrined in the second recital of that Declaration.⁴ They were repeated in the preambles to the ICCPR and the ICESCR of 1966.

In the immediate post war years, President Truman pursued the theme of freedom from fear in the context of violence and threats of violence directed at African Americans, including mob violence and police brutality. He established a Committee on Civil Rights which focused on both actual violence and fear of violence proposing, ahead of its time, measures which would be adopted in subsequent Civil Rights Acts.⁵

The first international reflection of the *Universal Declaration* was the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950. It made no reference to the Four Freedoms.

Perhaps the English lawyers who influenced the latter significantly⁶ regarded references to “freedom from fear” and freedom from want” as some sort of frolic by Mr and Mrs Roosevelt. Their intellectual heritage – by Austin and Dicey out of Bentham – reflected the intellectual amnesia of British jurisprudence about the natural law language of human rights freely deployed, for example, by Blackstone, which 19th century British texts had systematically distorted.⁷

The Significance of Fear

Over recent decades legal discourse, at an international level and within nations, has given the language of human rights salience and, in some contexts, dominance. Although still resisted by some, rights talk now provides, and is likely to continue to provide, the vocabulary of much legal discourse. The concept of freedom from fear has not featured prominently in this development. Indeed, to a very substantial degree, it has disappeared from legal discourse. Freedom from fear has become the forgotten freedom.

This is regrettable because the most significant impact on personal freedom occurs through the mechanism of fear, rather

than through actual direct interference with such freedom. No social system, including any governmental system, can possibly operate by reliance on physical restraint or direct interference alone. This must be so by reason of the limitation on resources available to those who wish to interfere with the freedom of others.

The most effective, indeed the most common, form of interference with freedom arises from the self-imposed restraint on behaviour because of the threat of adverse consequences if the behaviour is engaged in. Furthermore, the restraint on behaviour is greater, indeed almost always much greater, than would occur on the basis of calculation of the probability of those consequences actually occurring.

Fear is a socially pervasive human emotion. Indeed, it is the first emotion mentioned in the Bible, when Adam reacts in fear of God upon becoming aware of his nakedness.⁸ Freedom from fear should be restored to a central position in human rights discourse.

Once it is accepted that protection of human rights requires not only the prevention of direct interference, but also a response to the threat of interference, then freedom from fear can be seen

to inhere in most of the human rights protected by international instruments and domestic provisions. Such freedom is not, itself, a freestanding right. It should, however, be recognised as a critical dimension of other rights. There is force in the observation that Roosevelt conceived freedom from fear in terms of the fear that other rights would be violated.⁹

One academic commentator is technically correct to say that human rights instruments contain “no explicit human right to freedom from fear”.¹⁰ However, this understates the significance of such freedom.

To take the example of the *Universal Declaration of Human Rights*, it is perfectly appropriate to think about most of the rights identified in terms of the significance of threats, as distinct from direct infringement:

- Article 3 the right to life, liberty and security of person.
- Article 4 the prohibition on slavery.
- Article 5 the prohibition on torture or cruel, inhuman or degrading treatment or punishment.

- Article 7 the right to equal protection of the law and protection against discrimination or incitement to discrimination.
- Article 9 protection against arbitrary arrest, detention or exile.
- Article 10 the right to a fair hearing by an independent and impartial tribunal.
- Article 12 the prohibition on arbitrary interference with privacy, family, home or correspondence and attacks upon reputation.
- Article 13 the right to freedom of movement.
- Article 14 the right to asylum from persecution.
- Article 16(1) the right to marry and to equal rights in marriage.
- Article 16(3) the entitlement of family to protection.
- Article 17 the prohibition on arbitrary deprivation of property.
- Article 18 the right to freedom of thought and conscience.
- Article 19 the right to freedom of opinion and expression.
- Article 20 the right to peaceful assembly and association.
- Article 22 the right to social security and to economic, social and cultural rights required for personal dignities.

- Article 23 the right to work and freedom of choice for employment and protection against unemployment.
- Article 26 the right to education.

The practical ability to enjoy all of these rights can clearly be affected by threats. This is because persons are inhibited by fear of the infringement of each such right. Actual interference is not the only way in which each such right can be abrogated in practice. The well known “chilling effect” of constraints on the exercise of freedom of expression¹¹ is an effect that can be replicated in virtually every other context protected by human rights instruments. The significance of freedom from fear deserves more recognition than it has hitherto received.

There is one area in which freedom from fear is clearly acknowledged in human rights discourse. This is in the context of refugees. The *Convention Relating to the Status of Refugees* of 1951 (“Refugee Convention”) defines a refugee in terms of the now well-established phrase ‘well-founded fear of persecution’. It clearly distinguishes between a person who is “unable” to return to his or her country of citizenship, from a person who is “unwilling” to do so “owing to such fear”.

In the refugee context, the relevant fear of persecution must be on the basis of race, religion, nationality, membership of a particular social group or political opinion. However, the fear of persecution, or the fear of the imposition of adverse consequences of a character to which persecution may not be entirely an appropriate word, is something that can arise in contexts involving other human rights.

It is not possible in a lecture of this character to attempt to distil examples of the significance of fear from the vast body of writing and case law on the Refugee Convention. Nevertheless, this body of precedent may prove instructive for debate in the context of other human rights violations. It is, however, pertinent to note that this well-known body of precedent extends to freedom from fear of conduct by both state and non-state actors. The extension of the rights recognised by other human rights instruments to protection from conduct by non-state actors is an important issue in many contexts.

The Enlightenment Inheritance

The significance of freedom from fear was recognised by Montesquieu in his classic work of political philosophy *The Spirit of the Laws*. In Book XI, in the very chapter where he made his most influential contribution – the significance of the separation of legislative, executive and judicial power – Montesquieu stated, by way of an introductory paragraph to that proposition:

“The political liberty of the subject, is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted, as one man need not be afraid of another.”¹²

Book XI is concerned with political liberty with respect to the constitution of States. Book XII is concerned with political liberty from the perspective of each subject. In this latter respect Montesquieu reiterated the central significance of tranquillity of mind, when he said:

“[Political liberty] consists in security, or in the opinion people have of their security.”¹³

The word Montesquieu used, which is accurately translated as “security” in English, was the word “sûreté”, not the French word “sécurité”. The former carries the connotation of protection against dangers and threats which are external, as distinct from protection against defects or failings or errors. As I will presently show the word “sûreté”, and its English version “security”, has a significant role to play in international and national human rights instruments. Its origins can be traced back to the influence that Montesquieu’s book had in America and France.

The concept of security as an element of personal freedom was widely held in Enlightenment thought. That was a revival of the Roman concept of “securitas”, explained by Cicero as an individual condition involving tranquillity of spirit and freedom from care. Montesquieu’s link between liberty and tranquillity is reminiscent of Cicero’s aphorism: “Peace is liberty in tranquillity”.

Adam Smith, in his books *The Theory of Moral Sentiments* and *The Wealth of Nations*, also identified personal security as the fundamental purpose of the system of justice and of civil government. He identified economic prosperity as a product of “order and good government” which had the effect of ensuring “the

liberty and security of individuals”.¹⁴ Similarly, his French equivalent, Condorcet, placed the attenuation of fears, whether based on superstition – what Smith called “the terrors of religion”¹⁵ – or on political despotism, as the essential basis for prosperity.¹⁶

It was only after the Napoleonic wars that the word “security” came to be used primarily in terms of relationships between states.¹⁷ At the time of the formulation of the French Declaration and of the United States Bill of Rights – both of which were influential upon the drafters of 20th century human rights instruments – freedom from fear, expressed in terms of personal security, was an individual right which the state was required, indeed established, to protect.

Montesquieu was an important influence on the American founders – both directly and through the works of Blackstone. In his *Commentaries*, Blackstone identified three principal rights which he described as “rights of all mankind”.¹⁸ They were personal security, personal liberty and private property. This reflected the influence of Montesquieu on Blackstone.¹⁹

For Blackstone, the words “personal security”, as the first absolute right he identified, are deployed in the same sense as Montesquieu’s definition of liberty in terms of the “tranquillity of spirit”. He defined the right in the following way:

“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”²⁰

Blackstone also incorporated in his concept of personal security a right to social welfare of the basic necessities of life, echoing the economic and social rights subsequently developed. Indeed, Blackstone identifies the English legal tradition as more “humane” than the Roman civil law tradition in this respect.²¹

For present purposes it is pertinent to note that Blackstone included both actual and threatened violence as falling within the right to personal security. He said:

“Besides those limbs and members that may be necessary to man ... the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of *menaces*, assaults, beating, and wounding”²² [Emphasis added.]

The influence of these Enlightenment thinkers was reflected in the early human rights instruments. The first such reference was in the *Declaration of the Rights of Man and of the Citizen* adopted by the National Assembly of France on 26 August 1789 as follows:

“The aim of all political association is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security, and resistance to oppression.”

This idea was repeated in the *Declaration of the Rights of Man and Citizen* in the French Constitution of 1793 which identified the natural rights of man as: “equality, liberty, security, and property”.

Notably, Article 8 of the Declaration of 1793 went on to give this right to security content, as follows:

“Security consists in the protection afforded by society to each of its members for the preservation of his person, his rights, and his property.”

I note that each of these French references, translated by the word “security”, are to the word “sûreté”. The French Declarations were amongst the matters taken into account in the drafting of Article 3 of the *Universal Declaration*.

Security of the Person

That there is a tension between liberty and security has long been at the heart of social contract theories of the state – Rousseau, Hobbes and Locke. In critical respects, the power of the state as the protector of public security, but also as a potential source of persecution, underpins liberal democratic political philosophy and determines much of the content of the rule of law. Traditionally, the contrast is between liberty as an individual right and security as a public or collective interest. However, as Montesquieu and Blackstone emphasised, security is also an individual right.

In important jurisdictions, the interpretation of contemporary human rights instruments has subsumed “security” within the right to “liberty”. The idea of security as an individual right has, in large measure, been lost.

Security is a condition that exists in an inverse relationship to the risk of an adverse consequence. Each individual's sense of freedom is determined by the fear that such a risk may eventuate. The freedom of individual citizens from fear or, to use the terminology of Cicero and Montesquieu, each individual's sense of tranquillity, has not received, in my opinion, sufficient attention in human rights discourse. Specifically, security of the person, from actual violence and threats of violence is not a focus of that discourse. Yet such security appears to me to be fundamental, both in itself and to enable persons to enjoy other rights.

In the ICCPR, and in other human rights instruments, an individual right to protection from violence is recognised in the right to life and in the prohibition on torture and on cruel, inhumane or degrading treatment. However, there is a real issue as to whether further protection from violence is provided by the right to security of person found, for example, in Article 3 of the *Universal Declaration of Human Rights*, reflected in Article 9 of the ICCPR.

Article 3 of the *Universal Declaration*, protects the right to life, liberty and security of person. When the principles of the *Universal Declaration* came to be set out in the ICCPR, Article 3

was divided so that the right to life was set out as Article 6 and the right to liberty and security of person was set out in Article 9(1).²³

In this respect, Article 9 of the ICCPR followed Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950²⁴ (“European Convention”), which had separated the right to life in Article 2 and made provision in Article 5 for the “right to liberty and security of person”. Furthermore, Articles 5 (European Convention) and 9 (ICCPR) each elaborated in detail on the right to liberty, by setting out a range of provisions concerned with arrest and detention. There was, however, no elaboration of any character of the right of security of persons. This has proven to be a significant omission.

The right to security of person is, perhaps, the least developed of any of the human rights protected by international human rights instruments. On this matter, the human rights case law and literature, outside Canada and South Africa, to which I will refer, is tiny when compared with that on most other human rights.²⁵

Security of the person is also acknowledged in other international human rights instruments. Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965 (“CERD”) set out the basic undertaking of the State parties to prohibit and eliminate racial discrimination and to guarantee certain rights without distinction as to race, etc. Amongst the rights so guaranteed is Article 5(b):

“[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”.

Although the focus of case law and commentary on Article 5(b) of CERD has been on actual violence, threats and intimidation are clearly encompassed within its scope.

This Article is notable in three respects. First, it recognises “security of the person” as separate and distinct from “liberty”. Secondly, it gives specific content to the concept of “security of person” in terms of “protection against violence or bodily harm”. Thirdly, it imposes an obligation upon ratifying states to protect the

right to security from the activities of persons other than government officials.

Each of these three matters has been problematic in other human rights instruments which refer to security of the person. I will briefly outline how these matters have been considered in a number of jurisdictions.

Europe

There is a clear preponderance of case law and commentary under Article 5 of the European Convention, accepted in English case law and commentary, to the effect that the right to security of person has no operation independent of the right to liberty in Article 5.²⁶ This approach is based in part on the context in which Article 5 appears. Although the first sentence would appear to give the word “security” an independent operation from the word “liberty”, the remainder of the Article is only concerned with deprivation of liberty. Some other Articles in the European Convention also begin with a broad statement and proceed to define its content.²⁷

Accordingly, the case law on Article 5 of the European Convention focuses on arbitrary detention.²⁸ Attempts to establish a right to security of the person not involving deprivation of liberty, have been unsuccessful. For example, the former European Commission on Human Rights (now superseded) did not accept an argument on the part of a complainant that the authorities failed to protect him from attack by the IRA.²⁹ Similarly, when a terminally ill applicant sought a guarantee from prosecution of her husband if he should assist in her suicide, the House of Lords rejected the contention that Article 5 had any application.³⁰ This decision was upheld by the European Court of Human Rights.³¹

The European position is summarised in The Council of Europe's *Implementation Guide to Article 5* which states:

“The ‘right to liberty and security’ is a unique right, as the expression has to be read as a whole. ‘Security of person’ must be understood in the context of physical liberty and cannot be interpreted as referring to different matters (such as a duty on the state to give someone personal protection from an attack by others, or right to social security).”³²

In cases involving arbitrary detention the European case law has led to the imposition of positive obligations on the state to act. For example, in a number of cases involving the disappearance of individuals arrested in Turkey, the European case law has emphasised the obligation on the state to take preventive measures and to investigate violations of Article 5.³³

In European commentary there is a recognition that, if a right to security of the person was to be accepted as a positive right, ie a right which imposes obligations on the state, then issues would arise as to whether state action which has any such effect conflicts with other rights. The European Court's reluctance to accept an independent substantive content for the right to security has been supported on this basis.³⁴ It has also been subject to criticism.³⁵

The reluctance to give the right to personal security any substantive content confines the scope of the protection, particularly protection against violence. The interpretive explanation has a degree of legal orthodoxy about it, albeit a literalist orthodoxy not often manifest in this sphere of discourse. I can understand a reluctance to impose on the state an unqualified obligation not to derogate from security and a duty to protect

citizens from infringement of such a right. However, qualifications have often been implied in human rights instruments. It may well be that the recognition that state action to protect the security of its citizens has so often been the justification for official infringement of other human rights is the real source of this reluctance.

The ICCPR

The reference to “security of the person” in the ICCPR must be read in the context of the *Universal Declaration* which it was expressly carrying into effect. In that *Declaration*, liberty and security of the person were combined with the right to life in Article 3. Article 9 of the Declaration made separate reference to arbitrary arrest and detention.

The formulation “life, liberty and security of the person” – which also exists in the Canadian Constitution – clearly refers to three distinct concepts. There is, so far as I am aware, no proper basis for inferring that when the reference to “liberty and security of the person” was combined with “arbitrary arrest and detention” in Article 9 of the ICCPR, it was intended to strip the words “security of the person” of the substantive content they had in Article 3 of the *Universal Declaration*.

Furthermore, Article 9 of the ICCPR must be read in the light of the reference in the preamble to “freedom from fear”. There is no such reference in the *European Convention*.

Case law under the *European Convention* should not, accordingly, determine the interpretation of similarly expressed rights for nations, like Australia, whose international obligations are determined by the ICCPR. Specifically, English cases will have to be treated with care. In England, Strasbourg case law, although not strictly binding, is generally followed.³⁶

As would be expected from the existence of such different contexts, cases under the ICCPR with respect to Article 9 are not in accord with the European approach. There have been cases in which the right to security of the person has been given an independent operation from the right to liberty.

For example, the Human Rights Committee found a violation of Article 9(1) by reason of a state’s failure to take appropriate measures to ensure the safety of a Columbian applicant who had

received death threats and who was subsequently attacked. The Committee said:

“Although in the Covenant the only reference to the right to security of person is to be found in Article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. ... It cannot be the case that, as a matter of law, states can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. State parties are under an obligation to take reasonable and appropriate steps to protect them. An interpretation of Article 9 which would allow a state party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the covenant.”³⁷

Similarly, the failure of Zambia to press criminal charges, provide compensation, carry out investigations or make findings public three years after an applicant had been shot by the Zambian police force, was held to violate the applicant’s right to personal security.³⁸ In another case, Sri Lanka did not provide

security protection or investigate complaints after a person received death threats following comments by the President of Sri Lanka suggesting he had been involved with the Tamil Tigers. That was found to be a violation.³⁹

Other cases and commentary by the Human Rights Committee clearly give independent content to the right to security of person under Article 9, in a range of situations involving harassment, intimidation and threats of violence.⁴⁰ The European case law cannot be reconciled with practice under the ICCPR.

USA

A reference to the rights of a person also appears in the Fourth Amendment in the United States Bill of Rights of 1791, which provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated ...”

Textual context is even more significant in United States case law than under the European Convention. The Fourth Amendment reference to the right “to be secure in their persons”

appears in a provision expressly directed to “unreasonable searches and seizures”. Accordingly, the focus of American Fourth Amendment jurisprudence has come to be placed on privacy, not security.⁴¹

Recent commentary has suggested that it would be now appropriate for Fourth Amendment jurisprudence to be reconceptualised through the right to be secure, which is what it guarantees, rather than being analysed through the right to privacy, which is how it has developed. This has been put forward as a return to the Amendment’s core meaning and core principles.⁴² Nevertheless, even this reconceptualisation focuses only upon fears that the government will violate such security. It is not suggested that there is any positive obligation upon the government to protect a person’s right to security.

Canada

The right to security of the person has acquired considerable significance in jurisprudence on the *Canadian Charter of Rights and Freedoms*. The Canadian provision is in the following terms:

“7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof

except in accordance with the principles of fundamental justice.”

Canadian case law has not interpreted section 7 as conferring separate rights. An unqualified right to life, liberty and security would be too broad. The clause, it has been held, confers a composite right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice.⁴³ The emphasis given to the “deprivation” limb of s 7, together with the reference to “principles of fundamental justice”, has led the Supreme Court of Canada to restrict s 7 so that it does not extend to economic rights. Nor does it impose positive obligations on the state.⁴⁴

The Canadian right not to be deprived of security of the person has been given a significant function in some of the most controversial areas of politico-legal discourse. It has been held that a person is deprived of the right to security of the person by:

- The risk to health, because of legislative restrictions on the availability of abortion.⁴⁵
- Delays in access to public health care, when combined with a prohibition on access to private health care.⁴⁶

- The Criminal Code offence of assisting a person to commit suicide, which would have been struck down but for the fact that the particular law did not offend the principles of fundamental justice.⁴⁷

Of particular significance for my focus on freedom from fear is the fact that the Canadian case law emphasises the psychological dimension of security of the person.⁴⁸ Accordingly, an application to remove children for protective purposes could have such an effect on a parent's psychological integrity that the principles of fundamental justice required that the parent receive legal aid.⁴⁹ Similarly, the psychological stress caused by unreasonable delay on the part of a Human Rights Commission when disposing of complaints of sexual harassment could give rise to a constitutional remedy by reason of s 7.⁵⁰

South Africa

The position in South Africa, as in many other respects, reflects the fact that the bill of rights in that nation draws upon a wide range of prior experience and, as a result, contains a more detailed regime. Important aspects of the South African Constitution distinguish its position from the case law of other

nations. First, it extends to socio-economic rights as well as to civil and political rights. Secondly, all rights are expressly subject to three duties: to respect, to promote and to protect, which imposes positive obligations on the state (s 7(2)). Thirdly, the Bill of Rights operates horizontally, ie, it applies to disputes between private parties (s 8(2)).

Section 12(1) of the Constitution relevantly provides:

“Everyone has the right to freedom and security of the person, which includes the right

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way;
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

Section 12(2) proceeds to make detailed provision with respect to bodily and psychological integrity.

In contrast with other human rights instruments, the South African Constitution makes explicit provision in s 12(1)(c) for freedom from violence. This is set out as a specific example in the non-exhaustive list of the right to security of the person. Other examples, such as the prohibition on torture or on cruel, inhuman or degrading punishment, which in other contexts are separately stated rights, are also set out as specific examples of the right to security of the person.

The explicit reference to protection from violence has meant that South African jurisprudence could not accept the position in Europe that the reference to security of the person adds nothing to the right to liberty.

The basic text on the South African Bill of Rights identifies the purpose of s 12 in the following terms:

“It protects the individual specifically (but not solely) against invasions of physical integrity by way of arbitrary arrest, violence, torture or cruel treatment or cruel treatment or punishment.”⁵¹

The authors go on to state:

“s 12(1)(c) imposes two conflicting obligations on the state. The right to freedom from state violence protects individuals from police use of an unconstitutional degree of force. At the same time, the right to freedom from private violence imposes an obligation on the state to use violent means where necessary to quell or discourage violent acts by individuals that may threaten the physical security of others.”⁵²

Perhaps of greater significance as a precedent for other jurisdictions is the case law under s 11 of the Interim Constitution of South Africa. That section did not include a list of specific examples of the right to security of the person. Specifically, it did not include anything in the nature of s 12(1)(c) of the Constitution as finally adopted.

Section 11 of the Interim Constitution, the predecessor of s 12, stated:

“1 Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

2 No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.”

As a matter of textual analysis this provision is much closer to Article 9 of the ICCPR and Article 5 of the European Convention, albeit without the detailed elaboration of liberty provisions. The South African Constitutional Court took an approach to s 11 which is not consonant with the preponderant view of the European Court of Human Rights, now embraced by the English judiciary.

A range of views was expressed by judges of the Constitutional Court in the landmark case of *Ferreira v Levin NO*.⁵³ The majority view did not approach s 11(1) on the basis that the right to “freedom” was to be construed separately from the right to “security of the person”. However, none of the reasoning accepted the European position that the right to security of the person was in some way subsumed by the right to freedom. Chaskelson P said:

“[170] The primary, though not necessarily the only, purpose of s 11(1) of the Constitution is to ensure that the physical integrity of every person is protected. This is how a guarantee of ‘freedom (liberty) and security of the person’ would ordinarily be understood. It is also the primary sense in which the phrase, ‘freedom and security of the person’ is used in public international law.”⁵⁴

The learned President went on to refer to texts and European cases which are not representative of the European cases to which I have referred. He proceeded on the basis that that case law, and the section of the Interim Constitution, separately protect “physical liberty” and “physical security”. The principal judgment in the case does, however, acknowledge the textual reasons why the European provision has been narrowly confined.⁵⁵

Another judgment in the case referred to “freedom of the person” and “security of the person” as “two related rights” and specifically identified both as being concerned with “physical integrity”.⁵⁶ Sachs J referred to s 11(1) as “treating freedom and

personal security as two elements of a single basic right which encompasses protection from interferences ...”.⁵⁷

Ferreira had nothing to do with physical violence and, accordingly, the occasion did not arise for express attention to be given to whether or not the right to “security of the person” protected against violence in the manner made explicit by s 12(1)(c) of the final Constitution.

The express provision in s 12(1)(c) has, however, resulted in the imposition of obligations upon the State to protect individuals from violence by third parties, eg, with respect to release on bail of a person who actually attacked a woman as he had earlier threatened to do;⁵⁸ to support a law protecting persons from domestic violence;⁵⁹ to support a law prohibiting corporal punishment in schools.⁶⁰

Australia

In Australia, the two jurisdictions that have implemented a Human Rights Act have adopted the language of the ICCPR with minor modifications.

The *Human Rights Act 2004* (ACT) provides in s 18(1):

“Everyone has the right to liberty and security of person.”

The *Charter of Human Rights and Responsibilities Act 2006*

(Vic) provides in s 21(1):

“Every person has the right to liberty and security.”

There is no explanation in the Report upon which the Victorian Act was based as to why the words “of person” were deleted after the word “security”.⁶¹ However, the Explanatory Memorandum for the Bill, when introduced, strongly suggests that it was a deliberate change to avoid the political explosiveness of the Canadian approach, which extended the right to security of person to a right to an abortion and a right to euthanasia.

The Memorandum said:

“This clause ... is a right concerned primarily with physical liberty. It is intended to operate in a different manner to article 7 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to ‘life, liberty and security of the person’ in that the Victorian provision

is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures.”⁶²

The euphemism “medical procedures” was, no doubt, adopted so as not to invite a firestorm of controversy about euthanasia and abortion.

The report of the Human Rights Consultation appointed by the Commonwealth Government has recommended that the ICCPR formulation – “the right to liberty and security of the person” – be one of the rights included in any federal Human Rights Act.⁶³

Australia’s international obligations, which the existing and proposed human rights acts are intended to implement, are found in the ICCPR. The English *Human Rights Act* has been an important influence, indeed a model. Nevertheless, the *European Convention* is of no direct relevance. Insofar as the case law on security of the person under the ICCPR differs from that under the *European Convention* (and therefore in England), it is to the former, that Australian lawyers should look.

Positive Obligations

International human rights instruments impose obligations on states. The human rights literature often emphasises the responsibility of states under international law to take three kinds of action with respect to the human rights protected by the respective treaties to which the state is a party or pursuant to customary international law. These three are a duty to respect rights, a duty to fulfil rights by taking positive action and also a duty to protect rights, including from infringement by both state and non-state actors.

These duties are not always reflected in domestic legislation. Much turns on the interpretation of the particular provisions of the human rights instrument under consideration. Many instruments do not expressly impose positive obligations upon the state to protect citizens from infringement by non-state actors.

The responsibility upon states to take measures to respect, fulfil and protect rights is variously expressed in different international instruments. Such obligations sometimes appear in specific articles of the instruments. There are also general obligations imposed upon state parties, such as:

- “to respect and to ensure to all individuals ... the rights recognized in the present Covenant” (ICCPR, Article 2.1);
- “to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” (ICCPR, Article 2.2);
- “to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant” (ICESCR, Article 2.1);
- “States Parties ... undertake to pursue by all appropriate means ... a policy of eliminating racial discrimination in all its forms ... and, to this end:

...

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization” (CERD, 2.1);

- “States Parties ... agree to pursue by all appropriate means ... a policy of eliminating discrimination against women and, to this end, undertake:

...

(e) to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

(Convention on the Elimination of All Forms of Discrimination against Women of 1979 (“CEDAW”), Article 2);

- “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child” (*Convention on the Rights of the Child of 1989, Article 19.1*).

Constitutional or statutory bills of rights often reflect the origin of those provisions in such international obligations. Two

issues arise with respect to the enforcement of the rights so recognised. First, do the domestic provisions impose positive obligations on the state to take action? Secondly, do they impose obligations upon persons other than the government? The answer to these questions depends on the particular form in which the provision has been adopted for domestic purposes.

Perhaps the clearest case of a Bill of Rights imposing generally stated positive obligations upon the state, including measures to bind non-state actors, is the South African provision that the state is obliged to take steps to respect, promote and protect the constitutional rights of its citizens. In other jurisdictions, which do not have such express provisions, there are frequent statements in the case law that the relevant constitutional or statutory bill of rights does not impose positive obligations on the state. However, there is a discernible drift in case law, and perhaps more noticeably in academic commentary, which seeks to infer positive obligations as a necessary concomitant of negatively stated obligations.

The issue is one of interpretation, because some provisions, but not others, in international and domestic instruments contain

particular references imposing a duty to take steps to enforce the right.

Furthermore, there is a growing body of authority, notably in Europe, indicating that although negatively stated obligations are expressed in a form directed to the state, nevertheless the state has duties to protect its citizens from non-state actors.⁶⁴ For example, the European Court of Human Rights has done that with respect to the prohibition on torture or degrading treatment⁶⁵ and the prohibition on slavery.⁶⁶ I have also noted above the disappearance cases involving Turkey, where the Court held that the state had to take preventative measures and to investigate disappearances.⁶⁷

The Canadian *Charter of Rights and Freedoms* does not contain an express obligation to secure rights. The Supreme Court has been reluctant to impose positive duties on the state.⁶⁸ There is, however, one case in which a court imposed a duty to provide legal aid for parents in child protection proceedings with respect to alleged contravention of s 7 rights, relating to the right to life, liberty and security of the person.⁶⁹ This has been

categorised not as a duty of protection, but as a duty to facilitate access to justice.⁷⁰

The English *Human Rights Act* does not expressly impose positive obligations on the state. It does, however, provide, in s 6, that a public authority may not act in a way which is incompatible with a Convention right. This has been adopted in the two Australian jurisdictions with *Human Rights Acts* and a similar provision is proposed by the Report of the National Human Rights Consultation.⁷¹

Freedom from Violence

In international humanitarian law a Responsibility to Protect, or “R2P”, has recently emerged as a doctrine of international humanitarian law. It is concerned to establish a responsibility on the part of all states to protect civilians from mass atrocity crimes, including crimes committed by their own government. This doctrine has been advanced by the former Australian Foreign Minister, Gareth Evans, in his capacity as the President of the International Crisis Group, following an International Commission on Intervention and State Sovereignty in 2001.⁷² The focus of this

doctrine is on mass atrocity crimes such as the Holocaust, Cambodia, Rwanda and Bosnia.

The R2P concept is, in general terms, equivalent to the protection of the right to life and the prohibitions of torture and of cruel, inhumane or degrading treatment, in international treaties.

One commentator has sought to develop the doctrine of state responsibility into a duty of a state to protect its citizens from human rights violations, including those perpetrated by non-state actors.⁷³ However, as I have noted, an international obligation to protect citizens from any form of violence – beyond torture and cruel or unusual punishment – is not well established.

The most likely source of the development of a right not to be subject to violence, at least outside Europe, is the recognition of the right to security of the person. However, international instruments, like Article 9 of the ICCPR, do not expressly identify the qualifications which are necessarily implied in such an absolute statement. The state has many reasons to deploy violence, particularly in the exercise of legitimate police functions.

It is also necessary to determine whether, and if so how, the state has a duty to protect citizens from non-state actors.

In one academic commentary the acceptance of a positive duty on the state to protect its citizens' right to security is propounded as an important development, whilst recognising that it gives rise to the possibility of a conflict with other rights in contexts such as terrorism.⁷⁴ Another author concludes that, because of such conflicts, a positive right to security should be narrowly confined.⁷⁵

The most comprehensive treatment of security of the person in a thesis, which is not yet published, concludes that the right to personal security includes a positive aspect of protection as well as the negative aspect of restraint from abuse of power by government agencies. The author analyses in detail the European, Canadian and South African case law. The author develops the concept of security as protection against threats and risks.⁷⁶

It could be said that carrying into effect any such international obligation would add little if anything to the traditional

exercise of the police power of the state designed to protect citizens from violence, as reflected in the criminal law of every nation. This is plainly true of actual violence. It is, also true, albeit to a lesser degree, with respect to threats of violence.

Many jurisdictions have criminal offences relating to intimidation, harassment, blackmail, threats⁷⁷ and other such conduct which does not result in actual harm other than by inflicting fear on individuals. Protection of this character is less systematic, and much less uniform, than that dealing with actual violence. Many such provisions constitute the recognition in domestic law of the significance of the risk of harm to and, often, of the significance of fear amongst citizens.

Each nation has a patchwork quilt of such provisions. However, the failure to treat them as manifestations of an obligation to protect individual rights means that they are not taken into account, as such, in human rights discourse and decision-making. The restoration of an emphasis on freedom from fear as an integrative concept, could change this position.

The literature on human rights tends to treat the criminal law relating to actual and threatened violence as serving a public or collective interest. The analysis changes significantly if such interests are characterised as individual rights, particularly in situations where rights conflict. There is one good example of how freedom from fear can give content to the recognition of an individual right which was not hitherto recognised as such.

In comparatively recent times domestic violence has come to be seen as a human rights issue, often expressed to be based on inherent dignity, equal rights and freedom from fear.⁷⁸ This development was not feasible for as long as international human rights instruments were not seen to impose positive obligations on states to take steps to prevent rights infringements by non-state actors. There is a clear drift to the recognition of such obligations.

The *Convention on the Elimination of All Forms of Discrimination Against Women* (“CEDAW”) of 1979 was originally modelled on the *Convention on the Elimination of Racial Discrimination* (“CERD”). However, the scope and range of the nations, particularly in Africa and throughout the Islamic world, with customary and social practices which were problematic in terms of

gender bias, was such that the drafting process and the final product bore the marks of major compromise of a character which did not afflict CERD.⁷⁹ The CEDAW is also one of the international human rights instruments which has attracted the largest number of reservations of breadth and scope, including by a number of Islamic nations who declare that its key provisions conflict with Islamic law.⁸⁰

CEDAW notably makes no express reference to honour crimes, including honour killings, rape or violence against women. It does, however, contain a general prohibition of discrimination. The human rights literature, and the recommendations of the Committee on the Elimination of Discrimination Against Women, created under CEDAW propose that gender based violence, which infringes human rights, should be regarded as discrimination within the meaning of the Convention. This encompasses the right to life, the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment and the right to security of the person. The effects of fear and the significance of freedom from fear have been expressly acknowledged in this context.⁸¹

One detects an institutional turf battle here. Complaints about infringement of the right to security of the person would go to the Human Rights Committee under the ICCPR Optional Protocol. Complaints of discrimination against women go to the parallel CEDAW Committee.

I had occasion, in a judgment concerned with the Australian system for apprehended violence orders which protect against threatened acts of personal violence, stalking, intimidation and harassment, to characterise the system as a means of protecting the right to freedom from fear.⁸² Indeed, as I now know, in 1998 the West Australian Government launched a campaign of awareness on domestic violence issues which it entitled “Freedom From Fear”.⁸³ This is, however, only one context in which this perspective can be valuable.

The Battle of the Metaphors

The sphere of discourse with which I am here concerned is particularly bedevilled by a conflict of metaphors. On the one hand, those who regard themselves as most committed to human rights like to speak of “rights as trumps”. On the other hand, those who believe that their equally strong commitment to human rights

requires attention to the context in which they are asserted often speak of the need to balance rights in conflict with other rights or interests. Sometimes one encounters reference to a “thumb on the scales” of the balance. Both “trumps” and “balancing” invoke metaphors which must be deployed with care.⁸⁴

As Benjamin Cardozo pointed out, it is desirable that we avoid becoming “enveloped in the mists of metaphor” and we should not be diverted by the “picturesqueness of the epithets”. As Cardozo said:

“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁸⁵

A regrettable example of the distortion which can be caused by a metaphor is to be found in the recent report of the Australian National Human Rights Consultation. After referring to the Canadian concept of a “dialogue” model for a Human Rights Act,⁸⁶ the Committee recommended that only Australia’s final Court of Appeal, the High Court, should have the authority to make a declaration of incompatibility. The Report acknowledged that there were significant practical problems with such a limitation.

However, this proposal was said to be based on the application of “the dialogue” model in that:

“the Federal Parliament might not be persuaded to engage in ‘dialogue’ with 10 different courts.”⁸⁷

I have never been happy with the concept of “dialogue”.⁸⁸ It seems to me to be just a polite cloak for the significant transfer of power to the judiciary which a human rights act inevitably involves. So far as I can see, each participant in the “dialogue” only gets to speak once. That does not appear to me to be much of a conversation. A more accurate description of the relationship between the courts and the Parliament/executive branches is one of “creative tension”.⁸⁹

However, as the recent Australian report suggests, the metaphor has assumed a life of its own. The recommendation ignores the fact that in Australia’s century old Constitutional practice, any court exercising federal jurisdiction – from a Local Court to the High Court – can come to the conclusion that legislation is constitutionally invalid. To say that some special regime needs to be established, solely referable to human rights,

appears to me to reflect the dialogue metaphor getting in the way of the analysis.

The traditional tension between liberty and security in political philosophy can be replicated in a human rights focussed jurisprudence. There is, in principle, no substantive difference between the tension between liberty, as an individual right and security, as a collective interest, on the one hand, and liberty, as an individual right and security of the person, as an individual right which the state has an obligation to protect, on the other hand. There is, however, a significant difference in how these alternative perspectives are deployed.

Human rights discourse is transparently comfortable when privileging a right over an interest. However, that literature often flounders when faced with a conflict between rights. As Jeremy Waldron has put it:

“Rights versus rights is a different ballgame from rights versus social utility. If security is also a matter of rights, then rights are at stake on both sides of the equation, and it might seem that there is no violation of the

trumping principle or of the idea of lexical probity when some adjustment is made to the balance.

This business of conflicts of rights is a terribly difficult area – with which moral philosophers are only just beginning to grapple.”⁹⁰

The difficulty is reflected in a wide range of debates that are at the forefront of human rights discourse, such as laws directed to terrorism, organised crime and hate speech. In such contexts, measures taken by the state to protect persons from threats have led to conflicts with other human rights, perhaps most often with the right to a fair trial and the right to freedom of expression.

In the human rights literature, it appears to make a great deal of difference whether something is approached from the perspective of a conflict between rights, rather than as a conflict between a right and an interest. This tension is exacerbated if freedom from fear is included as a dimension of a right, which the state has a responsibility to protect.

Such issues have been particularly acute in the context of debates about anti-terrorism legislation. The human rights

literature tends to treat the issue of security as a form of “national security”, rather than as security of the person, which the state has a duty to protect. However, as George Williams once said:

“Terrorism is an attack on our most basic human rights. It can infringe our rights to life and personal security and our ability to live our lives free of fear.”⁹¹

This is a rare reference in the human rights literature which regards the right to personal security, coupled with a positive obligation upon the state to protect that right, as a relevant part of the analysis. It is also a rare instance in the literature on terrorism where the concept of freedom from fear is mentioned. There is a lot of discussion about fear. However, fear is generally treated as if it is merely an emotion, rather than a result of infringement of a right.

Clearly the principal objective of anti-terrorist legislation is to protect the community, including each individual in the community, from acts of violence that can cause death or physical harm. Such legislation expressly extends to freedom from fear. In most jurisdictions terrorist acts are defined to extend to threats and to conduct undertaken with the intention of intimidating the public.

There can be no doubt that many incursions into human rights have occurred in the name of security. It is not, however, necessary to adopt the approach of a conflict between individual rights and a general collective interest. It is appropriate to approach such matters as a conflict between rights. That does not mean that the right to security of the person must prevail. Issues of probability and proportionality necessarily arise.

Accordingly, George Williams, writing with Ben Golder, has criticised suggestions that a right to security can be regarded as a “primary, almost inviolable, human right”.⁹² The authors advocate a balancing process. This metaphor, albeit contested, remains serviceable.

Balancing is a process which is well understood by judges who undertake it in numerous disparate areas of the law. As one useful analysis of the overall process, not focused on any particular debate, has suggested:

“[A]lthough we may all recognize the difficulties of balancing the conflicting interests of parties or citizens, we all share a common intuitive grasp of, or at least are

in agreement about, what the metaphor of balancing interests entails.”⁹³

The issue often faced by courts is how to compare elements that are fundamentally incommensurable, such as the right to security and the right to a fair trial or to free speech. As Justice Scalia once put it, this is like asking “whether a particular line is longer than a particular rock is heavy”.⁹⁴ Nevertheless, this is a task that judges, as well as parliaments, are often called upon to perform.

Andrew Ashworth has rejected the terminology of “balancing” on the basis that it leads to “sloppy reasoning” and allows the right to a fair trial to be “balanced away”.⁹⁵ When applying this critique to terrorism legislation, however, Professor Ashworth focused was upon security as a collective interest, rather than as an individual right.⁹⁶ Nevertheless, he makes a valid point when he says:

“[T]he term ‘balance’ tends to disarm opponents because it has no tenable antithesis: nobody, that is, would stand up and argue for imbalance, or indeed for disproportionality, unreasonableness or unfairness.”⁹⁷

Ashworth is right to emphasise that the use of the metaphor does not address the essential consideration about how the process of weighing conflicting rights should be undertaken. There are both empirical and value assumptions that must be made in the process.

As another commentator has observed whilst “balancing is ... an opaque box that is undefined and undefinable”, some such intuitive process is often essential. What is required is to “accept the opaque box and try to improve its output”.⁹⁸ The danger in the “quantitative imagery” of balancing is, as Jeremy Waldron has warned, the false connotation of precision.⁹⁹

Where incommensurable values conflict, intuitive judgment is often unavoidable.¹⁰⁰ Nevertheless, as in other constitutional law contexts, principles to guide the process are capable of being discerned or developed.¹⁰¹ The process of balancing is not necessarily unprincipled.¹⁰² The problem is to identify a scale of values that is not simply personal to the judge making the decision.

Insofar as there is legal guidance, it is to be found in the foundational legal texts, both international and domestic. When such issues arise particular attention must be given to the specific provision which may provide within itself a terminology that indicates how the appropriate balance should be undertaken.

It is always appropriate in legal analysis to focus on the scope of the right in issue. Precise identification of the scope of a right will often be the preferable means of avoiding conflict between rights. As one author has observed:

“With complex rights ... reasons for constricting, limiting or qualifying the exercise of the relevant right may in many cases be thought of as constitutive or definitional. The weight given to competing rights or considerations simply goes to defining the proper scope and application of the right. When properly weighted, rights to reputation or public safety merely illustrate the proposition that freedom of communication is a qualified right that does not include in its scope shouting fire in crowded theatres or destroying reputations.”¹⁰³

This process has been characterised as “definitional balancing” rather than “ad hoc balancing”.¹⁰⁴

Of particular significance in a “balancing process” is any indication, either express or implicit, that there exists a hierarchy of rights, whereby some rights are entitled to greater weight than others. There is, for example, a considerable body of opinion, including case law both national and international, that some rights such as the right to life or the prohibition on torture, are expressly non-derogable, and are, in any event, entitled to determinative weight in any balancing process. Similarly, case law on freedom of expression, most notably American First Amendment jurisprudence, has placed that right high in the hierarchy.

More often, however, the real focus of debate is whether or not the derogation, as a matter of empirical fact, has or is likely to have any effect, and if so to what degree, in promoting the human right on the other side of the scale. This is an issue much in dispute in criminal law generally and, particularly, in the context of anti-terrorism legislation.¹⁰⁵

These are not matters capable of conclusive resolution. That is particularly so if the concept of freedom of fear has a role to play in the course of balancing. If any such balancing is to be done by judges then fear must be seen to have an objective basis. The position is not necessarily so confined if the balancing is done by the legislative or executive arms of government. In a democratic society subjective perceptions of risk are entitled to weight.

Problems of this kind often arise in the context of the criminal law. Public perceptions about the actual incidence of crime often bear no relationship to the facts. Nor do public beliefs about the efficacy of harsh punishment necessarily bear any relationship to actual outcomes.

In the context of giving weight to freedom from fear it has to be acknowledged that some human fears are non-rational: such as the fear of spiders and sharks – arachnophobia and galeophobia. In many respects such reactions are at the heart of the debates over terrorist legislation or legislation directed at organised crime.

Human rights scholars instinctively reject any suggestion that a subjective sense of threat should be accorded any weight. As Andrew Ashworth said, in the course of advancing his critique of balancing with respect to anti-terrorist legislation:

“no curtailing of human rights simply to alleviate insecurity in the subjective sense should be contemplated, because human rights are much too serious for that. The strongest case for any curtailment of human rights must be predicated on reduction of security in the objective sense.”¹⁰⁶

To similar effect are the observations of Jeremy Waldron, also in the context of his critique of balancing, when he said:

“... the balancing argument is supposed to turn on what we can achieve by diminishing liberty; it is not supposed to turn on the sheer fact or horror at what has happened nor of our fear of what might happen. Fear is only half a reason for modifying civil liberties: the other and indispensable half is a well-informed belief that the modification will actually make a difference to the prospect that we fear.”

There is a well established body of jurisprudence in the context of refugee law as to what it means for a “fear of persecution” to be “well founded”. Although subjective considerations may arise in particular contexts, the objective test in this sphere of discourse may prove a useful source of precedent.¹⁰⁷ In this, as in many other respects, refugee law will be a guide to the restoration of freedom from fear to its proper place in human rights discourse.

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- ¹ The Four Freedoms Speech and the Atlantic Charter are available in full or in extract in numerous sources. See, eg, James MacGregor Burns, *Roosevelt: The Soldier of Freedom* (1970) Harcourt Brace Jovanovich Inc at 34–5, 130.
- ² See, eg, David Kennedy, *Freedom from Fear: The American People in Depression and War 1929-1945* (1999) Oxford University Press esp at 469–70.
- ³ See Mark R Shulman, “The Four Freedoms: Good Neighbours Make Good Law and Good Policy in a Time of Insecurity” (2008) 77 *Fordham Law Review* 555.
- ⁴ See generally M Glen Johnson, “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights” (1987) 9 *Human Rights Quarterly* 19; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) Random House.
- ⁵ See *To Secure These Freedoms: The Report of the President’s Committee on Civil Rights* (1947).
- ⁶ See A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) Oxford University Press.
- ⁷ See J J Spigelman, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” (2005) 26 *Australian Bar Review* 1, reprinted in Tim Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998–2008* (2008) CS2N Publishing.
- ⁸ *Genesis* 3.10. I owe this example to Corey Robin, *Fear: The History of a Political Idea* (2004) Oxford University Press at 1.
- ⁹ See generally Simpson *supra* at 172–3.
- ¹⁰ Ben Saul, *Defining Terrorism in International Law* (2006) Oxford University Press at 29.
- ¹¹ See Frederick Schauer, “Fear, Risk and the First Amendment: Unravelling the ‘Chilling Effect’” (1978) 58 *Boston University Law Review* 685.
- ¹² Baron de Montesquieu, *The Spirit of Laws* (2005) vol 1, Law Book Exchange, Book XI Ch VI at 185.
- ¹³ *Ibid* at Book XII Ch 1 at 224.
- ¹⁴ See Adam Smith, *The Theory of Moral Sentiments* (1976 ed) at 156, 290; Adam Smith, *The Wealth of Nations* (1976 ed) at 412.
- ¹⁵ Smith, *Theory* *supra* at 164; Smith, *Wealth* *supra* at 797.
- ¹⁶ See Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (2001) Harvard University Press at 12–15.
- ¹⁷ See generally Emma Rothschild, “What is Security” (Summer 1995) 124 *Daedalus* 53.
- ¹⁸ Sir William Blackstone, *Commentaries on the Laws of England* (18th ed, 1829) vol 1 at [129].
- ¹⁹ See Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (2003) University of Chicago esp at 117, 122, 126–8, 153–4.
- ²⁰ Blackstone *supra* at [129].

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- 21 Ibid at [131].
- 22 Ibid at [134] (emphasis added).
- 23 The text of art 9(1) reads: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.
- 24 See, eg, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) NP Engel Publishers at 214.
- 25 The most comprehensive treatment, not yet published, is Rhonda Louise Powell, *Security and the Right to Security of Person*, DPhil Thesis, St Hilda’s College, Oxford University (2008). (I am grateful to the author for providing me with this unpublished thesis which, I understand will be published next year.) See also Sandra Fredman, “The Positive Right to Security” in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing; Liora Lazarus, “Mapping the Right to Security” in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing.
- 26 See Rhonda Powell, “The Right to Security of Person in European Court of Human Rights Jurisprudence” (2007) 6 *European Human Rights Law Review* 649; Nowak supra at 214; Clare Ovey and Robin White, *Jacobs & White European Convention on Human Rights* (3rd ed, 2002) Oxford University Press at 103; Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd ed, 2009) Oxford University Press at 628; *East African Asians v United Kingdom* (1981) 3 EHRR 76 (‘*East African Asians*’); *Bozano v France* (1986) 9 EHRR 297. Clayton and Tomlinson supra at 628 note there is only one early authority which suggested that ‘security of person’ had independent content: *Kamma v Netherlands* (1974) 18 YB 300.
- 27 See, eg, *East African Asians* supra at [220]–[221]; Ovey and White supra at 103.
- 28 See, eg, *East African Asians* supra at [222]; *Kurt v Turkey* (1999) 27 EHRR 373 at [122] (‘*Kurt v Turkey*’); *X v United Kingdom* (1981) 4 EHRR 188 at [43]; *Mentes v Turkey* (1997) 26 EHRR 595.
- 29 *X v Ireland* (1973) 16 YB 388.
- 30 See, eg, *Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61; [2002] 1 AC 800 at [23].
- 31 See *Pretty v United Kingdom* (2002) 35 EHRR 1.
- 32 Monica Macovei, *Human Rights Handbook No 5: The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (2004) Council of Europe at 6. Others also emphasise that there is no duty to protect. See, eg, Clayton and Tomlinson supra at 628–9.
- 33 See, eg, *Kurt v Turkey* supra; *Cyprus v Turkey* (2001) 35 EHRR 30; *Bilgin v Turkey* (2002) 35 EHRR 39; *Tanis v Turkey* (App No 65899/01) 2 August 2005; *Ipek v Turkey* (App No 2560/94) 17 May 2004.
- 34 See Powell, “The Right to Security of Person in European Court of Human Rights Jurisprudence” supra at 8–9.
- 35 See, eg, Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed, 2006) Intersentia at 457.
- 36 See *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. See generally Jonathan Mance, “Opting into Community Law and Interpreting

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- Convention Rights: Is the United Kingdom More or Less Committed?” [2009] *Public Law* 544.
- 37 *Delgado Paez v Columbia*, 12 July 1990, No 195/85 at [5.5].
- 38 See *Chongwe v Zambia* (Communication 821/1998) at [5.3]; Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd ed, 2009) at 116–17.
- 39 *Jayawardene v Sri Lanka* (Communication 916/2000) at [7.3]. See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) Oxford University Press at 306.
- 40 See, eg, Nowak *supra* at 215; Joseph, Schultz and Castan *supra* at 304–7.
- 41 See, eg, Jed Rubenfeld, “The Right of Privacy” (1989) 102 *Harvard Law Review* 737; William J Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* (2009) Oxford University Press.
- 42 See Jed Rubenfeld, “The End of Privacy” (2008) 61 *Stanford Law Review* 101 esp at 103–4.
- 43 See Peter W Hogg, *Constitutional Law of Canada* (5th ed, 2007) vol 2, Thomson Carswell at 367.
- 44 See, eg, *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.
- 45 *R v Morgentaler* [1988] 1 SCR 30.
- 46 *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 (‘*Chaoulli*’).
- 47 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.
- 48 See, eg, *Mills v The Queen* [1986] 1 SCR 863 at 920; *R v O’Connor* [1995] 4 SCR 411 at [111]; *Chaoulli* *supra* at [41], [116]–[119], [123], [205].
- 49 *New Brunswick (Minister of Health and Community Service) v G (J)* [1999] 3 SCR 46 (‘*New Brunswick*’); *Winnipeg Child and Family Services v K LW* [2000] 2 SCR 519.
- 50 See *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307.
- 51 See Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th ed, 2005) JUTA and Company Ltd at 293.
- 52 *Ibid* at 304.
- 53 1996 (1) SA 984 (CC).
- 54 *Ibid* at [170].
- 55 See *ibid* at [89] per Ackerman J quoting with approval at fn 120 commentary that: “liberty and security are the two sides of the same coin”.
- 56 *Ibid* at [209]–[210] per Mokgoro J.
- 57 *Ibid* at [254].
- 58 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).
- 59 *S v Baloyi* 2000 (2) SA 425 (CC) per Sachs J (‘*Baloyi*’).

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- 60 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
- 61 See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) esp at 43.
- 62 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) at 16.
- 63 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) at 369.
- 64 See generally Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) Hart Publishing; van Dijk, van Hoof, van Rijn and Zwaak (eds) *supra*. See also David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002) Oxford University Press at 53–5.
- 65 See Feldman *supra* at 257–66; *MC v Bulgaria* (2005) 40 EHRR 20 esp at [148]–[153].
- 66 *Siliadin v France* (2005) 43 EHRR 16.
- 67 See fn 33 *supra*.
- 68 See, eg, Ran Hirschl, “‘Negative’ Rights v ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 *Human Rights Quarterly* 1060. Hirschl primarily focuses on social and economic rights as positive obligations.
- 69 See *New Brunswick* *supra*.
- 70 See Powell, *Security and the Right to Security of Person* *supra* at 114.
- 71 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) s 40B; National Human Rights Consultation Committee *supra* at 331–2.
- 72 See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008) Bookings Institution.
- 73 See Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5 *Melbourne Journal of International Law* 1.
- 74 See Fredman *supra*.
- 75 Lazarus, “Mapping the Right to Security” *supra*.
- 76 See Powell, *Security and the Right to Security of Person* *supra* at 110–113.
- 77 See, eg, the legislation considered by the High Court in *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1.
- 78 See, eg, Dorothy Thomas and Michelle Beasle, “Domestic Violence as a Human Rights Issue” (1993) 15 *Human Rights Quarterly* 36.
- 79 See, eg, Roberta Jacobson “The Committee on the Elimination of Discrimination Against Women” in Phillip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (1992) Clarendon Press; Laura Donner, “Gender Bias in Drafting International Discrimination

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- Conventions: The 1979 Women’s Convention Compared with the 1965 Racial Convention” (1994) 24 *California Western International Law Journal* 241.
- 80 See Rebecca Cook, “Reservations of the Convention of the Elimination of all Forms of Discrimination Against Women” (1989–1990) 30 *Virginia Journal of International Law* 643.
- 81 See, eg, Dorothea Beane, “Human Rights in Transition – Freedom from Fear” (2000) 6 *Washington and Lee Race and Ethnic Ancestry Journal* 1. See also *Baloyi* supra at [12]–[13] per Sachs J.
- 82 *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at [20].
- 83 See R J Donovan, D Patterson and M Francas, “Targeting Male Perpetrators of Intimate Partner Violence: West Australia’s ‘Freedom From Fear’ Campaign” (1999) 5 *Social Marketing Quarterly* 128.
- 84 As suggested by Jeremy Waldron, “Security and Liberty: The Imagery of Balance” (2003) 11 *Journal of Political Philosophy* 191 esp at 196–7.
- 85 See *Berkey v Third Avenue Railway Company*, 244 NY 84, 94–5 (1926).
- 86 National Human Rights Consultation Committee supra esp at 241–2.
- 87 *Ibid* at 374–5.
- 88 See the debate amongst Canadian scholars in the special issue “*Charter Dialogue – Ten Years Later*” (2007) 35 *Osgoode Hall Law Journal*.
- 89 See Murray Hunt, “The *Human Rights Act* and Legal Culture: The Judiciary and the Legal Profession” (1999) 26 *Journal of Law and Society* 86 at 89.
- 90 Waldron supra at 198–9.
- 91 George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) UNSW Press at 27.
- 92 Ben Golder and George Williams, “Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism” (2006) 8 *Journal of Comparative Policy Analysis* 43 at 51.
- 93 Vincent Luizzi, “Balancing of Interests in Courts” (1980) 20 *Jurimetrics Journal* 373 at 373.
- 94 *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888, 897 (1987). See generally John Adler, “The Sublime and the Beautiful: Incommensurability and Human Rights” [2006] *Public Law* 697.
- 95 See Andrew Ashworth, “Crime, Community and Creeping Consequentialism” [1996] *Criminal Law Review* 220 at 229; Andrew J Ashworth, “Criminal Proceedings after the *Human Rights Act*: The First Year” [2001] *Criminal Law Review* 855 at 864–7.
- 96 See Andrew Ashworth, “Security, Terrorism and the Value of Human Rights” in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing.
- 97 *Ibid* at 208.
- 98 Stephen E Gottlieb, “The Paradox of Balancing Significant Interests” (1994) 45 *Hastings Law Journal* 825 at 839, 850.

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- 99 Waldron *supra* at 192–3.
- 100 See generally Henry S Mather, “Law-making and Incommensurability” (2002) 47 *McGill Law Journal* 345. See also R George Wright, “The Role of Intuition in Judicial Decisionmaking” (2005–2006) 42 *Houston Law Review* 1381.
- 101 See, eg, Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 *Yale Law Journal* 943.
- 102 See also Frank M Coffin, “Judicial Balancing: The Protean Scales of Justice” (1988) 63 *New York University Law Review* 16.
- 103 Geoffrey Marshall, “Things We Can Say About Rights” [2001] *Public Law* 207 at 209. See also Phillip Montague, “When Rights Conflict” (2001) 7 *Legal Theory* 257.
- 104 See Aleinikoff *supra* at 948. See also Andrew S Butler, “Limiting Rights” (2002) 33 *Victoria University of Wellington Law Review* 113.
- 105 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) Law Book Co esp at 37–43, 874–6; Simon Bronitt, “Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform” in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (2008) ANU Press.
- 106 See Ashworth, “Security” *supra* at 208.
- 107 See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) Oxford University Press esp 63–4, 92; Roz Germov and Francesco Motta, *Refugee Law in Australia* (2003) Oxford University Press, ch 6.

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COUR**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 13 November 2009

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

JUDGMENT

- 1 We assemble in this Banco Court to mark the departure as a Judge of Appeal of one of the most prodigiously energetic intellects in the Court's contemporary history. It has been a fruitful and at times exciting journey, which has left all of us breathless with admiration. However, we knew, nine years ago, what we were letting ourselves in for. This occasion marks over 20 years of judicial service, first in Western Australia and then in New South Wales.

- 2 Your professional adventurousness and self-confidence was clear at the very commencement of your legal career. You chose to attend Stellenbosch University where all courses were taught in the Afrikaans language, in which you were not fluent. You were inculcated into the system of Roman/Dutch law in a faculty dominated by one of the great South African legal academics, J C de Wet, who was once described, in words not entirely inapt to yourself, as "[p]ithy, pungent, sometimes remorseless".¹ Those of us who were taught by Bill Morrison at Sydney Law School are familiar with that academic style.

- 3 You were admitted as a legal practitioner in South Africa in 1963, becoming a partner in a well-known Johannesburg law firm the next year.

Between 1973 to 1981 you were a member of the Cape bar. In that year, at the age of 43, you took the decision to migrate to Australia with all the attendant uncertainties and disruption, at a time when few could predict with any confidence when the oppressive apartheid regime of your native land would end and no-one predicted that it could end without significant bloodshed. Again your self-confidence came to the fore. You were convinced that you could adapt from the Roman law tradition to the common law tradition. As you have often said, until the age of 43 you thought that Equity was the name of an insurance company.

- 4 You became an Australian citizen. Apparently the authorities were ignorant of the fact that you named one of your sons Graeme, because he was born on the day that Graeme Pollock scored a century at the Wanderers Ground – against Australia. We have all had to tolerate your relentless barracking for the South African cricket and rugby teams, often through gritted teeth.
- 5 Your progress in Perth was breathtaking. Your success as a counsel was immediate, first as a partner of a well-known firm of barristers and solicitors and then between 1984 and 1989 as a member of the independent Western Australian bar. You were appointed a judge of the Supreme Court of Western Australia in 1989, immediately after qualifying for such an appointment on the basis of the eight year membership of the local profession then required for such appointment.
- 6 As a judge of that Court your Honour participated in all areas of the Court's jurisdiction, as a trial judge in both civil and criminal matters and on both civil and criminal appeals. This Court was the ultimate beneficiary of your broad range of experience.
- 7 You made a contribution to the administration of justice throughout Australia as one of the judges who, during the course of the '90s, transformed the way civil litigation was conducted in this nation. You were the principal driving force behind the introduction of case management and

the recognition of alternative dispute resolution in Western Australia as the first judge in charge of the Expedited List, as the chair of the relevant court committees and from 1993 to 2001 as the judge in charge of the Civil List.

- 8 As Chief Justice Malcolm said at your farewell from the Supreme Court of Western Australia:

“You were the State’s number one mover and shaker in the reform of civil procedure.”²

- 9 Through your example, through your writings and through continual contact with judges seeking to achieve the same results in other States, including New South Wales, your influence was national.

- 10 In your own address on your retirement in Perth you indicated the nature of the reform process when you said:

“Reformist judges in each State frequently discussed with each other what changes were being introduced and how they were working. We all learnt from each other. Something would be tried in one State and the best parts would be copied in another. Each State acted as an experimental test tube for the country as a whole. It was an excellent example, I thought, of the strength of the federal system.”³

- 11 Today attention is focused on harmonisation and uniformity of practice. We should, however, recognise that harmonisation and uniformity, once achieved, can become an impediment to major reform by the operation of the lowest common denominator approach to decision-making. Each generation is prone to suffer the conceit that it has discovered answers of permanent validity. The principal myth associated with the Greek goddess of concord, Harmonia, is that she received a necklace on her wedding day, which proved disastrous for all who later possessed it.

- 12 In 2001 your Honour migrated again – from Perth to Sydney – first as an Acting Judge of the Court of Appeal for over a year and subsequently as a

permanent judge for over eight years. This was an early manifestation of the emergence of a national judiciary. Once again you were the pioneer.

- 13 Your entire period of judicial service has been characterised, to the last day, by your unflagging enthusiasm, your extraordinary capacity for rapid digestion and analysis of legal material and your intensity of application, which everyone who has served with you has come to admire. All of us share with your former Western Australian colleagues, some of whom are present here today, an immense gratitude for your guidance, inspiration and your willingness to do more than your fair share of the hard yards.
- 14 It was always a pleasure to sit with your Honour in court. The power of your intellect, the speed with which you identified the issues in the appeal and your capacity to distil the essential elements, even in the most complex of cases, was of inestimable value to all who sat with you. There were, however, touches of your background in Africa in your judicial method. On the veldt dangers emerge rapidly: big cats must be confronted as soon as they appear. This was your model. Counsel who appeared before you came to understand that your approach to exchanges with the bar table was that of the lion who does not stand in the path, but approaches at the charge, a tactic with which counsel must be equipped to deal. The Honourable Keith Mason AC told me that his practice, as a presiding judge when sitting with you, was to insist that counsel be allowed to complete the announcement of their appearances before you asked the first question.
- 15 Your principal contribution for the future of the administration of justice lies in the judgments which you delivered both in the Supreme Court of Western Australia and in this Court. Your Honour has been a prolific contributor to the courts on which you have served. In the period of just over nine years in which you served on this Court you participated in more than 900 appellate judgments, that is about 100 per year. This is a formidable output.

- 16 Even before I became a judge I was well aware of the quality of your Honour's judgments from Western Australia and your extra-judicial writing. Indeed, in my own swearing-in speech, upon the assumption of this office, you were one of only two judges whom I quoted, and the other quotation was ironic.
- 17 You have throughout your judicial career manifested the capacity to produce judgments that are both erudite, in the sense of manifesting a complete grasp of the relevant legal principles, and, at the same time, written in a manner which has a force, clarity and logical structure, so that the judgment flows and the reader can understand where your chain of thought is going and why. Your Honour has produced many landmark judgments which are still quoted today.
- 18 From your service in Western Australia there are important precedents on the nature of fiduciary obligations;⁴ on equitable compensation in the context of corporate misfeasance;⁵ on full faith and credit in constitutional law;⁶ on director's duties;⁷ on various aspects of sentencing;⁸ on the principles of subrogation;⁹ and on conflicts of interest by solicitors and the permeability of Chinese walls¹⁰ which, as you know, I believe is an inappropriate metaphor, with its suggestion of impenetrable inscrutability. In Australia we should call such an arrangement "the dingo fence".
- 19 Your contribution continued in New South Wales in virtually every area of this Court's extensive civil and criminal jurisdictions. The cases include landmark judgments on powers of other courts in the New South Wales system;¹¹ on extension of limitation periods;¹² on dealing with vexatious litigants;¹³ on promissory estoppel;¹⁴ on the liability of a litigation funder to provide indemnity for costs;¹⁵ on contempt of court;¹⁶ on complex commercial arrangements;¹⁷ and, of course, on every aspect of the law of tort from the duty of care to independent contractors;¹⁸ the duty of care of statutory authorities;¹⁹ of a prison to a prisoner;²⁰ of a retail seller of

goods;²¹ numerous treatments of the concept of causation;²² and the duty of a publican serving drinks to a patron²³ which has a distinct resonance in this week's High Court judgment.²⁴

- 20 This is a body of work of which you can be truly proud. The legal community of Australia will be in your debt for many years to come.
- 21 Throughout your years of judicial service, you also contributed to the administration of justice in the form of articles and speeches on a broad range of subjects. Your best known public role was as the Chair of the Panel appointed by the governments of the Commonwealth and the States and Territories to review the law of negligence. Your recommendations in that report were enormously influential. Most of the criticism of the tort law reform of the period is directed to changes which went beyond your actual recommendations. Your contribution to restoring an appropriate balance in the practical operation of the law in our society was of the first order. Thereafter, in judgments, articles and speeches your Honour continued to contribute to the development and application of these reforms.
- 22 Your Honour's contribution to this Court was, as in Western Australia, not limited to the production of judgments. Your Honour participated fully in the collegial life of the Court and brought your enthusiasm and experience to all aspects of the Court's internal affairs. As Chair of the Library Committee and of the Education Committee you made invaluable contributions to essential aspects of the internal workings of the Court. If judicial independence is to be a practical reality, then it is essential that judges of the Court play an active role in the internal administration of the affairs of the Court. Otherwise the real power to control the court will drift to others. You have set an example to all of your colleagues in this respect and I am personally very grateful for the scope and quality of the contribution you have made.

- 23 I know I speak on behalf of all of the judges when I say we will miss both your wit and your wisdom. Having you around was simply fun. As Justice Allsop has noted, your distinctive laugh should be made into a ring tone.
- 24 Perhaps what I will miss most, however, on a personal basis, is the intellectual stimulation that I received from you over all of your years on this Court by reason of the breadth of your interests, particularly on history and current affairs. You and I exchanged books and articles on a regular basis and I trust that this will not cease, nor require, in view of your new responsibilities, some form of disclosure on a public record.
- 25 The universal response to your Honour's appointment to the Independent Commission Against Corruption is one of congratulations both to you and to the government that had the confidence to appoint you. You are a person of exceptional independence of mind and strength of character. Together with your experience and competence, these characteristics equip you for this new role, as they did throughout your judicial service. I know I speak on behalf of all of your colleagues when I say that we acclaim your sense of public service and look forward to your continued contribution to the people of this State and of Australia.
- 26 **THE HONOURABLE JOHN HATZISTERGOS MLC, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, today we formally farewell you reflecting on your truly distinguished career to date, a career which has spanned across not only decades but also continents and a career of service to the law, at the Bar and on the Bench and in academia. Born in Johannesburg you graduated from the University of Stellenbosch in South Africa in 1960 with a Bachelor of Commerce and Bachelor of Laws degrees. Your successful career in South Africa included practising as a solicitor, partnership in a law firm, membership to the Cape Bar, serving on the Cape Bar Council and being an examiner in trial practice for the South African Bar Association and in Business Law for the University of Capetown.

- 27 In 1981 you migrated to Australia and I am confident everyone in this room will agree that South Africa's loss has been Australia's great gain. Your contribution to the law, particularly civil law reform in Australia, began in Western Australia which you made your new home. You quickly established your legal provenance and became in 1984 a member of the Western Australian Bar and in the following year appointed Queen's Counsel. It was not long before your talents as a leading member of the Commercial Bar in Perth were recognised by the State of Western Australia and in 1989 you were appointed as a judge of the Supreme Court of that State. It is to your credit that the Western Australian Bar Association to this day regards you with great esteem in appreciation of your outstanding service to that State as a judge.
- 28 You are known to have a superhuman capacity for work and significantly as judge in charge of the Supreme Court Civil List you were instrumental in overcoming considerable backlogs in the work of that court. This included introducing case management and establishing an expedited list and other procedures. Further, you ordered the report which eventually led to the establishment of the Court of Appeal of Western Australia.
- 29 In 2001 you were enticed eastwards and after a brief period as an acting judge of the Court of Appeal of New South Wales you were soon appointed as a permanent judge of the Court of Appeal in 2002. You continued your adventures further east by taking up a part time appointment as a judge of the Supreme Court of Fiji between 2006 and to early this year. Your expertise in negligence and tort law led you to be appointed by the former Prime Minister in 2002 as the chairman of the Panel of Eminent Persons. The panel was tasked with the significant responsibility of examining the law of negligence including its interactions with the Commonwealth Trade Practices Act of 1974. Chief Justice Spigelman commented on the extraordinary work of the panel under your leadership given the stringent time constraints that the panel operated under. The fact that the final report produced by the panel is known as the Ipp Report is evidence of your significant contribution to it and from 2002

to 2004 the report's recommendations were substantially adopted by Parliaments throughout Australia enacting reforms to personal injury. Your role in implementing major reforms of court procedure in Western Australia and in reviewing the law of negligence was recognised by the Government of Australia in 2007 when you were made an Officer of the Order of Australia for your outstanding achievements and service.

30 As an appellate judge in the New South Wales Court of Appeal you are remembered for your professional manner and your great ability to engage counsel within the court room in challenging legal debates, all the time penning clear and succinct judgments, not always an easy feat for an eminent scholar. Despite the extensive lists of achievements I have enumerated I have not yet begun to scratch the surface of your Honour's accomplishments in legal practice, judicial service and academia. Your Honour was also a Fullbright Senior Scholar, had Fellowships at the University of Western Australia, the Inns Court and the University of Cambridge in addition to being widely published. Your colleagues and those close to you speak in unison as they describe you as highly personable and a great intellect and those who have worked with you closely speak with heartfelt sincerity when they say that they greatly respect you and that you will be sorely missed.

31 I understand from your colleagues that your Honour also has a wonderful sense of humour and a sonorous laugh. They always know you are coming down a corridor because of the laugh that precedes you. There is, however, one thing that they will not miss and is of course your Honour's secret vice. Notwithstanding your unimpeachable position as a judge your Honour is outrageously biased. You do your best to conceal it but every so often you brazenly sledge other judges revealing your unbridled passion for the Springboks. I understand you and Justice Tobias have a running bet of \$5 each time South Africa and Australia play and to the great consternation of Justice Tobias your Honour is currently ahead.

- 32 In farewelling you I also congratulate you on your appointment as Commissioner of the Independent Commission against Corruption. Your wealth of experience, work ethic and knowledge will be invaluable to the Commission. Your Honour's son, Stephen Ipp, was hoping your farewell from this place would translate into more time for your favourite pastimes of cricket, rugby and cooking with your family but despite your new posting I think you of all people will be able to balance the professional and recreational spheres of life.
- 33 Your Honour, the State of New South Wales has been fortunate that such a committed, passionate and personable legal professional such as you has served its justice system for such a long period. On behalf of the State and the New South Wales Bar Association I thank you for your service and wish you all the best in the next chapter of your career. May it please the court.
- 34 **MR H MACKEN, IMMEDIATE PAST PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** On behalf of the President of the Law Society of New South Wales, Joseph Catanzariti, who is overseas today, and the 22,000 solicitors of New South Wales I am delighted to add my valedictory comments on the occasion of your Honour's departure from this court. Wonderful things have come from the west, Robert Holmes a'Court, Bon Scott, Rose Porteous, the America's Cup winning team, Special Air Service Regiment and, most relevantly today, some fantastic judicial minds, Ronald Wilson, our current Chief Justice, Robert French, come immediately to mind but most significantly for our fair State it is you, the Honourable Justice David Ipp. Your life and career are reflective of a man of many skills, a gifted mind and a driving passion for both Springbok rugby and the law. The son of Heimann and Freda Ipp, you were born in Johannesburg in South Africa. Your brother, Howard, lives in Toronto and your sister, Sheila in Houston, USA. You studied at the University of Stellenbosch and there you were able to pursue the three great passions of your life, rugby, law and Erina to whom you met there and have been

married ever since and ;your success in two out of three is not bad, rugby can be a very difficult game.

- 35 Your children have generally followed in your footsteps. Stephen is a barrister working in Melbourne, Graham is a pilot, presumably ferrying the lpps around the globe, and your daughter, Tessa, is a social worker. The tyranny of distance for the family may result in the accrual of tens of millions of frequent flyer points but yours is still a close family.
- 36 Your legal career commenced in 64 as a solicitor at Hayman Godfrey & Sanderson, Attorneys in Johannesburg. You were called to the South African Bar in 1973. Your Honour moved across the big ditch to Perth in 1981 and was admitted as a barrister there and appointed Queen's Counsel in 1985. It's reflective of the tremendous regard that you were held in by your fellow professionals and the skills you've developed as a lawyer that you were made a judge of the Supreme Court of West Australia in 1989. This probably even eclipsed the position you then held as treasurer of the Law Society of Western Australia in 1988. Then, as now, you were really going places in the legal profession. You were made a Fellow of the University of West Australia in 1999, admitted to the Inns of Court in the United Kingdom.
- 37 Plenty has been said this morning about your achievements but you were drawn ever east into the sun's morning rays. Like some of your famous West Australian compatriots your skills were required in a bigger arena than that provided by the world's most isolated capital. You were an acting judge in the Court of Appeal in 2001, appointed as a judge to this court in 2002, a position you've held until today. This appointment coincided with the release of the lpp Report into the Review of the Law of Negligence which was handed down on 30 September 2002. The discussions of the effect of the change of personal injury laws have been ventilated in this court room before you for years, you don't need my tuppence worth in respect of that particular process, it's always been the case that you say it better than most and I note a paper you delivered at

the conference to celebrate the 80th anniversary of the publication of the Australian Law Journal where you said:

“Certain of the statutory barriers that plaintiffs now face are inordinately high. Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and Government authorities should be treated before the law in the same way as the ordinary citizen. It’s difficult to accept that public sentiment will allow these changes to remain long term features of the law.”

38 I don’t need to point out to you that you had some tremendous assistance in the preparation of that report. This was not limited to the late Professor Don Sheldon, a wonderful man and a gifted surgeon who in fact corrected my deviated septum. Of more relevance to me was the professor of sociology who gave evidence to that committee, that is, my mother, who gave me the deviated septum. Thankfully no cause of action arose from the surgery which would have needed the enhanced protection the law gives to medical professionals and I have long since settled with my mother.

39 Better minds than mine have described some of the high points of your judicial life, your erudite, cogent and logical decisions are but a flick of the mouse away. The views of your brother judges are a little bit harder to obtain. I note the Honourable Justice Harrison at the swearing-out of the Honourable Roddy Meagher in 2004 said:

“Justice Ipp has been able to master the technique of looking like a Rembrandt portrait. He can sit in court for hours staring straight ahead but, as with all good paintings, the eyes follow you around the room.”

40 Justice Murray Tobias is one of your colleagues who will miss your Honour’s huge laugh that can be heard from inside the lift shaft and your feet pounding down the corridor to his room. In fact, such is your impact that his Honour said that he would have slit his throat were it not for your

Honour, you are his *raison d'être*, well, so far as coming into work applies anyway, he will miss your Honour tremendously. I am assured by Justice Tobias and those who know that in respect to the \$5 wagers the worm is turning.

41 Your appointment to the Independent Commission against Corruption will limit the opportunities for your Honour's other leisure pursuits including bushwalking, classical music, concerts and perhaps an odd bottle of wine; "a wonderful man", "gregarious", "generous to a fault", "compassionate" and "cheeky" are just some of the descriptive labels given to your Honour by your associate, tippy and other chamber colleagues. I understand that now your Honour is on the move the lolly jar will no longer require constant replenishing.

42 You take with you today the deep-seated thanks and appreciation of the solicitors of New South Wales. You are certainly the greatest legal asset we have ever received from South Africa. As for contributions from the world of the sand gropers it's a line ball between you and Bon Scott. You've demonstrated an intellectual rigour, a logical and insightful grasp of difficult facts, circumstances and a capacity to apply the law efficiently and impartially. These skills, coupled with an ingrained warmth and compassion for your fellow citizens all go very well for your new role at the Independent Commission against Corruption. As a profession we have our favourites. This is a luxury we have but, unhappily for you, you cannot have. We're not pleased to see you leaving this court, you've made a wonderful contribution to its work, however, we are very pleased the public confidence in the administration of justice in this State is protected by your stepping into the breach at the Independent Commission against Corruption. We are really pleased that your contribution can continue.

43 Today is Friday the thirteenth and viewed by some to be a dangerous day by some superstitious types and I am not sure if this is right. Today is a wonderful day for the profession and for your Honour personally. However, South Africa plays France in the next day or so and it is, after all,

Friday the thirteenth. The profession thinks you are fantastic but. that said, come on the Froggies. May it please the court.

44 **IPP JA:** Thank you, Chief Justice, for your most generous remarks and Mr Attorney and Mr Macken for your kind observations.

45 I am honoured by the presence of each of you in this court room this morning. I welcome particularly those retired judges of the High Court and this court and the judges, past and present, of the Federal Court who are here today. I would also specially mention the presence of two very old Perth friends, the Honourable Chris Steytler, until recently the President of the Western Australian Court of Appeal, and Chris Zelestis QC who has for several years been a leader of the WA Bar. I am very happy that my son, Stephen and his wife, Lee, are here from Melbourne.

46 I am an inveterate sceptic but there are two things in which I firmly believe; the rule of law and the traditions of the law. From a very early age I wanted to be involved in the practice of the law. Fifty-four years ago I commenced studying the law and I have not stopped learning since.

47 In 1884 Lord Bowen wrote:

“As fro the law, it is no use following it unless you acquire a passion for it. ...I don't mean a passion for its archaism, or for books, or for conveyancing, but a passion for the way business is done, a liking to be in court and watch the contest, a passion to know which side is right, how a point ought to be decided.”

That passion has been my touchstone and motivating force.

48 In 1956 at the age of 17 I went to Stellenbosch University in the Cape, far from my home in Johannesburg, to study law. As the Chief Justice has mentioned, the language of instruction was Afrikaans, which at that time I spoke and understood very poorly. Later, however, I became fluent. Going to that university was a fateful decision for me. In my fourth year I

met my wife, Erina. Five years later we were married and in the words of the American poet, Robert Frost, “together started out on life’s perilous journey oar to oar and wing to wing”. I have practised law in four cities and two continents. This itinerant life has not been without its crises, struggles and desponds. Without Erina’s wisdom, courage, determination, grace and support, I would not have been able to survive, let alone achieve anything. She is the foundation on which my life rests.

- 49 At Stellenbosch there were but fifteen students in my final year LLB class. All graduated. Pretty rapidly three were struck off the roll. This may remind you of the Springbok rugby team. Happily, I was not one of the three. To teach these fifteen students there were four professors and a senior lecturer, a ratio of three to one. The fact that the four professors had all obtained their doctorates at Leyden University in Holland was not coincidental. In the 1950s the movement to eradicate any influence of English law from Roman Dutch law in South Africa was at its height. Stellenbosch Law School was the leading proponent of this movement which has long since dissipated.
- 50 Much of my time as a law student was spent in listening to how English law was irrational, unprincipled, idiosyncratic and uncertain. I was taught that the civil law virtues of certainty, rationality and devotion to principle were unsurpassed. As I grew older and more experienced, however, I realised that this intense admiration for one’s own legal system is not a unique phenomenon - rather it is ubiquitous, one finds it everywhere. It is merely a manifestation of nationalism and patriotism. As one would say if charging a jury, poor guides for judgment.
- 51 I am part of a generation of lawyers who were trained by men who saw active service in World War II. It has always seemed to me that the experience at a young age of putting one’s life at risk for one’s country moulded attitudes that are not always found today. The returned soldiers who trained me were strong-minded, stern disciplinarians, with an unswerving sense of commitment of duty and of what was ethically right

and wrong. Notions of moral relativism were alien to them. They drummed into me the need for grinding preparation followed by a commitment to whatever conclusion I had reached. No hedging was allowed. One had to take the consequences if one was wrong. Stylistically no adjectives, adverbs, multi-syllabic words or compound sentences were tolerated. Unnecessary length was deplored. Simplicity and clarity counted far more than intellectual grandstanding and the complexity it brings. As an impressionable young lawyer I admired this approach and throughout my career, not always successfully, strove to emulate it.

- 52 Later as a barrister at the Cape Bar I was fortunate to appear often with and against leading silks. Some were barristers of vast skill and experience whose path to the Bench had been blocked by their political convictions. They taught me the great traditions of the Bar and how one should conduct oneself as a barrister. I think of them fondly and with gratitude.
- 53 As a careful and deliberate choice twenty-eight years ago we applied to immigrate to Australia and I have never regretted that decision. I thought of Australia as a truly democratic country where everyone is given a fair chance, no matter what creed or background or colour, and it has proved to be everything I had hoped for. Australia has given me opportunities that I never expected and I am genuinely proud to be an Australian.
- 54 On arriving in Perth in 1981 at the mature age of forty-three I had to adapt quickly to the new legal philosophy and jurisprudence and rid myself of attachment to Roman Dutch principles and influences. Success in coming to terms with equity and the common law was crucial to my survival and that of my family. Of course it was difficult at that age to learn the new system and to apply it in practice. I soon realised what Winston Churchill meant when he said, "England, like nature, never draws a line without smudging it ...in our climate the atmosphere is veiled." He must have had equity in mind. I will not mention the current law of negligence.

- 55 Necessity is a compelling taskmaster. I began to acquire an understanding and appreciation of the law of Australia. I found it thrilling to find how a 20th century judgment was based on a decision of the 19th century, that was in fact based on what Blackstone had written in the 18th century, or the case from Cook in the 17th century, who found it in Littleton's writing of the 15th century, and so to Bracton in the 13th century.
- 56 In time I became totally absorbed in Australian law and today I would not be able to express an opinion on Roman Dutch law. I have acquired a deep admiration for the ageless quality of the common law, its veneration for the past, its pragmatism and flexibility, the way it is able to adapt to modern conditions and its capacity to provide fairness and justice in individual cases.
- 57 Nevertheless, for a long time I believed that my education and training in the civil law was an asset rather than a liability, in effect, a broadening experience. After all, the same stable had produced Lords Steyn and Lord Hoffmann and the legendary barrister, Sir Sydney Kentridge QC, but *Farrah Constructions v Say-Dee* shattered this illusion. There, the High Court deplored, and I quote: "Lawyers whose minds have been moulded by civilian influences to whom the theory may come first." I immediately realised that that described me to a T. Gloom descended. After a while, however, the usual process of rationalisation kicked in and I began to feel better. It occurred to me that perhaps the High Court was thinking of Justice Hammerschlag.
- 58 Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focuses on historical purity and holds that

judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people - an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law.

- 59 It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: *Donoghue v Stevenson*, *Hedley Byrne*, *High Trees* and *Anisminic* are but a few examples of this. Maitland's aphorism remains pointedly relevant: "Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."
- 60 In 2001 I had the great good fortune to be given the opportunity to sit as a judge of this court. Being part of this institution has been a rejuvenating and life-fulfilling experience that I will always treasure. In many ways this has really been the happiest period of my professional career.
- 61 I have had the privilege of working in a court under the aegis of Chief Justice Spigelman. His leadership has added to the quality of the court and court life in countless ways. History will regard him as one of the great chief justices of our country.
- 62 I have also had the privilege to work under the skilful and considerate stewardship of Presidents Mason and Allsop. Both are outstanding lawyers and administrators. The collegiality of the Court of Appeal could not have existed without their guiding hands. The foundation of that collegiality is the working together of judges in intimate, friendly, good-humoured and non-competitive relationships. It involves respect for the worth and strengths of each other. It results in the whole of the court being greater than the sum of its parts.

- 63 A fascinating aspect of this court is the difficulty in forecasting which way a particular judge is going to decide. Although some judges may be thought to be of a particular makeup in my experience each has great independence of mind and can easily react in an unexpected way. It is a mistake to place judges in pigeon holes. I have more than once been on the receiving end of this phenomenon but not more so than when, in my first year on the court, I was sitting in a workers compensation appeal. Justices Meagher and Handley were firmly of the view that the worker's appeal should be dismissed. I thought it should be upheld. They each gave ex tempore judgments and so did I, but in dissent. As we were walking out Justice Meagher said to me, "I didn't know you were a pinko."
- 64 I shall miss the companionship that is so much part of judicial life on the Supreme Court. From the moment we arrived in Sydney all have treated Erina and I with kindness and friendliness. The warmth and hospitality of the judges and their partners have contributed greatly to the fact that our time here has been such a rewarding and agreeable experience.
- 65 I wish to pay tribute to the New South Wales legal profession. When I arrived the thought of being a judicial newcomer in what has been described as the Sydney vortex was intimidating but my fears were quickly allayed. From the time I arrived I was struck by the high quality of representation at both senior and junior level. Having practised law in so many jurisdictions I think I am well qualified to say that the New South Wales Bar stands back for none in regard to courtesy, skill, professionalism and commitment to the ideals to which all barristers should aspire. Some years ago 11th Floor Wentworth Chambers did me the honour of adopting me as a member and that association has meant a great deal to me.
- 66 I have had the good luck of having had two associates, Pam Kirwan and Sally Guth, who have facilitated my daily life with their efficiency, good humour and kindness. I owe them a great deal and thank them both.

67 I have been fortunate to have had as my tipstaves engaging young people of many different cultures and backgrounds and of high ability. I have valued and enjoyed the assistance they have given me.

68 I have tried to produce my judgments as soon as possible after the hearing, usually within a week or two. Some doubt the merits of this approach. I have been urged to take longer to think about the issues and not to be in too much of a hurry. This was particularly the case with the negligence inquiry when I was severely criticised for handing down the report on time. I have taken heart, however, from the words of the illustrious Justice Olive Wendell Holmes. On 4 April 1909, just over 100 years ago, he complained in a letter to Sir Frederick Pollock that some people regarded the fact that his decision was written at once as evidence of inadequate consideration. He wrote,

“Such humbugs prevail. If a man keeps a case six months it is supposed to be decided on great consideration. It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull.”

69 In every speech Cato the Elder made in the Roman Senate, no matter the topic, he would conclude by saying “Carthago delenda est”, Carthage must be destroyed. Given that precedent, I hope I will be forgiven if I repeat that, firstly, I had no part in the drafting of the Civil Liability Act and, secondly, that Act contains many provisions that I did not recommend.

70 Ever since when at dawn on Friday the thirteenth, precisely 702 years and one month ago, King Philip IV arrested and later tortured the Knights Templar Friday the thirteenth has been regarded as an unlucky and unhappy day but by reason of this ceremony this day has been a very happy one for me. I thank the Chief Justice for this occasion and each one of you for your presence here today. In this historic court room, in the midst of family, friends and colleagues on the Bench and in the profession, I would have to say the race is worth the running. For my part, the joy has

been in the camaraderie, the debate and the doing and, if I may say so, the doing where possible at top speed.

71 I think it fitting after almost twenty-one years to leave this court and close my judicial career with the words, may it please the court.

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- 1 See Andreas Van Wyk, “Johannes Christiaan de Wet” (1991) 2 *Stellenbosch Law Review* 5 at 11.
- 2 Supreme Court of Western Australia, Farewell to the Honourable Justice Ipp, transcript of proceedings, Perth, 1 March 2002 at 4.
- 3 Ibid at 17–18.
- 4 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187.
- 5 *Biala Pty Ltd v Mallina Holdings Limited (No 4)* (1994) 13 WAR 11.
- 6 See *Bond Brewing Holdings Limited v Crawford* (1989) 1 WAR 517.
- 7 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.
- 8 *Jarvis v The Queen* (1993) 20 WAR 201; *R v Liddington* (1997) 18 WAR 394.
- 9 *Woodside Petroleum Development Pty Ltd v H & R–E & W Pty Ltd* (1999) 20 WAR 380; *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291.
- 10 *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357.
- 11 *Air Link Pty Ltd v Paterson (No 2)* [2003] NSWCA 251; (2003) 58 NSWLR 388; *Orellana-Fuentes v Standard K Knitting Mills Pty Ltd* [2003] NSWCA 146; (2003) 57 NSWLR 282.
- 12 *Itek Graphix Pty Ltd v Elliott* [2002] NSWCA 104; (2002) 54 NSWLR 207.
- 13 *Wentworth v Graham* [2003] NSWCA 229; (2003) 57 NSWLR 741.
- 14 *Australian Crime Commission v Gray* [2003] NSWCA 318.
- 15 *Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr [No 2]* [2005] NSWCA 420.
- 16 See *Street v Hearne* [2007] NSWCA 113; (2007) 70 NSWLR 231.
- 17 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; (2008) 252 ALR 659.
- 18 *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65; *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132.
- 19 *Amaca Pty Ltd v State of New South Wales* [2004] NSWCA 124; (2004) 132 LGERA 309
- 20 *State of New South Wales v Bujdoso* [2007] NSWCA 44; (2007) 69 NSWLR 302.
- 21 *McPherson’s Ltd v Eaton* [2005] NSWCA 435; (2005) 65 NSWLR 187.

²² See, eg, *Flounders v Millar* [2007] NSWCA 238; (2007) 49 MVR 53.

²³ *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; (2002) 55 NSWLR 113.

²⁴ *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.

CASE MANAGEMENT IN NEW SOUTH WALES
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
PAPER PREPARED FOR THE JUDICIAL DELEGATION
FROM INDIA
SYDNEY 21 SEPTEMBER 2009

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

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

The Supreme Court has a trial division divided into two parts: the Common Law Division and the Equity Division. The former deals with cases involving personal injury, professional negligence, defamation and administrative law. The judges of this Division

also conduct criminal trials for the most serious indictable offences. Other indictable offences are tried in the District Court. The Equity Division of the Supreme Court hears cases involving commercial law, corporations law, equity, trusts, probate and the family provisions statute. This judicial structure enables the Court to take advantage of the specialist knowledge of members of the private bar, from which the overwhelming majority of appointees to the Court still come.

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

Judges are appointed by the Governor of the State on the advice of Ministers. There is no independent judicial appointments commission. The desirability of such a commission has been raised in recent years as a possible development. This proposal has had little support in the past.

Judges can serve until the age of 72 and may be appointed as acting judges until the age of 75, or in some cases until 77. A significant majority of judges practised at the independent bar. However, a number of solicitors and a few legal academics have been appointed to the bench.

Judicial Management

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

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

particular proceedings. Managing individual cases efficiently is a necessary, but not a sufficient condition, for effective management of the caseload.

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

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

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

One of the reasons why managerial judging has emerged is because of what economists would call market failure. In a market for legal services, where knowledge was perfect, clients would ensure that the cost of litigation would be minimised and reasonably proportionate to the value to them of success in the litigation. However, there is a substantial disparity in the knowledge of clients and that of their lawyers with respect to the process of litigation, a disparity which economists would call information asymmetry. The requirements of specialised skills and

the complexity of the process of litigation are such that clients are not able to assess the quality of, or even the need for, a legal service before it is purchased. Those difficulties persist even after the service has been purchased. This kind of market failure explains a number of aspects of the legal profession. Managerial judging offsets this form of market failure.

On the other hand, it must be acknowledged that case management imposes costs on the parties. For cases which would settle anyway, costs are front loaded. Case management must attempt to minimise the number of appearances in court and to restrict adjournments.

Our procedures prepare cases for a single continuous trial. This avoids the inefficiencies involved when judges and practitioners have to familiarise themselves with a case more than once.

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

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

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

New South Wales Practice

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

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

of delay as the time beyond that which is reasonably required for the fair and just determination of the case.

The New South Wales Courts do not have what the Americans call a “docket system” under which cases are assigned to the judge who will conduct the trial for management. Other courts in Australia use a docket system. There are arguments for and against the two approaches and what is right for one court is not right for another. In my opinion, if New South Wales were to adopt a docket system the productivity of our courts would significantly decline.

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

Effective and efficient use of resources, in our experience, requires something more than managing individual cases for trial. It requires an overview which, in our experience, is best done by disaggregating the caseload into distinct categories which require

different treatment based, to a significant degree, on specialised law and specialization amongst legal practitioners. Most case management systems involve some system of differentiation, often called “tracks”. The New South Wales system involves a greater number of categories or “tracks”, but it works in our system because of our particular caseload. Each jurisdiction will differ in this respect.

The Act and Rules

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

The relevant statutes and court rules have been consolidated and applied uniformly to all three New South Wales courts by the *Civil Procedure Act 2005 (NSW)* and *Uniform Civil Procedure Rules 2005*. After a process of collaboration amongst the three courts, under judicial leadership with considerable input from departmental officers, we have adopted a uniform Act and uniform set of Rules of Civil Procedure applicable to all courts. These

Rules are sufficiently flexible to allow for the differing requirements at the three levels of the hierarchy. The Act and Rules integrated existing practice. This did not involve significant change to past practice. The key reform was in the uniformity. This achievement would have been delayed if significant changes had been proposed.

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

The first statutory provision to which I should refer is the *Legal Profession Act* 2004. That Act requires that a legal

practitioner, before filing a pleading – whether for a plaintiff or for a defendant – must certify that, “there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law” that the claim or the defence has “reasonable prospects of success”. This section reinforces the traditional professional obligation of legal practitioners that they must not permit the commencement or continuance of baseless proceedings.

The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules* confirm and re-enact the powers of courts to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. When exercising any power a court is required to give effect to the overriding purpose expressed in the Act, namely: to facilitate the “just, quick and cheap” resolution of the real issues in the proceedings.

Under our *Civil Procedure Act*, parties have a statutory duty to assist the court to further this overriding purpose and, therefore, to participate in the court’s processes and to comply with directions and orders. Furthermore, every legal practitioner has a statutory

duty not to conduct himself so as to cause his or her client to breach the client's duty to assist.

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

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

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

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

- Power to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed, 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.

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

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

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

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

The courts encourage the use of alternative dispute resolution to resolve a dispute as early as possible and make detailed provision for mediation and arbitration. Earlier provision for neutral evaluation was not much used and has been removed. There has been an increase in the number of legal practitioners who are skilled in mediation and arbitration. Registrars of the

Courts have been trained as mediators and conduct mediations in the court. Unlike some other courts, judicial officers do not conduct mediations in New South Wales.

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

Court Organisation of Management

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

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

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

Building on our long experience with the success of our Commercial List, cases of similar character are grouped by subject category and specialised Practice Notes set out in detail the requirements of the particular field. Each of these lists is managed by a judge, in conjunction with a registrar. The specialist lists in the Common Law Division are the Administrative Law List, the Criminal List, the Defamation List, the General Case Management

List, the Possession List and the Professional Negligence List. In the Equity Division the specialist lists are the Admiralty List, Adoption List, Commercial List, Corporations List, Probate List, Protective List and Technology and Construction List.

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

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

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

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

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

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

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

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

The Registrar in Equity manages cases until they are ready for hearing and lists them for hearing before the judges of the Division. The judges usually hold a pre-trial directions hearing about five or six weeks before the trial to ensure that the parties are adhering to the real issues for trial.

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

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

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

In Common Law, except for the Professional Negligence List, the registrar manages cases in a similar way to the Equity Division. Similar criteria apply for referring matters to associate judges and judges of the Division.

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

Caseload and case management is a matter that is regularly discussed in formal and informal meetings, including weekly meetings of the relevant list judges and by regular contact between the judge in charge of a particular list and the registrar administering the list under the judge's guidance. A considerable body of statistical information is available about the caseload and the progress of individual cases. Judges with administrative

responsibilities for Divisions and particular Lists are able to monitor the state of any part of the list, so that emerging problems can be anticipated and corrective action taken. Our present systems will be substantially enhanced when a new software system under development, called JusticeLink is fully deployed.

Commercial and Construction Lists

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

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

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

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

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

Interlocutory motions and directions are heard in a running list on every Friday and otherwise as required. Use of technology

often enables cases to be managed without the costs of attendance at court.

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

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

The objective of a Stop Watch Hearing is to achieve a more cost effective resolution of the real issues between the parties. It requires more intensive planning by counsel and solicitors prior to trial. The technique has been successfully used in commercial

arbitration and I have every reason to believe it will work in commercial litigation.

Backlog Reduction

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

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

The first measure to clear the backlog was an increase in the jurisdiction of the lower courts and the transfer of significant numbers of matters from the Supreme Court into the District Court. The jurisdiction of the District Court was increased and, in motor vehicle cases, was made unlimited. A Supreme Court judge sat for many days reviewing all of the files, identifying a large number of matters in which no issue of complexity or legal difficulty arose so that they could be handled, appropriately, at a District Court

rather than a Supreme Court level. Hundreds of cases were transferred and were disposed of by the more expeditious procedures employed in the District Court. Getting the distribution of the caseload in the hierarchy of courts right is an important way of achieving the most effective use of limited resources.

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

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

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

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

The “blitz” technique involved sitting a substantial number of judges, including on occasions virtually the entire court, including appeal judges, to hear hundreds of cases in a short period of time.

Cases were not listed for a particular day, but for a particular week, and were treated as a running list so that, whenever one case settled or was determined, the next case in the list was sent to the judge immediately. This approach provided considerable incentive for the profession to settle cases and enabled judges to dispose of substantial numbers of cases in a short period of time.

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

The combined effect of all these measures was such that, within a decade or so, the substantial delays of five years and more were reduced to a substantial degree. In the case of practitioners who genuinely want to get their cases on, there is no reason today why the case cannot be disposed of to final hearing

within 12 months in the District Court and within two years in the Supreme Court. However, many cases are still taking longer than they should and the task of disposing of older cases requires continuing attention.

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

Conclusion

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

- (1) A court must monitor and manage both its caseload and individual cases.
- (2) Management cannot be successful without judicial leadership and commitment.

- (3) Procedures must be clearly established in legislation, court rules and written practices.
- (4) Cases must be brought under court management soon after their commencement.
- (5) Different kinds of cases require different kinds of management.
- (6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter.
- (7) The number of court appearances must be minimised.
- (8) Realistic but expeditious timetables must be set and, unless there is good reason, must be adhered to.
- (9) A key objective is to identify the issues really in dispute early in the proceedings.
- (10) Trial dates must be established as soon as practicable and must be definite, so as to ensure compliance with timetables.
- (11) Alternative dispute resolution should be encouraged and sometimes mandated.
- (12) Monitoring of the caseload must provide timely and comprehensive information to judges and court officers

involved in management. Time standards may be useful in focussing the attention of all those involved.

- (13) Communication and consultation within the court and with others involved in the litigation process is an ongoing process.

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

SOCIAL HISTORY OF COMPANY LAW: BOOK LAUNCH¹

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

BANCO COURT, SYDNEY, 9 SEPTEMBER 2009

The origins of my invitation to launch this book lie, somewhat counter-intuitively, in remarks I made when launching a book on Corporate Governance in Japan.² The audience on that occasion was bemused, at least for the first five minutes of my speech, with my focus on Robert Lowe, who I thought and think is one of the most interesting politicians in our colonial history. It was, however, his activities on his return to England in 1850, after eight years in Sydney, with which I was then concerned.

The future Viscount Sherbrooke, who would serve as Chancellor of the Exchequer under William Gladstone, was the principal promoter of the Joint Stock Companies Act of 1856 which revolutionised corporate law. That Act removed restrictions upon a company obtaining limited liability, so that from that time onwards incorporation was no longer a privilege, but in substance, a right attainable on application. Contemporary corporations legislation can be traced to this radical reform. As I noted in my

earlier address Robert Lowe has appropriately been called the “Father of the Modern Company”.³

Indeed, Lord Sainsbury said during the second reading for the new United Kingdom *Companies Act* 2006:

“One hundred and fifty years ago, my predecessor Robert Lowe, later First Viscount Sherbrooke, brought forward the Bill that created the joint stock limited liability company. It was the first nationwide codification of company law in the world, and he has recently been described as ‘the father of modern company law’.”⁴

Lowe held a range of views which are no longer acceptable, such as his opposition to extending the franchise and anything democratic. However, he can be forgiven much for his eloquence. I particularly like his description of the role of a Treasurer when assuming the equivalent British Office:

“The Chancellor of the Exchequer is a man whose duties make him more or less of a taxing machine. He is entrusted with a certain amount of misery which it is his duty to distribute as fairly as he can.”

His classical learning was on full display when he described his, ultimately rejected, tax of a halfpenny on a box of Lucifer matches in 1871 with the epigram *ex luce lucellum*, “out of light a little profit”. Even then not politically sensitive, but you have to admire a person who cannot suppress his wit.

Robert Lowe is one of the central figures in Rob McQueen’s new book *A Social History of Company Law*, which traces the development of English corporation legislation and its adoption in Australia. Whilst recognising his significance, our author is not content with Lowe’s laissez faire beliefs. Lowe emerges as a bit of an anti-hero.

In the debates of that time, Lowe denigrated the efficacy of detailed regulation, for example, with respect to the value of disclosure and publicity. The significance of Government regulation is a central theme of this book. Rob McQueen makes his views quite clear:

“The legislative model of 1862 continues to have important ramifications in the present day ... [T]he core features of the legislation have nevertheless remained unaltered. This is particularly the case in respect to the

core belief embedded in Robert Lowe's company legislation of 1856 that corporations are economic entities which owe their sole responsibility to their shareholders, even if by so acting the company may be acting contrary to broader social interests.

The responsibility of a company to pursue the interests of its shareholders at any cost, enshrined in the corporate legislation of 1856 and reinforced in the legislation of 1862, created an 'asocial' framework within which the modern corporation operates. ... If one were to look for the embodiment of the corporate psyche one would find it in the prescription to pursue profit and the shareholders' interests at all costs, which has been inherited from the 1862 legislation."

One of the most intriguing aspects of this book, is how decidedly contemporary many of the issues debated during the 19th century still are.

During the period covered by this volume and, of course, before and since, there have been numerous oscillations in the

intellectual zeitgeist as to whether the principal problem of the day should be regarded as arising from market failure or from government failure. We have experienced a particularly dramatic oscillation in this regard as recently as last year. These shifts in intellectual fashion are often driven by particular events, such as the bursting of bubbles of various kinds from tulips to subprime mortgages.

The broader approach to history writing, encapsulated in the concept of social history which Rob McQueen adopts, provides context of a depth which conventional legal history does not often give. With respect to so important an area of social regulation as corporations law, this broader perspective is particularly appropriate. It is a perspective that can inform contemporary debates about the role and function of this critical economic institution and about the most effective mechanisms for ensuring the fair and efficient operation of capital markets.

The recognition that earlier generations have gone through very similar debates, which led to particular legal structures, should, at the very least, instil a sense of caution if not modesty, against contemporary certitudes as to how we should respond to

the latest crisis and what the effect of a particular response is likely to be. Such a sense is particularly important in a media driven political age, where the most dominant political requirement is “to be seen to be doing something” – with precisely what is to be done, especially anything with no implications during the current electoral cycle, appearing often to have a distinctly secondary significance.

Tracing, as he does, the development of English company law and then its adoption and adaptation by the Australian colonies, Rob McQueen has provided us with an understanding of the different forces and ideas that have always impinged upon this area of the law. This improves our understanding of why those same forces and ideas are still of significance.

For example, during the period to which this book relates there was a fluctuation of views on key aspects of the law: as

- the extent to which shareholders could be expected to control corporations;
- the significance and efficacy of disclosure requirements about the financial position of corporations;

- the comparative effectiveness of government regulation and market or commercial pressures as a mechanism for ensuring proper conduct;
- the costs imposed by different regulatory regimes.

The continued significance of our institutional inheritance has been emphasised by the school of institutional economics, one of the founders of which, Douglas North said:

“History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society’s institutions. Today’s and tomorrow’s choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution.”⁵

This insight has transmogrified into a considerable literature on what has come to be called “path dependence”.

The volume I am launching today traces how the path, upon which we remain dependent, was trod. It traces the commercial, political and social pressures as they emerged from time to time. Its principal contribution is to enhance our understanding of the

political processes which have had long term consequences and which were always the subject of deliberate choice. We are not dealing with natural law here.

The later chapters also confirm the fact, often overlooked in the past, that our adoption of English legal models always involved adaptation. Whatever the proclivity of Australians of the era to call England “Home”, our legislators did respond to local needs and conditions. The best single example is how the needs of the mining industry led to the invention of the “No Liability” company.⁶ Nevertheless, one of Rob McQueen’s themes is the failure to recognise the inappropriateness of the British model in some respects, specifically by reason of the comparative inadequacy of local regulatory authorities.

A knowledge of the history of corporations law is, at least in the Australian context, a matter of high constitutional significance. One does not need to be a strict “originalist” on constitutional interpretation to recognise that the words “trading or financial corporation” in 51(xx) of the Constitution of the Commonwealth have a historical context. Even the approach to the Constitution as a living document – as intended by the framers to change with the

times, as all Constitutions must – also requires attention to what the concept meant at the time the Constitution was framed.

On the latter approach, it is pertinent to note that the nature of a “trading or financial corporation” was understood in the 1890’s to be subject to change. Indeed, the entire history of corporations law in the 19th century indicates that there were such changes, driven by legislation, by commercial development, by social ideas and by political disputation.

Nevertheless, the words are words of limitation.

When the High Court decided the definitive contemporary case on the corporations power – the *Work Choices* case – it did not need to define the concept of a trading or financial corporation. The *Work Choices Act* used the concept of a constitutional corporation defined in terms of the Constitution itself. Nevertheless, the issue was clearly regarded as a live question by the High Court, as the exchange with counsel in the course of argument clearly showed.⁷

The High Court will need to revisit the unsatisfactory state of the case law as to precisely where the line is to be drawn with respect, for example, to the trading and financial activities of incorporated schools, universities, local government entities and State statutory corporations. In this regard the history of corporations law will be of significance. The Court hinted at this in the Work Choices case itself. The joint judgment contained a long passage under the heading “Relevant 19th Century Developments”, outlining the history of the Corporations Acts in England and Australia.⁸

Although the joint judgment did not recognise the particular significance of the 1856 Act, its essential provisions were repeated in the 1862 Act which the Court said: “marked a watershed in the development of modern corporations law”.⁹ It is not without significance that that Act primarily focuses on corporations created for the purpose of profit making. Indeed, its long title was “An Act for the Incorporation, Regulation and Winding Up of Trading Companies and other Associations”. One of the basic texts of the 1890’s was entitled *The Law of Trading and Other Companies*.¹⁰

The 1862 Act distinguished a company “that has for its object the acquisition of gain”, from a company that “is formed for the purpose of promoting commerce, art, science, religion, charity or any other useful object”. The former may prove to be the defining characteristic of the constitutional concept of a “trading or financial corporation”.

As Jessel MR put it, the distinction between the latter and the former is that “the objects mentioned” (with respect to the latter) “are such as prima facie would lead to expenditure as distinguished from profit ... [R]ather a company ... formed to regulate the spending of the members’ money than the acquisition of any money by the members ... [A] company for giving away or spending as distinguished from a company for getting or acquiring anything”.¹¹

This kind of distinction may soon, on the basis of a historical survey, form part of our Constitutional law. Detailed investigation of the history of the concept of a “trading” and a “financial” corporation is clearly in the offing. This will be of particular significance in determining the extent to which the *Work Choices* case did, in the long run, shift the balance of authority between the

Commonwealth and the States. In terms of our federal balance this is the next important High Court case and an understanding of the history of English corporations legislation, and its adoption in Australia, will be at the heart of the argument when it occurs.

For those of us like myself, who have developed a certain affection for Robert Lowe, by reason of his extraordinary achievements both in Australia and in England, I regret to say that there is an unfortunate proposal likely to be adopted in the near future. The Australian Electoral Commission, in a report published only a few weeks ago, has proposed that the seat of Lowe, named after Robert Lowe, will be renamed after a former member for that seat. It is to be called McMahon.¹²

One does not have to know much about political history to realise that to prefer the name of this most insipid of characters over that of a fascinating individual such as Robert Lowe, is a step backwards. Billy McMahon may have been Prime Minister but this idea is “silly”, to deploy the adjective so often attached to his first name.

In the same report, the Electoral Commission proposes to abolish the adjoining seat of Reid, named after Sir George Reid, again manifesting the short term memory that is unfortunately characteristic of our celebrity dominated era. In the future someone will have to resurrect the name of Reid for the purposes of naming a seat after one of our more substantial founding fathers, a Premier of this State and a Prime Minister of significance. Much more substantial than McMahon will ever be regarded. These misjudgements reflect an inadequate understanding of our history which those who recognise that our heritage matters must combat.

Until 1969 there was a seat called Parkes. It was abolished in 1969. The last member of the seat was Tom Hughes QC. This was the first time since federation that the person often called the Father of Federation did not have a seat named after him. Eventually someone recognised just how idiotic this was and the seat was recreated as a rural seat in New South Wales in 1984. I have, no doubt, the same will happen to the seat of Reid. Unfortunately, I doubt if the seat of Lowe will experience the same resurrection. This is regrettable as, to repeat an observation I made in my earlier address, by reason of the global influence of

the British Companies Acts, no Australian figure has had a greater influence on world history than Robert Lowe.

I am, however, sure that the seat named McMahon will have a short shelf life.

Unfortunately, there is no conventional symbolic act for the launching of a book – such as smashing a bottle of champagne on the bow of a ship or cutting a ribbon at the entrance of a new road or bridge. All I can do is to say, and I do say, this book is launched.

¹ Rob McQueen *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920*, Ashgate, Farnham 2009.

² See J J Spigelman “Australian Business Law in an International Perspective: Remarks on launch” 2009, 32 *Australian Bar Review* 133.

³ J Micklethwait and A Wooldridge *The Company, a Short History of the Revolutionary Idea* Modern Library, New York, 2003 p 51.

⁴ As quoted in the Wikipedia entry for Robert Lowe.

⁵ Douglas North *Institutions, Institutional Changes and Economic Performance* 1990 p vii.

⁶ See McQueen *supra* at 297-300; see also Phillip Lipton “A History of Company Law in Colonial Australia: Economic Development and Legal Evolution” (2007) 31 *Melbourne University Law Review* 805 at 818-822.

⁷ See the exchanges set out in Nicholas Gouliaditis “The Meaning of ‘Trading or Financial Corporations’: Future Directions” (2008) 19 *Public Law Review* 110 esp at 120-122.

⁸ See *The Work Choices Case* (2006) 229 CLR 1 at [96]-[107].

⁹ *Ibid* at [100].

¹⁰ Edward Mason *The Law of Trading and Other Companies* London, William Clowes, 1891 and 1893 (2nd ed).

¹¹ *In Re Arthur Average Association for British, Foreign and Colonial Ships Ex parte Hargrove & Co* (1875) 10 Ch 542 at 547.

¹² See www.aec.gov.au/about_aec/media_releases/2009/08-07.htm.

**THE MACQUARIE BICENTENNIAL:
A REAPPRAISAL OF THE BIGGE REPORTS
THE ANNUAL HISTORY LECTURE
HISTORY COUNCIL OF NEW SOUTH WALES
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 4 SEPTEMBER 2009**

At 2.00pm on Thursday, 7 October 1819, Governor Lachlan Macquarie, the bicentennial of whose assumption of office we will commemorate on 1 January next year, laid a foundation stone for a new building on the edge of the unkempt open space, partly used as a racetrack, upon which the Governor had grandiloquently conferred the aspirational title, Hyde Park.¹ In accordance with the practice of the time, the stone bore no inscription as to the intended use of the building. That was fortunate. The building, designed by the convict architect, Francis Greenway, was proclaimed on that day to be a courthouse. In fact, the building, with slightly modified plans, primarily above the level of the eaves, became St James' Church.

The change would occur at the insistence of John Thomas Bigge, who had just arrived to execute a Royal Commission, with wide ranging terms of reference, into the conduct of the administration of the colony. Bigge quickly came to reject what he regarded as extravagance in the execution of public works on the part of Governor Macquarie. One example was the elaborate design for a large building to become the Anglican cathedral, not far from the site where St Andrew's Cathedral does now stand and to which the foundation stone Macquarie had laid was subsequently moved. The plans for a courthouse were considerably less elaborate and Bigge decided they were too good for a court, but good enough for a church.

There are indications that, despite an express direction from Lord Bathurst, Secretary of State for War and the Colonies, that Macquarie should adopt Bigge's recommendations,² the headstrong Governor originally intended to proceed with his plans for the court building.

Bigge visited Tasmania in February and March 1820 and upon his return discovered that Macquarie's building plans had not changed in the way he had expected. Work had in fact continued on the

large cathedral and Greenway had prepared a design for the Hyde Park site with what appeared to be an entrance foyer more appropriate for an imposing court than a church. Macquarie had a habit of misleading London about his building plans but, with a man on the spot who had frustratingly co-ordinate authority, he had to submit.³ The court became a church, although, after Bigge's departure, an Ionic colonnade was added to the design of St James.⁴

The resultant gross inadequacy of the accommodation for the Supreme Court of New South Wales was only partially alleviated in the 1890s. The first time the court was properly housed was in the 1970s, regrettably at a time when the transient architectural fashion was concrete brutalism. The best thing about working inside the Supreme Court building is that you do not have to look at it.

I have struggled to overcome my institutional resentment with Commissioner Bigge's mean mindedness.

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One hour before the laying of the foundation stone for what became St James', the great and the good of Sydney town had assembled at Government House, then situated where Governor Phillip Tower now stands, for the formal inauguration of Bigge's Commission of Inquiry, with the taking of oaths and a reading of the terms of reference. At that investiture Bigge had identified the primary purpose of his inquiry to be the role of the settlement as a gaol, to determine whether it was still fulfilling its purpose of instilling a sense of what he called "salutary terror",⁵ and what we would now call general deterrence, amongst the criminal classes of the United Kingdom.

The Bigge Commission was created by Lord Bathurst, Secretary of State for War and Colonies from 1812 to 1827, the significance of whose contribution to the culminating phase of the war against Napoleon was attested by the fact that he was the only civilian invited by the Duke of Wellington to the annual dinner in celebration of the victory.

A doughty representative of aristocratic society, the third Earl Bathurst exercised authority effortlessly. He was a quietly competent, indeed sometimes self-effacing, but serious and

shrewd decision-maker, with conservative, but not reactionary, instincts and the personal confidence to be the last man in London to wear a pigtail. His principal political virtue was loyalty. He gave it and expected it in return. Commissioner Bigge, located towards the base of the pyramid of social deference, knew that he had to execute his instructions to the letter.

Bathurst and Macquarie approached their responsibilities with diametrically opposed philosophies. Bathurst had unwavering faith in the old order and, as historian D M Young has noted, he was “at heart a sceptic with little faith in the possibility of improvement of men or society”.⁶ Macquarie was an improver. He was not a reformer in the sense that he thought there was something wrong that needed to be changed. Rather, he was an improver in the sense that he believed that individuals and social arrangements could always be made better. His faith in the civic virtues was a product of the Scottish Enlightenment.⁷

Bathurst’s approach was a manifestation of what A V Dicey would later describe as “the obstinate Toryism” that was at that time “the accepted creed, if not of the whole nation, yet assuredly of the governing classes”.⁸ Contemporary historians have

modified this Whiggish interpretation.⁹ Nevertheless, the politics of the Tory Government, which Commissioner Bigge instinctively reflected, was hostile to the spirit of improvement that Macquarie represented.

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The principal outcomes of the Reports of Commissioner Bigge – particularly the first, on *The State of the Colony of New South Wales*, published in 1822 – were the enhancement of severity in the punishment of serving convicts, the diminishment in the social standing of emancipated convicts and a substantial reduction in public expenditure. In each respect, Bigge reversed the policies, and undermined the legacy, of Governor Macquarie. The consequences for the development of the colony were so palpably adverse that Commissioner Bigge has acquired a pre-eminent place in the annals of Australian infamy.

In important respects the Bigge Reports, either by reason of direct recommendation or as a stimulus to further decisions, made positive contributions to the development of Australia. Nevertheless, critical aspects of the Reports, particularly with respect to convicts, emancipists and public works, impeded or

delayed such development. It is, of course, natural for Australian commentators and historians to focus on these negative aspects. This must, however, be recognised to be a parochial perspective.

It is not possible in an address such as this to comprehensively review the conduct and content of Commissioner Bigge's work. I do, however, wish to highlight that it is important to understand his work in the context from which he came: the preoccupations and requirements of London, the Imperial centre.

Bigge was first and foremost an imperial civil servant. He served as Chief Justice of Trinidad and, after executing the New South Wales Commission, was appointed to lead a similar Commission of Inquiry in South Africa, Mauritius and Ceylon. In all of these capacities he executed his duties with diligence and competence but, understandably, in the interests of the imperial authority which he represented. It is inappropriate to assess his work as a Commissioner in Australia solely from the perspective of the missed opportunities to extend and consolidate the progressive policies of Macquarie. He came with clear instructions to reverse those policies and he did so. That was his job.

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Commissioner Bigge was the emissary of an imperial capital still in the process of painful social and economic adjustment after two decades of almost continual warfare, amidst the Schumpeterian gales of creative destruction arising from the Agricultural and Industrial Revolutions. With respect to the subject of his inquiry, the dominant concern of the British political nation – extremely limited in its scope by a restricted franchise – was fear of the lower orders, both in terms of criminality and also political radicalism. Bigge shared this concern and, in any event, was told to act upon it.

After the final victory against Napoleon in 1815 Britain suffered an economic depression. Unemployment increased sharply with the return of demobilised soldiers and sailors and the reduction of military expenditure on armaments and shipbuilding, aggravated by a famine inducing drought. The depression created what was widely perceived to be a crime wave. Although the statistics are, understandably, fragmentary, historical studies confirm that criminality did increase significantly after the war.¹⁰ Furthermore, the number of convicted criminals to be transported

increased because they were no longer pressed into the army and navy.

The post-war depression also stimulated popular agitation and gave renewed prominence to politically radical ideas, especially directed to reform of the corrupt and socially exclusive political system, so well established that it was called “the Old Corruption”. As the British Marxist historian E P Thompson characterised the era, this was “the heroic age of popular Radicalism”.¹¹

Dominating the intellectual mindset of this political nation was the apocalyptic experience of the French Revolution. There was a visceral fear of what the political elite called “the Mob” and political radicals called “the People”. This was reinforced, no doubt, in the minds of the critical Ministers who made the relevant decisions, by the fact that in 1812 Spencer Perceval was the first, and to this day remains the only, British Prime Minister to be assassinated in office. Although that was an act of a deranged individual, to the contemporary political elite it must have been an indication of what was possible.

Perceval's successor, Lord Liverpool, Prime Minister from 1812 to 1827, described the elite's fear of popular revolution as arising from what he characterised as the collapse of "all respect for established authority and ancient institutions".¹² Lord Bathurst shared this opinion and so did Commissioner Bigge. Transportation to Australia was part of the solution.

The fear of the mob is well encapsulated in the title of the most recent conspectus history of the era in the *New Oxford History of England* series: *A Mad, Bad & Dangerous People?*¹³ This volume title, together with its sceptical question mark, was adopted in intentional contrast to the predecessor volume in the series for the 18th century which was entitled *A Polite and Commercial People*. That was a quotation from a self-satisfied remark by William Blackstone.¹⁴ In fact, the 18th century was characterised by crime, riots and widespread unrest.

There is no doubt that the fear of the people, both in terms of criminal activity and of political radicalism, was at its height during the years 1817 to 1822, when the Bigge Commission was instigated, conducted its investigations and reported.

Although the reform agitation was not continuous, there were frequent incidents which reinforced the moral panic of the political nation about the mob and reinforced its determination to control and extirpate any popular mobilisation.

- Between 1812 and 1815 was the height of the attacks by the Luddites, often in the form of military style gangs, deploying violence, especially against the new machines of the Industrial Revolution, in support of traditional community values. There were mass trials and those not executed were transported to Australia.
- In December 1816, a drunken reform meeting at Spa Fields in London, spurred on by a small group of radical extremists who planned an uprising, marched on the City and were dispersed by force.
- In January 1817, the window of the coach of the Prince Regent, the future George IV, was smashed when driving through London, a shocking event for the times.
- The Spa Fields incident and the attack on the Prince Regent's coach led to repressive legislation including the suspension of *habeas corpus* and restrictions on public meetings. Ministers were convinced that there existed a treasonable conspiracy, but that there was insufficient

evidence to convict the ringleaders. This was based on a parliamentary report of what was appropriately called the “Committee of Secrecy”, which investigated seditious societies.¹⁵ William Cobbett went into exile in the United States.

- In March 1817, a large crowd of blanket carrying weavers sought to march in support of political reform from Manchester to London. This ‘March of the Blanketeers’, as it became known, was dispersed by force.
- In June 1817, there was an uprising of about 300 textile workers at Pentrich in Derbyshire, urged on by a Home Office agent provocateur, which was put down by force. Forty-five people were tried for treason, three were hanged and 30 transported to Australia.¹⁶
- In August 1819, a peaceful crowd of some 60,000 assembled in support of constitutional reform on St Peter’s Fields in Manchester. The local magistracy panicked and ordered regiments of the hussars and the local yeomanry to disperse the crowd by force. Eleven people were killed and 400 wounded. The occasion was immediately characterised as the Massacre of Peterloo, a sarcastic adaptation of the triumphal military victory at Waterloo.

- As protest meetings and pamphleteering escalated after the massacre, the Government reacted with a series of new repressive and coercive measures, notorious as the Six Acts of 1819: public meetings of greater than 50 persons had to have a licence from the local magistrate; any form of drilling was prohibited; the stamp duty on newspapers and pamphlets was increased as a means of damaging the radical press; laws against blasphemy and seditious libel were clarified and extended.
- In February 1820, a plot – known to history as the Cato Street Conspiracy – being a plan to murder the entire Cabinet at dinner, was foiled as a result of infiltration by government spies. Five conspirators were executed for high treason, and another five were transported to New South Wales.
- In August 1821, the public rioted at the funeral of Princess Caroline – the spurned wife of the new King George IV. Caroline was the first ‘Peoples’ Princess’. She had the same intense public support as Princess Diana in our era, and for much the same reasons. These riots led to significant clashes between the public and the military, including a number of fatalities. They have been characterised by Boyd

Hilton as “arguably the largest movement of the common people during the early nineteenth century”.¹⁷

The Government’s determination to increase the severity of criminal punishment after transportation must be understood against this fervid social landscape. What was at stake was the protection of the social and political power of the ruling elite.

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For Lord Bathurst, New South Wales remained primarily what he called “a distant Colony of Convicts” or “a rascally Community”.¹⁸ He was of course aware that continued development moved New South Wales towards a true colony, rather than just a place of punishment. However, he regarded such development as “a Secondary consideration”.¹⁹

Prior to the appointment of the Commission, Bathurst was subject to considerable pressure in public debate and from the Home Office about what was perceived to be excessive leniency on the part of Governor Macquarie in the administration of the penal colony. The terrors of exile to what was, originally, an incomprehensibly distant and unknown destination, had dissipated.

It had become widely believed, not least Bathurst thought, amongst the criminal classes, that being sent as a convict to New South Wales was preferable to being unemployed in England. It probably was. In fact, contrary to Bathurst's expressed views and public perception, it had been from the beginning.²⁰

It would be quite wrong to characterise Macquarie's policies as weak and merciful. He was no stranger to public executions, flogging and other forms of harsh punishment. However, he did, in a number of respects, manifest a humanitarian streak with which others disagreed.

As has always been the case with punishment for crime there was a diversity of views. The issue was then, as it is now, one of balance and, from a political perspective, one of perception. Bathurst had come to the opinion, or found it necessary to act on the basis, that convict conditions in New South Wales were too lenient and had significantly reduced the deterrent effect of transportation.

Lord Bathurst's instructions to Commissioner Bigge expressly asserted the primacy of New South Wales as a penal colony. Bathurst told Bigge in his formal letter:

"[Y]ou will ... constantly bear in mind that Transportation to New South Wales is intended as a severe Punishment applied to various Crimes, and as such must be rendered an Object of real Terror to all classes of the community. ... If ... by ill considered Compassion for Convicts, or from what might under other circumstances be considered a laudable desire to lessen their sufferings, their Situation in New South Wales be divested of all Salutary Terror, Transportation cannot operate as an effectual example on the Community at large, and as a proper punishment for those Crimes against the Commission of which His Majesty's Subjects have a right to claim protection, nor as an adequate Commutation for the utmost Rigour of the Law."²¹

The words "salutary terror" were dutifully repeated by Commissioner Bigge in his investiture speech at Sydney's Government House the next October.

Macquarie's liberality towards both convicts and emancipists, whilst not always manifest in his conduct, did emerge as a fundamental policy to which he was increasingly committed. Subject only to good behaviour, further punishment was not normally imposed. The rations were good. Compulsory labour varied in its harshness, but was generally tolerable. Convicts in fact received payments like wages and those in the city had time off to supplement their income by other work or to pursue less morally acceptable pursuits. Tickets of leave and conditional pardons were more readily available than the disciplinarians thought appropriate.

In his 10 years of office, Macquarie gave 366 absolute pardons, 1,365 conditional pardons and 2,319 tickets of leave.²² The ticket of leave system was an important measure, subsequently adopted in England as the foundation of the parole system.

Early in his administration, Macquarie had promulgated detailed regulations for the circumstances in which persons could acquire tickets of leave or pardons. His formal regulations were widely accepted as appropriate. They required varying periods –

in effect non-parole periods – prior to an indulgence becoming available, which periods varied with the severity of the offending conduct for which convicts had been transported. However, the regulations were not implemented in practice. On one calculation out of 2,730 indulgences granted in the period 1813-1820, 710 were made by Macquarie contrary to his own regulations.²³

Bigge had no discretion to decide that the treatment of convicts in Australia at that time was appropriate. His express instructions were to review the entire system for the purpose of increasing the severity of the convict experience in Australia in such a manner as would ensure that potential criminals back in England knew about it. He was further instructed to explore the possibility of creating centres of secondary punishment within Australia so that, if confinement, hardship and flogging were proving insufficient, then those convicts who did not respond appropriately would be dispatched to isolated locations, where the prospect of any form of social interaction was impossible and even harsher punishment could be inflicted.

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Closely related to the deterrent value of transportation was what happened to convicts after they had served their sentence. Then, as now, it was recognised that rehabilitation was a possible result of punishment. However, if forgiveness was too readily available that, of itself, would tend to diminish the deterrent value of the sentence. In this respect Bathurst knew that policy instructions from the Imperial centre had to take into account the peculiarities of this small community and Bigge was instructed to do so.

The social system of Australia in this era was based on castes. Different social groupings were segregated by differences of function and culture – almost as distinct as the castes of the Indian subcontinent. The castes included convicts, emancipists, free settlers, civil officials, the military, the native born and Aborigines together with the human flotsam of a seaport in the Rocks.

The principal source of Macquarie's conflict with elements of the community he governed – especially the military, the judiciary, many free settlers and some clergy – was his liberal approach to emancipists. Once a convict had served his or her term, or had

been pardoned, Macquarie believed that s/he was entitled to be restored to the position in society which s/he had occupied before their conviction. This 'clean slate' policy served the purposes of rehabilitation, which Bathurst and others, including the future George IV, then Prince Regent, purported to promote. It was also an enlightened and pragmatic approach to the future development of the colony beyond its penal origins.

In an age preoccupied by status, for those who could not rely on the presumption of respectability conferred by aristocratic birth or lesser forms of "breeding", actual conduct alone revealed the character entitling one to gentry status. Once a person had manifested a defect in character, only his or her exclusion from polite society could restore the proper social order. This policy of social exclusion was so widely accepted that those, like Macquarie, who took a different view could not escape censure by those whose status was thereby rendered less secure.

In a private letter to Commissioner Bigge which, unlike his formal instructions, Bathurst may not have had to show to the Prince Regent, the future George IV, he said:

“I allude to the Propriety of admitting in Society Persons, who originally came to the Settlement as Convicts. The Opinion, entertained by the Governor and sanctioned by The Prince Regent, has certainly been with some few exceptions, in favour of their reception at the expiration of their several Sentences upon terms of perfect Equality with the Free Settlers. But I am aware that the Conduct of the Governor in this respect, however approved by the Government at home, has drawn down upon him the Hostility of many persons, who hold associations with Convicts under any circumstances to be a degradation. Feelings of this kind are not easily overcome”.²⁴

Macquarie was, generally, steadfast in the application of his basic principal that former convicts, subject to good behaviour, were entitled to be restored to the position in society which they had originally occupied. There would be no permanent convict stain.

His policy was particularly focused on those persons who came to the colony with some skill, or had acquired wealth after

arrival. These were the people whom he invited to dine in Government House, with the result that some free settlers and most military officers refused his invitations. Macquarie's 'clean slate' policy, which was more meritocratic than egalitarian – he was, at best, a benevolent autocrat – was an anathema to the social exclusivists at the Imperial centre and their colonial epigoni.

The pragmatism of a military man, who was most concerned with what works, led to Macquarie's promotion of the emancipists who had manifested competence in practical affairs. His policy was in part a product of Enlightenment principles, and in part a product of Macquarie's own achievement as a self-made man who had risen from a family background of abject poverty, albeit with such claims to gentility as rural Scotland could proffer.

Macquarie, not atypically for a military officer turned administrator, regarded disagreement as a form of insubordination. Some of his behaviour in this respect bordered on the petulant and, in reaction to local criticism, he began to discriminate in favour of ex-convicts, rather than treating them on the basis of equality. He was once driven to declare:

“There were two types in the colony – those who had been transported and those who should have been.”²⁵

Commissioner Bigge could not accept Macquarie’s policy.²⁶ He had imbibed the values of an aristocratic system, preoccupied with matters of status and convinced that breeding mattered more than achievement and that character mattered more than competence. A product of the minor gentry, this bachelor bureaucrat was pleased to serve what he, no doubt, called his betters and to receive such signs of approval as they deigned to confer upon him. His snobbery was derivative but firm.

When his final reports were presented, it was clear that Commissioner Bigge believed that the free settlers were entitled to retain their sense of moral superiority over the emancipists. This was a social ascendancy which his recommendations did much to perpetuate. Bigge proposed that ex-convicts should no longer be entitled to grants of land or to have convicts assigned to them. He wanted to reinforce the caste system.²⁷

A critical flashpoint was the appointment by Macquarie of ex-convicts as local magistrates. During the course of Macquarie’s

dispute with the local judiciary, over whether emancipists would be allowed to practice as attorneys, Lord Bathurst indicated clearly that that would not be appropriate, even though he rejected the way in which the judges had behaved.²⁸ He had also expressly told him that he did not think it “judicious” to appoint a former convict as a magistrate. Rehabilitation, Lord Bathurst said, “may be carried too far”.²⁹ Macquarie did not take the hint about the need to recognise limits beyond which an emancipist could not be accepted in polite society.

The idea of a convicted criminal playing a determinative role in the administration of justice, including criminal justice, was too awful for many to contemplate. Early in Bigge’s visit, Macquarie insisted on carrying into effect his intention to appoint the emancipist William Redfern as a magistrate. The Commissioner made it quite clear, correctly as it transpired, that this would not be tolerated in London.³⁰ This led to an early confrontation between them, a confrontation from which their relationship never recovered.

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Macquarie brought a vision to the structure of the township and to its infrastructure and built form which has rarely been equalled, let alone surpassed. In all of this his wife Elizabeth made a critical contribution – it was she who brought a book of building and town designs – recognised in the title of the road and point, Mrs Macquarie’s Chair, and in the not well remembered fact that Elizabeth Street is named after her.

One of Macquarie’s first acts was to organise and plan the roads – so that they would be at least 50 feet wide – which required some houses to be removed; to build new roads, including Elizabeth Street; to rename all the principal roads: the main street after the King – George – and the parallel roads after four of his sons, the Dukes of York, Clarence, Kent and Sussex, and leading political figures – Pitt and Castlereagh, together with streets named after Macquarie’s predecessors – Phillip, King, Hunter, Bligh. Never having suffered from false modesty, he named the putative principal official thoroughfare on the eastern ridge of the town, Macquarie Street.

Macquarie brought a sense of civic order to a streetscape where before, as James Broadbent has put it:

“no honest man could fall drunk without fear of being savaged by foraging pigs or trampled by straying cattle.”³¹

The same sense of order was displayed in the plans for the Macquarie towns: Castlereagh, Wilberforce, Pitt Town, Windsor and Richmond.

Perhaps the principal reason why Governor Macquarie is remembered with a degree of fondness not afforded to any of the other early Governors is his legacy of public buildings – buildings of urbanity and gentility – which, at least over recent decades, have come to be admired as a fundamental part of our urban, indeed national, heritage. In his ultimate defence to criticism of his governorship, Macquarie reported to Bathurst that during his term 265 buildings were constructed. He listed them all.³²

The first major public building was Sydney Hospital – of which two wings remain – Parliament House and the Mint – clearly influenced by Macquarie’s time in India, with their graceful verandahs of double Tuscan-upon-Tuscan colonnades. The hospital was built by private enterprise, at a time when Macquarie

had been told not to spend any money on buildings, in exchange for a three year monopoly on the import of rum. It was, like many of Macquarie's projects, open to criticism – it was too big, there were no kitchens or lavatories – but it is a precious inheritance. The “Rum Hospital”, as it became known, was Australia's first private-public partnership, and in many respects, is the model for the construction of most of the tunnels and expressways that have been built in this city in the last two decades. Only the unnecessary step of charging the public through the intermediation of alcohol has been superseded.

Macquarie managed to ignore or evade most attempts to constrain his public works programme. He has left us, amongst numerous public buildings, some of our most graceful churches, an obelisk, the Government House stables, now occupied by the Conservatorium of Music, the Female Factory at Parramatta, the Hyde Park Barracks, the South Head Lighthouse – the present structure being a replica when the unsafe original had to be torn down. There is a striking photograph of the two lighthouses side by side.³³ Some of Macquarie's public works have not survived – I particularly regret the loss of the folly that was the Newcastle lighthouse in the shape of a Chinese pagoda.³⁴ Macquarie's

legacy would have been much greater but for the intervention of Commissioner Bigge.

Bigge reserved his greatest distaste for what he described as the unnecessary ornamentation in Macquarie's buildings.³⁵ To some extent this seems to have been a philistine reaction to the elements of the buildings which manifested the then new fashion of the Gothic revival, such as the crenellations and pointed arches on the stables for Government House, and on the gateway to the turnpike road to Parramatta – Australia's first toll road – and ornamental elements for the proposed Cathedral. However, Bigge's objection to unnecessary expenditure, for what he was instructed had to remain in substance a penal colony, extended to classic elements, such as the Grecian obelisk and the canopy of the fountain in Macquarie Place.

Our disappointment as to what might have been the legacy of Lachlan and Elizabeth Macquarie, without the intervention of Commissioner Bigge must, however, be tempered by an acceptance of the "he who pays the piper" principle. This was a time when the development of Australia, in every respect, depended on subsidy from the British taxpayers who never met

less than 90 per cent of public expenditure.³⁶ They footed the bill. It is not unreasonable that their representatives also insisted on deciding how much they were prepared to pay. I use the word “they” advisedly, because it is an anachronism of hindsight. Contemporaries both in London and here regarded the settlement as an outpost of Britain itself.

The creation of Australia was a major act of British public investment involving the transfer of capital – both human and material. Virtually all salaries, transport, shipping, food, clothing stores, equipment, ships and arms were supplied from British public revenue.³⁷ It should come as no surprise that those responsible for paying the bills wanted to know why they kept growing.

Australian residents had shown themselves to be adept at exploiting the British taxpayer, at a time when the fiscal control by the Treasury over the diverse range of agencies that spent money on the colony was, at best, rudimentary. This process of exploitation redounded to the personal advantage of all local residents including officials, settlers and emancipists. It was facilitated by the inefficiencies of the system of audit and control of

public expenditure.³⁸ Much of the conduct – I hasten to say not Macquarie’s conduct – could only be regarded as corrupt. This included corruption by the Treasury’s own representatives in the Sydney Commissariat.

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The years in which Bigge’s Commission of Inquiry was instigated, conducted and reported were years of fiscal crisis in Britain. After the defeat of Napoleon the national debt and public expenditure moved to the centre of political disputation. The Government was attacked by both radicals and conservatives for waste and corruption.

During the 18th century taxation had never exceeded 10 per cent of the national income. During the Napoleonic wars it jumped to 20 per cent. The Government had introduced an income tax – explicitly as a war tax – which had in fact been suspended during the interlude of peace in 1802-1803.³⁹ Public debt had quadrupled during the Napoleonic wars and absorbed half of the total tax revenues,⁴⁰ by way of interest and in sinking fund payments. The Government sought to continue the income tax after the war. In

1816, Parliament rejected that attempt and again, in 1819, refused to accept the introduction of a modified form of income tax.

This substantial reduction in revenue, together with the fixed overheads required to service the national debt, led to a fiscal crisis. Increased reliance on regressive indirect taxation stirred popular unrest.

Furthermore, between 1820 and 1822 the landed gentry responded to a collapse in the price of wheat, and the inflation caused by a return to the gold standard as the basis of monetary policy, by engaging in what has been called “the Squires’ Revolt”.⁴¹ The response, in terms of further tax reduction, exacerbated the ongoing fiscal crisis.

In response to the fiscal crisis, numerous government offices were abolished, departments were downsized and official salaries, including ministerial salaries, were slashed by 10 per cent across the board. Even the Regency monarchy grudgingly gave up £50,000 per annum. Indeed the years 1815-1822 have been characterised by Philip Harling as “the politics of retrenchment”.⁴² When the fiscal position in the United Kingdom eased somewhat,

during the economic upturn of 1822-1825, Commissioner Bigge's Reports had already been tabled and endorsed.

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The administration of Lord Liverpool was accurately criticised by George IV who said: "The misfortune of this government is that it is a government of departments".⁴³ Amongst the most independent of all departments were those under the administration of Lord Bathurst. In a process described by N G Butlin as "calculated non-co-operation",⁴⁴ he resisted all attempts by the Treasury to interfere in his administration by supervising expenditure. On one occasion he emphasised the need to let the Treasury do no more than was its absolute legal right to do, saying that Treasury officials "seem more anxious to extend their duties than to discharge them".⁴⁵

Bathurst was determined to retain control of all that fell within his administration. Subject to compliance with his directions, he would not allow anyone else – not even the Treasury – to interfere with his men on the ground, like Macquarie.

Governors of New South Wales had what has been described as a "virtual *carte blanche*" to draw on parliamentary

funds, in a manner otherwise only permitted for military expenditure.⁴⁶ The virtually unregulated ability of the Governor of New South Wales to simply sign a bill to be presented on the Treasury in London, and to have it paid, effectively without supervision, was an almost unique privilege.⁴⁷

Nevertheless, the administration of the colonies was not immune from the fiscal crisis. Expenditure was curtailed in all colonies.⁴⁸ Bathurst demanded expenditure restraint from Macquarie, who purported to obey those instructions and did so in part. Bathurst was not, however, always diligent in enforcing the demands of the Government which he had conveyed. However, he expected the fiscal retrenchment to be implemented.

At the time he was appointed in 1810, Macquarie was told by the then Secretary for the Colonies to restrain any extravagance in public works and not to build anything without prior approval.⁴⁹ He never obeyed. Furthermore, he regularly deceived London by delaying dispatches until any reply could not interfere with the building work which he had commenced without prior approval.⁵⁰

Lord Bathurst frequently gave clear instructions to Macquarie to exercise restraint in expenditure.⁵¹ However, the principal difficulty with exercising restraint was that from 1813 onwards the numbers of convicts sent to the colony increased dramatically. Between 1806 and 1821 the proportion of the population who were prisoners rose from 26 per cent to 41 per cent.⁵²

As Macquarie justifiably noted, although total expenditure had increased, expenditure per convict had in fact decreased. There was a need for continued public spending on persons and infrastructure.

It is noteworthy that Bathurst's instructions to Bigge did not include an express demand that he review public expenditure with a view to significant reduction. He was, however, instructed to investigate whether locally generated revenue could be increased.⁵³

However, Bigge did have access to the previous correspondence between Bathurst and Macquarie, which was replete with references to fiscal restraint and the difficulty of doing that in the face of the significant increase in the number of convicts

transported. In any event, Bigge would have been well aware of the British Government's fiscal crisis, which was, perhaps, the most salient political issue of the day.

Bigge's direct intervention to curtail Macquarie's public works programme was driven by this consideration.

* * * * *

Early in his investigations, Commissioner Bigge focused on an idea by which increased severity of the convict experience could be attained in such a way as to also reduce public expenditure in the colony. This could be achieved by ensuring that a greater proportion of convicts were assigned to private employers, especially pastoralists. Public works expenditure would decline and the obligation to feed, clothe and house convicts would be removed.

Bigge formed the view that assignment to pastoralists involved longer hours of harder work. Furthermore, removal from the temptations of urban life would be beneficial. The way in which convicts had manifested a preference to work for the Government, at least in Sydney as distinct from road gangs

outside the town, together with what was seen as excessive liberality in the treatment of convicts in government employ in the town – Bigge called them “luxurious indulgence[s]”⁵⁴ – indicated the leniency involved in the existing system.

Alternative industries which were beginning to thrive – such as whaling and sealing – offered opportunities for escape. A rural life, whether on grazing properties or in road gangs, was the best option.

It was a feature of Bigge’s conduct as a Commissioner that once he developed an approach, his investigation was directed to reinforcing his opinion. Evidence to the contrary, if he came across it at all, because he did not look for it, was given little weight.⁵⁵ That is what happened with this neat solution.

The key element in his Report was the assertion that the increased number of convicts transported could have been put to useful employment by assignment to private enterprise, particularly to pastoralists. That would not have been the case during the recession in the colony between 1812 and 1815 and was unlikely to have been the case for some years thereafter.

As it transpired, Macquarie's successors were able to successfully implement a system in which convicts were generally assigned to private enterprise. That is not to say that Macquarie had not been anxious to do all he could in that respect also. For him, the issue was not one of quantity, so much as of quality. Macquarie appropriated for the public sector the overwhelming proportion of the skilled migrants.⁵⁶ Their skills were critical to his active public works programme. Understandably, the settlers were unhappy with receiving such a low number of skilled convicts on assignment.

Subsequent experience, when Bigge's policies were implemented, suggests that, at least by that time, they were appropriate policies. In particular, his early recognition of the possibilities of the wool industry proved to be more insightful than many of his witnesses' opinions. The opportunity cost, in terms of lost public infrastructure, is invisible.

* * * * *

Bigge made numerous specific recommendations to increase the "salutary terror" of the convict experience. Although

Macquarie had already taken some steps to reduce the degree of freedom that convicts had enjoyed in the colony, for example by sequestering a significant number in the large Hyde Park Barracks,⁵⁷ Bigge recommended harsher and further steps be taken in these respects. The payment of wages to convicts which gave them a certain amount of freedom was to be abolished, as was their ability to control property.

The results, not all recommended by Bigge, were an escalation in the level of cruelty of punishment within the colony: the number of floggings increased, as did the maximum number of strokes per flogging; pillories and treadmills were introduced; the number of public executions increased. Furthermore, on Bigge's express recommendation secondary penal centres, where even harsher treatment was to be administered, were created at Port Macquarie, Moreton Bay, Norfolk Island and Port Arthur.

The comparative freedom of an open air prison – what has been called “a patriarchal penal farm”⁵⁸ – in which humanitarian principles had a prospect of implementation, and which Macquarie had already partially altered, was even further curtailed. The Sydney tradition in which convicts had the personal liberty of a

certain amount of free time, which Macquarie had reduced, was finally abolished.⁵⁹

The benefits for the Imperial centre were immediate. Macquarie's successor, Governor Brisbane, halved the bills drawn on Treasury within seven months and reduced the number of convicts in government service by two-thirds within 20 months. Over 1,200 skilled convicts were transferred from the public sector on private assignment. Brisbane was able to claim that the demand for assignees exceeded supply.⁶⁰

* * * * *

The basic themes of Commissioner Bigge's Reports, for all their historical particularity, have a timeless quality. To this day we debate the emphasis to be given to the different objectives of criminal punishment – rehabilitation punishment, deterrence, incapacitation. This is a debate that will know no rest, because there is no correct answer on which widespread unanimity can be expected. Both Macquarie and Bigge – as far apart as they were – would stand well beyond the disciplinarian end of the spectrum of reasonable opinion today. However, the moral panic of the political nation which led to Bigge's instructions to devise a system

of increased severity is an experience that has often been repeated. The oscillation between an emphasis on mercy and an emphasis on severity is with us still.

Bigge wrote at a time when the free trade ideas of Adam Smith were gaining traction, soon to be manifest in the repeal of the Corn Laws. The issue he addressed, primarily in the context of assignment of convicts, which was the principal supply of human capital, was the extent to which the public sector could crowd out the private sector. This has a familiar quality. The debate as to the proper balance between the public and private sectors of the economy – first manifest in Australia in these events – has continued for two centuries. As we have witnessed as recently as last year, the oscillation of opinion between an emphasis on market failure and an emphasis on government failure is with us still.

Finally, the waste and injustice of social exclusion remains an abiding concern. It is no longer manifest in the social pretensions of an insecure upper class, desperately trying to mimic the social order and hierarchy of a distant aristocratic society.

Today, exclusivists adopt different criteria for their intolerance. But they are with us still.

Robert Hughes brings the themes together:

“Greenway’s public buildings publicly epitomized one of the ‘distasteful’ facts of penal Australia – that free birth did not confer a monopoly of talent. For all the Exclusives’ obsession with status, and despite the armored barriers of class raised by the Emancipists, the free still had to employ an ex-convict to form and condense their desire for urban elegance and ceremonial space. To worship God in a house built by a forger, while across the way more criminals were confined in another house of equal elegance – this was a piquant contradiction, not to be dwelt on. It summed up the peculiar insecurity of the signals respectable people in Sydney devised to distinguish themselves from their Others.”⁶¹

* * * * *

The Bigge Reports are the work of an imperial bureaucrat – written in convoluted and often turgid prose – but thorough,

detailed, practical and full of good sense as well as unconscious prejudice. There was never any reason to expect ambition or vision from such a process or from such a man. That was why he was chosen.

There was no vision of the kind Macquarie displayed when he seized upon and popularised Matthew Flinders' designation of the continent as "Australia" – the very word constituting the essential foundation of further patriotism. Vision for the future was not on the agenda of the "obstinate Tory" Government which Bigge faithfully represented.

There is no doubt that Australia would have developed differently if Commissioner Bigge had not made so comprehensive a set of recommendations to ensure that Australia remained primarily a penal settlement designed to incapacitate British criminals and to deter others.⁶² However, that was what he was asked to do.

Macquarie died believing that his reputation had been permanently tarnished by the Bigge Commission. However, the future belonged to the improvers of the world. That his

contribution to Australia could have been greater does not detract from the fact that Lachlan Macquarie stands in the first rank of Australian statesmen.

¹ John Ritchie, *Punishment and Profit: The Reports of Commissioner John Bigge on the Colonies of New South Wales and Van Diemen's Land, 1822–1823; Their Origins, Nature and Significance* (1970) Heineman, p. 110.

² Bathurst to Macquarie, 18 January 1819 in *Historical Records of Australia: Series I – Governors' Despatches to and From England, January 1819–December 1822* (1917) vol X, pp. 2–3 ('HRA, Series I, vol X').

³ *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales*, House of Commons, 19 June 1822 (1968) Irish University Press, pp. 50–1 ('Report of Commissioner into the State of the Colony'); Ritchie, *Punishment and Profit*, p. 173.

⁴ Ritchie, *Punishment and Profit*, p. 212.

⁵ *Ibid.*, p. 109.

⁶ D M Young, *The Colonial Office in the Early Nineteenth Century* (1961) Longmans, p. 18.

⁷ See generally Lenore Coltheart and Peter Bridges, 'The Elephant's Bed? Scottish Enlightenment Ideas and the Foundation of New South Wales' (2001) *Journal of Australian Studies* 19, 68, pp. 19–33.

⁸ A V Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd ed, 1962) Macmillan, p. 31.

⁹ See, for example, J E Cookson, *Lord Liverpool's Administration: The Crucial Years, 1815–1822* (1975) Scottish Academy Press.

¹⁰ See Peter King, *Crime, Justice and Discretion in England 1740–1820* (2000) Oxford University Press, Ch 5.

¹¹ E P Thompson, *The Making of the English Working Class* (1968) Penguin Books, p. 603.

¹² See Boyd Hilton, *A Mad, Bad and Dangerous People? England 1783–1846* (2006) Oxford University Press, p. 251.

¹³ *Ibid.*

¹⁴ Lanford Pole, *A Polite and Commercial People: England 1727–1783* (1998) Oxford University Press.

¹⁵ See Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820' (1990) *Oxford Journal of Legal Studies* 10, p. 310.

¹⁶ See Hilton, *A Mad, Bad and Dangerous People?*, p. 252; Michael J Turner *The Age of Unease: Government and Reform in Britain, 1782–1832* (2000) Sutton Publishing, p. 158.

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- 17 Hilton, *A Mad, Bad and Dangerous People?*, p. 269.
- 18 N D McLachlan, 'Bathurst at the Colonial Office, 1812-27: A Reconnaissance' (1969) *Historical Studies* 13, p. 485.
- 19 Bathurst to Bigge, 6 January 1819 in *HRA*, Series I, vol X, p. 4.
- 20 J B Hirst, *Convict Society and its Enemies* (1983) George Allen & Unwin, p. 87.
- 21 Bathurst to Bigge, 6 January 1819 in *HRA*, Series I, vol X, p. 7–8.
- 22 John Ritchie, *Lachlan Macquarie: A Biography* (1986) Melbourne University Press, p. 133.
- 23 Fredk Watson, 'Introduction' in *HRA*, Series I, vol X, p. xiv.
- 24 Earl Bathurst to Commissioner Bigge, 6 January 1819 in *HRA*, Series I, vol X, p. 11.
- 25 Ritchie, *Macquarie*, p. 160.
- 26 *Report of the Commissioner into the State of the Colony*, p. 149-150.
- 27 *Report of the Commissioner into the State of the Colony*, pp. 172 ff.
- 28 Bathurst to Macquarie, 18 April 1816, in *Historical Records of Australia: Series I – Governors' Despatches to and From England, January 1816–December 1818* (1917) vol IX at 108 ('*HRA*, Series I, vol IX').
- 29 Bathurst to Macquarie, 3 February 1814 in *Historical Records of Australia: Series I – Governors' Despatches to and From England, January 1813–December 1815* (1916) vol VIII, pp. 134–5.
- 30 Bigge was right. Bathurst subsequently chastised Macquarie and instructed that Redfern not be reappointed. See Bathurst to Macquarie, 20 March 1821 in *HRA*, Series I, vol X, pp. 310–11.
- 31 James Broadbent, 'Macquarie's Domain' in James Broadbent and Joy Hughes (eds), *The Age of Macquarie* (1992) Melbourne University Press, p. 4.
- 32 'Appendix to the Report of Major General Lachlan Macquarie, late Governor of the Colony of New South Wales, being A List and Schedule of Public Buildings and Works erected and other useful Improvements, made in the Territory of New South Wales and its Dependencies, at the expence of the Crown from 1st of January, 1810, to the 30th of November, 1821, both inclusive' in *HRA*, Series I, vol X, pp. 684 ff.
- 33 See Geoff Stuart, *Secrets in Stone: Discover the History of Sydney* (1993) Brandname Properties Ltd, p. 35.
- 34 See James Broadbent, 'Building in the Colony' in Broadbent and Hughes (eds), *The Age of Macquarie*, p. 163.
- 35 See, for example, *Report of Commissioner into the State of the Colony*, pp. 50–1.
- 36 N G Butlin, *Forming a Colonial Economy, Australia 1810-1850* (1994) Cambridge University Press, p. 70.
- 37 See generally Butlin, *Forming a Colonial Economy*.
- 38 See, for example, *ibid*, esp pp. 59–60, 65–7, 69–70; J J Eddy, *Britain and the Australian Colonies 1818–1831: The Technique of Government* (1969) Clarendon Press, pp. 154–9.

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- 39 See Martin Daunton, *Trusting Leviathan: The Politics of Taxation in Britain 1799–1914* (2001) Cambridge University Press, p. 45.
- 40 See Turner, *The Age of Unease*, pp. 135 ff; Daunton *Trusting Leviathan*, esp p. 47.
- 41 See Hilton, *A Mad, Bad and Dangerous People?*, p. 268.
- 42 See Philip Harling, *The Waning of ‘Old Corruption’: The Politics of Economical Reform in Britain, 1779–1846* (1996) Clarendon Press, pp. 163–82.
- 43 W R Brock, *Lord Liverpool and Liberal Toryism 1820–1827* (2nd ed, 1967) Frank Cass & Co Ltd, p. 47.
- 44 Butlin, *Forming a Colonial Economy*, p. 60.
- 45 See Young, *The Colonial Office*, p. 188.
- 46 See *ibid*, p. 184.
- 47 The Governor of Sierra Leone was the only other colonial officer with such power.
- 48 Ritchie, *Punishment and Profit*, p. 18–22.
- 49 Liverpool to Macquarie, 26 July 1811 in *Historical Records of Australia: Series I – Governors’ Despatches to and From England, January 1809–June 1813* (1916) vol VII, p. 362 (‘HRA, Series I, vol VII’); Liverpool to Macquarie, 5 May 1812 in *HRA*, Series I, vol VII, p. 481.
- 50 See, for example, Coltheart and Bridges, ‘The Elephant’s Bed?’.
- 51 See, for example, *HRA*, Series I, vol IX, pp. 130–56, to which Macquarie replied, pp. 392–5.
- 52 See Ritchie, *Macquarie*, p. 157.
- 53 Bathurst to Bigge, 6 January 1819 in *HRA*, Series I, vol X, p. 11. See also Marion Phillips, *A Colonial Autocracy: New South Wales under Governor Macquarie, 1810–1821* (1971, originally published 1911) Sydney University Press, p. 64.
- 54 *Report of the Commissioner into the State of the Colony*, p. 48.
- 55 See J M Bennett, ‘Bigge, John Thomas’ in *Australian Dictionary of Biography* (1966) vol 1, Melbourne University Press, pp. 99–100.
- 56 Ritchie, *Punishment and Profit*, p. 221.
- 57 William M Robbins, ‘Spatial Escape and Hyde Park Barracks’ (2005) *Journal of Australian Colonial History* 7, pp. 81–96.
- 58 Eddy, *Britain and the Australian Colonies*, p. 26.
- 59 Hirst, *Convict Society and its Enemies*, p. 46.
- 60 Ritchie, *Punishment and Profit*, pp. 248–9.
- 61 Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1788–1868* (1987) Collins Harvill, pp. 341–2.

For a recent overview see Raymond Evans '19 June 1822: Creating "an Object of Real Terror": The Tabling of the First Bigge Report' in Martin Crotty and David Roberts (eds), *Turning Points in Australian History* (2009) UNSW Press, pp. 48-61.

CORPORATE GOVERNANCE AND INTERNATIONAL

BUSINESS LAW:

BOOK LAUNCH

BY THE HONOURABLE J J SPIGELMAN AC

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18 JUNE 2009¹

Robert Lowe was one of the most interesting politicians in our history. As an albino, suffering from the nickname “pink eyes”, it is no doubt politically incorrect to describe him as one of our more colourful politicians, but his intellect and personality were such that as a politician, barrister, orator and journalist he exerted considerable influence during his eight years in Sydney (1842-1850). That influence extended to a range of matters of considerable significance in the formative years of our institutions including, perhaps most notably, responsible government and public education.

The strength of his intellect was such that he held opinions on a range of issues which, even at that time, did not appear to cohere naturally with each other. It was not inappropriate for the

biographer of his time in New South Wales to adopt an inherently contradictory title: *Illiberal Liberal*.² For a man widely regarded as a progressive, one of the contradictory elements of his makeup is the censorious approach he took to questions of morals and of moral fibre.

The incident that led to his departure from Australia, leaving behind Bronte House as one of his permanent contributions to this city, arose in the context of the foundation of this University. He objected to the proposed appointment of Dr William Bland as one of the original senators of the University of Sydney. This may not have been unrelated to the fact that, upon his arrival in Sydney, Dr Bland had given him entirely inappropriate medical treatment and told him that he would be blind within a few years and that there was no point in pursuing his career – a diagnosis which he decided, after some hesitation, to ignore.

His main objection was that Dr Bland was an emancipated convict. The fact that he was transported after being convicted for murder, was enough for Lowe. The fact that the murder occurred in a duel fought on a matter of honour, when he and the deceased were serving in the Royal Navy, was of no account, perhaps

because Bland was later imprisoned in the colony after being found guilty of criminal libel for criticising Governor Macquarie.³

Lowe uttered the taboo word “convict” when questioning Bland’s qualification for appointment. This was a violation of the rigorously enforced politesse of the time.⁴

Lowe returned to England. His hostility to emancipated convicts, who had acquired wealth when, as he suggested, it was extremely easy to do so in Sydney, led him to successfully advocate in the House of Commons the adoption of a low property qualification for New South Wales, so that the more recent free migrants would be enfranchised. This led to the establishment of a democratic basis for government in this State long before it was the case in England.⁵

Some of you are no doubt wondering what this has to do with either of the books that I am launching today. The significance is in Lowe’s subsequent career in England, where he would ultimately serve as Chancellor of the Exchequer under Prime Minister William Gladstone. His relevance to tonight’s occasion arises because he was the principal promoter of the Joint Stock

Companies Act of 1856 which removed all restrictions upon a company obtaining limited liability, so that from that day onwards incorporation was no longer a privilege but, in substance, a right attainable on application, together with an automatic conferral of limitation on the liability for the incorporators. It was this legislation, soon replicated in substance by the Joint Stock Companies Act of 1862, to which the corporations legislation of the world can be directly traced. This has led historians to confer upon Robert Lowe the title of “Father of the Modern Company”.⁶

No Australian figure has ever had a greater influence upon world history than Robert Lowe did by this means.

The significance of the corporation, as one of the great contributions of Victorian England to global prosperity, was widely recognised in the decades thereafter, although, like so many things, we tend to take it all for granted today. From the Gilbert and Sullivan repertoire, one does not frequently hear of a revival of their operetta *Utopia Limited or The Flowers of Progress*, no doubt because a paean of praise for the limited liability joint stock company does not have the resonance that it once did.

In that operetta the residents of the south sea island of Utopia sing a chorus which could well be an introduction to the volume on corporate governance in Japan which is launched today. This has accurately been described as “one of the most improbable choruses ever set to music”.⁷

“All hail, astonishing Fact

All hail, Invention new

The Joint Stock Companies Act

The Act of Sixty-Two.”

Perhaps the most interesting feature of the book on corporate governance is how the range of issues that are being addressed in Japan are generally the same as those which other nations, including our own, are facing. Of course, there are particular matters that reflect the culture of Japan, for example the chapter on the Japanese tradition of life long employment. Nevertheless, most of the issues raised are quite familiar to an Australian lawyer. This can be attributed to the success of the innovation which Gilbert and Sullivan celebrated.

It is a little difficult to comment on the content of the book, because most of what I know about corporate governance in

Japan is derived from this book. I did, however, meet the judges of the Commercial Division of the Tokyo District Court in the judicial exchange that I organised to commemorate the 30th anniversary of the signing of the 1976 Treaty of Friendship and Co-operation between Australia and Japan. I wish to acknowledge the assistance that Luke Nottage gave in the preparations for that visit.⁸

My knowledge of Japanese corporate law was extended by the participation of the Chief Judge of that Commercial Division in the Judicial Seminar on Commercial Litigation which the Supreme Court of New South Wales organised in conjunction with the High Court of Hong Kong in Sydney in April 2008 and which attracted senior commercial judges from throughout the region. The Seminar will be repeated in Hong Kong next January.

However, it was in the context of the original judicial exchange with Japan that I first researched and articulated the significance of a comparative law approach to commercial and corporate matters, particularly by reason of the expansion in cross-border issues which requires co-operation and understanding between the lawyers, including the judges, of different

jurisdictions.⁹ This is a matter which has become a theme that I have developed on a number of subsequent occasions.¹⁰

It is this interconnectedness of global commerce that links the two books being launched today. The requirements of corporate governance, particularly in major commercial nations such as Japan, represents an essential basis for the facilitation of international trade and, perhaps more particularly, capital flows. The volume by Robin Burnett and Vivienne Bath sets out the range of legal issues that can arise in such transactions and does so in a comprehensive manner.

The collection of essays edited by Luke Nottage, Leon Wolff and Kent Anderson will enhance the understanding of the basic institutional framework for commerce in one of the most important global economies on the part of all lawyers who have to advise their clients when dealing with Japanese corporations, particularly with respect to investment in, providing credit to and creating or conducting joint ventures with Japanese corporations.

The principal focus of Robin Burnett and Vivienne Bath's book is the range of international regimes which regulate the sale,

and carriage of goods in international trade as well as the financing of international transactions. They discuss the requirements for effective operation in foreign markets and the systems for the settlement of disputes that inevitably arise with respect to both trade and investment. The volume will be of considerable assistance to legal practitioners asked to provide advice in any context with an international commercial dimension.

These volumes manifest the central significance for Australia's future prosperity of an understanding of global trade and investment. I understand that this event occurs under the auspices of Caplus, the Centre for Asian and Pacific Law at the Sydney Law School. A global perspective on commercial matters is, I am aware, a central concern of this law school, as manifest in the activities of Caplus of which, at least in part, the two books are a product.

This global perspective, and specifically an Asian focus, is of great, indeed, vital, importance for our national future. Regrettably I have to say that there are still areas of the law which remain inward looking and parochial. From time to time there emerge particular reforms that indicate a global outlook, but they occur on

an ad hoc basis in particular categories of reference. There is no systematic and co-ordinated approach to these matters which was suggested, perhaps most clearly, in the Australian Law Reform Commission's Report No 80 entitled *Legal Risk in International Transactions*, much of which has never been acted upon.

I regret to say that my attempts to encourage Attorneys General to pursue a more ambitious project of this character have been successful in some specific respects, but not yet in the broad based manner that I believe is required if Australia is to develop an image abroad of approaching global issues with a global perspective.

Regrettably we have not developed such an image and in a number of particular respects we appear parochial. I refer, for example, to our adoption of the "clearly inappropriate forum" test, rather than the English "more appropriate forum" test, for determining whether or not to decline jurisdiction on forum non conveniens grounds.¹¹ However, the practical significance of this approach is significantly attenuated by the adoption of an internationally sensitive "no advantage principle" for choice of law.¹²

Similarly, much of our legislation such as the *Trade Practices Act*, the *Insurance Contracts Act* and the proposed national Consumer Law¹³ are enacted or proposed without consideration of their effects on international commerce. I refer specifically to whether they contain “mandatory rules” for the purposes of private international law. The result is that we have judgments which determine that a foreign jurisdiction clause offends our public policy in circumstances where no order of an Australian court could be of any practical efficacy.¹⁴

To some degree the level of parochialism amongst Australian lawyers reflects the instincts of a generation that came to maturity in reaction to the traditional deference that Australian lawyers used to give to English lawyers. We really have to get over this reverse colonial cringe. The English no longer regard us as an inferior species. Rather, they regard us in much the same way as we regard New Zealanders: as altogether too successful for our proper station in life, of which, from time to time, we need to be reminded.

Our own attitude to England should move from adolescence to adulthood in the context of the recognition of the change in our respective global significance. I refer particularly to our close involvement with the most dynamic commercial region of the world.

In the development of such a global perspective amongst lawyers, particularly focused on the Asian region, the two books which I launch today represents a development from which we can all take comfort.

¹ Robin Burnett, Vivienne Bath *Law of International Business in Australasia* Federation Press, Sydney, 2009; Luke Nottage, Leon Wolff and Kent Anderson (eds) *Corporate Governance in the 21st Century: Japan's Gradual Transformation* Edward Elgar, Cheltenham, UK, 2008.

² See Ruth Knight *Illiberal Liberal: Robert Lowe in New South Wales 1842-1850* Melbourne University Press, Melbourne, 1966. For a more recent analysis of the significance of his contribution see Peter Cochrane *Colonial Ambition: Foundations of Australian Democracy*, Melbourne University Press, Melbourne, 2006.

³ See *Australian Dictionary of National Biography*, vol 1, 1788-1850, Melbourne University Press, Melbourne, 1966, pp 112-113.

⁴ See J J Spigelman "Tolerance Inclusion and Cohesion", 2006, 27 *Australian Bar Review*, 133 at 136-137.

⁵ See eg J D Hirst *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, Allen & Unwins, Sydney, 1988, pp 24-26.

⁶ John Micklethwait and Adrian Wooldridge *The Company, a Short History of a Revolutionary Idea*, Modern Library, New York, 2003, p 51.

⁷ Micklethwait and Wooldridge *supra* at xiv.

⁸ See J J Spigelman "Judicial Exchange between Australia and Japan" 2006, 11 *Journal of Japanese Law* 225.

⁹ *Ibid.*

¹⁰ See J J Spigelman "Transaction Costs and International Litigation" 2006 80 *Australian Law Journal* 438; 2006 3 *Chuo Law Journal* 118; J J Spigelman "International Commercial Litigation: An Asian Perspective" 2007 35 *Australian Business Law Review* 318; 2007 37

Hong Kong Law Journal 860; J J Spigelman “*Cross Border Insolvency: Co-operation or Conflict?*” 2009 83 *ALJ* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” 2009 83 *ALJ* forthcoming.

¹¹ *Oceanic Sun Line Special Shipping Co Ltd v Fay* (1988) 165 CLR 197.

¹² See *Neilson v Overseas Projects Corporation* (2005) 223 CLR 331.

¹³ This speech was delivered at a time when the proposal for the Australian Consumer Law was directed to any standard form contract and not limited to consumer contracts. (See *The Australian Consumer Law: A Consultation on Draft Provisions of Unfair Contract Terms* Commonwealth of Australia, 11 May 2009.) The Bill subsequently introduced is limited to consumer contracts.

¹⁴ See, eg *Akai Pty Ltd v The People Insurance Co Limited* (1996) 108 CLR 418 as discussed in my paper “Transaction Costs in International Litigation” *supra* at pp 442-443.

LAUNCH OF *THE WORDS TO REMEMBER IT*
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
AT THE SYDNEY JEWISH MUSEUM
SYDNEY, 24 MAY 2009¹

Accepting this invitation didn't take any time, because it was so obvious I had to do it. This is the community that nurtured me. These are the people, many of them friends of my late mother and father, with whom I grew up and with whom I became involved in many activities in this community.

No one in this room needs to be told of the horror and the tragedy of the Holocaust. It was the defining moral event of the 20th century. Virtually everyone in this room was personally touched, either directly or indirectly, by those events. The significance of remembrance is now well established, at least to people such as us. It is not always so well established to others. Whilst it may be true that, for many, there is a certain amount of overload on the subject of the Holocaust, nevertheless, it is theme that repeats itself again and again. We cannot leave it alone because of the extraordinary range of human characteristics, ranging from satanic evil on the one hand to the most self-denying personal altruism on the other, which it evoked.

In the stories collected in this volume, taken together, you have many examples of that full range of human characteristics. There are people who committed acts which are outrageously, extraordinarily, difficult to understand.

There are people who acted on the basis of cupidity, others from fear for their own safety, and others who took risks with their own safety on the basis of a strong moral stance. There are examples of one or other of such human conduct in each of the essays. If you read the whole you come across not only the full range but diversity within that range. That is what makes it a book, not just a collection of individual reminiscences.

Thank you to each author for sharing your experiences with us. It is a delight to read. It should be read in full in order to get that complete sense from it. Obviously, the events that I have the greatest direct personal relationship with is the chapter by my brother, Mark.

There are people who feel there is nothing new to say about the Holocaust. However, this book has gone well beyond what a book like this will do in terms of educating those who are not familiar with the issues raised simply by what happened yesterday morning on the front page of the Sydney Morning Herald.² I do not think there has been a Holocaust story on the front page of the Sydney Morning Herald for a very long time. It was personally extraordinary for myself and my family to wake up in the morning and see that. We knew that there would be an article, but we expected it somewhere in the back. That one story will unquestionably awaken a degree of interest from people who will never read this book.

The Holocaust is the kind of event that if you keep working at its significance, if you keep talking about it, there are ways of getting through the communication barrier. This fortuitously is one such occasion.

The journalist from the Sydney Morning Herald who wrote that piece was a young woman who was educated in Germany. She is not Jewish. She learned about the Holocaust in her high school education. That was why she was interested. It is the kind of interest that, of course, is wonderful to have for those of us who are more directly associated. It is the kind of interest that was always displayed by Caroline Jones, who is present today. She has, on previous occasions, interviewed my brother and she has written the introduction for this book. Everyone in the room thanks her for her continued interest and involvement in these high moral and spiritual issues.

For many years Holocaust survivors, whether adults or children, did not talk about their experience very much. In the public arena they did not attribute significance to their experience. It was in the 80s that this began to change and Holocaust survivor groups began to form, including this one. From that time there emerged testimony of a wide ranging character throughout the world. To that large body of memory and remembrance this is a worthy addition. It is of significance to almost everyone in this room in a personal way, but it is also a significant contribution from a broader perspective.

The basic theme of this book by members of the Child Holocaust Survivors Group is the importance of refusing to be victims. Being a victim is passive and a sign of weakness. Being a survivor is a mark of strength and of resilience. The message that comes through the book as a whole is one of strength and resilience by individuals.

There are certain things that emerge from all of the essays. The first is the sheer intelligence of the parents who enabled survival to occur, often by simply not believing what everyone else wanted to believe. The second, is the role of accident. Virtually every one of the essays attributes survival to some completely accidental event or luck. The more religious of you may be inclined to have a different explanation, but that's a bit difficult having regard to the entirety of the situation.

The third element is childhood memory. Childhood memory is something that comes back like flashbulb events or associations. Childhood memory is not a narrative or a chronology. Children do not remember in that sort of way. May I say I come across this all the time now in my current occupation, because of the number of child sexual assault cases that come before the Court. How children remember comes through in the book in a way that is of abiding interest to all of us.

It is important for all of us to get a sense of our personal narrative, of who we are, of what our family background was. That is very hard when you only have a flashbulb memory.

I was born after the war and the stories I was able to piece together from my parent's recollections and discussions were never complete, because it was difficult for them to talk about. The last member of my family of that generation is an aunt in New York. She emerged from Bergen-Belsen as a 16 year old girl suffering from typhoid. In terms of degrees of separation, Anne Frank died in the last week of the war from typhoid at Bergen-Belsen. There is a connection there that goes from Australia to Holland. My aunt will not talk about her experiences to this day. Others have been able to. My mother began to talk about it, because of the Holocaust survival group in Sydney when it emerged in the mid 80s.

The significance of my brother's contribution to this book for me and for my family cannot be understated. This is part of the personal identity of each of us. I did know most of these stories in one way or another, but not all them and not in the way he has recorded them. It is significant for me, and of course for my children, to read his recollections. I am sure that is true also of the families of other child survivors who contributed to this volume.

The memories of my own family was put in a dramatically different way by the publication, I am sure you are aware of *Maus*, the cartoon history of the Holocaust by my cousin, Art Spiegelman. In *Maus* my father is a character of significance, because he hid with Art's father just before the ghetto in Sosnowiec, the town where I was born, was liquidated.

Mark is depicted in *Maus* as a crying baby. He says in his memoirs that he was taught not to cry. Well, Vladek, Art's father, had a different memory. At least on one occasion he did cry. He was probably two at that time. It is understandable that his memory, in the flash bulb type of manner, was not complete.

The stories from my childhood were put into a chronological sequence by Art's work. As you know he won the Pulitzer Prize for *MAUS*. No one could think of a category in which it could fit. The Pulitzer Prize is usually given in categories of drama, fiction, non-fiction etc. They just gave him a Pulitzer Prize without a category. He created a new art form, the graphic novel, which is now quite established. But he did it in a particular way that carries a message through to many others, including non-Jews, by a mode of communication that has power and simplicity and force. I know that his image of Jews as mice and of Germans as cats does not appeal to everyone because it represents what the Germans tried to do and how they treated Jews as vermin. But of course that is the point. That is why he did it, because that is how Jews were treated. It is a form of artistic expression.

I might say that before he got his Pulitzer Prize, Spielberg produced the movie *American Tale*, which had Jews as mice. Art was convinced that Spielberg pinched various things from his work, but he decided not to sue because Spielberg was a little more powerful and wealthier than he was.

When an exhibition of Art's original artworks toured Australia, I opened it at the Jewish Museum in Melbourne. My son, Daniel, who is here, wrote a very insightful personal memoir about the significance of *Maus* for him. It was published in the catalogue for that exhibition. His memoir shows the power of this special form of communication. He, as an eight year old, was able to absorb this story and realise that this was a part of his own personal history and background. Even as an eight year old, and thereafter, *Maus* became a constant reference point for him. As he said, it had an important influence on his own sense of identity as a child in Sydney and now as a young man.

The events which Mark has recollected in this chapter will also be of significance for my family and I hope for others. I am sure that the recollections of the 30 other contributors will also perform that function for their own families in the future. Records of this character are of great significance for the families of those individuals and also for the broader community.

In 2005, on the 60th anniversary of the liberation of Auschwitz, there was that extraordinary event at Auschwitz when Heads of State of some 30 different nations attended and, for the first time, accepted a wide ranging collective responsibility for what happened there. That was the culmination, at an international level, of the Holocaust remembrance movement, if I can call it that, that began in the 80s and of which this book is a manifestation. That anniversary was an important event internationally. It was not a final, but a

dramatic, act of remembrance on behalf of a large number of nations including by the then Chancellor of Germany.

Remembering the Holocaust has a special significance when anti-semitic acts are clearly on the rise throughout the world. There are parts of the world where the kind of irrational and completely inexplicable belief in the evils and propensities of Jewish people is gaining currency of a character that really we thought had ended in 1945. This is so particularly in the Muslim world, but not only in that part of the world.

I can give you one example from my personal experience. A few years ago I was in Malaysia and when I was leaving Kuala Lumpur I went to the airport bookshop to see what sort of different books might be available. In the current affairs section on the table in the middle of the bookshop were three books. One, which I knew existed was a virulently anti-semitic tract written by Henry Ford written in the early 20s. I have never seen it in print but I knew it existed. The second was a book I didn't know existed but, if anyone had asked me, I would say that someone had written a book like it. It was a book blaming Mossad for the assassination of John F Kennedy. After all everyone else has been blamed. The third book in the current affairs section, not the history section, on things you need to know now, was *Mein Kampf* in English.

That is a manifestation of the kinds of tensions that are present in the world today and anything that can be done to combat them, however small, is welcome. The book that is being launched today is of such character. The

Sydney Morning Herald piece yesterday is also of such a character. I congratulate all of those who are responsible for this project. Thank you for your contributions. I am happy to launch this wonderful book.

¹ *The Words to Remember it: Memoirs of Child Holocaust Survivors* Scribe Publications, Melbourne 2009.

² Geesche Jacobsen “His brother is one of our most celebrated judges, but Mark Spigelman has an even more extraordinary tale. He survived the Nazis by dressing as a girl.” *Sydney Morning Herald* 23-24 May 2009.

THE TRADITIONALITY OF THE LAW
OFFICIAL ADDRESS
OPENING OF THE LAW SCHOOL
UNIVERSITY OF SYDNEY
THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 30 APRIL 2009

This new Law School represents the most recent manifestation of one of the great institutional traditions of this University. I refer to the strength of its professional faculties, of which the Faculty of Law is only one, albeit one with a high level of achievement for well over a century.

Each of the professional faculties have, throughout their lengthy respective histories, manifested the symbiotic relationship between an underlying body of learning considered as an academic discipline, on the one hand and the practical requirements of implementation of that knowledge in the context of a collegial profession, on the other hand.

The long debate about whether the Law School should stay downtown or move to the campus reflects, to some degree, the emphasis to be given to one or other of these requirements. However, the experience of the other professional faculties, with their on-campus locations, establishes that both roles can be properly performed from here.

From the time that I left this campus after four years of an Arts Honours degree, for Phillip Street, I was an advocate of the move to campus. I am pleased and honoured to give this address on the occasion of the opening of this wonderful new building.

The closeness of this Law School to the profession has been one of its great strengths. That bond remains, in this era of competition amongst tertiary institutions, one of its competitive advantages. This move will require the Law School to make an extra effort to retain its traditional ties.

Ensuring that graduates of this faculty are in a position to become fully trained members of the profession is a matter which must continue to be given significant weight, as I am sure it will be. That objective is not, however, incompatible with the objective of

ensuring that law graduates do not emerge from the Law School with a narrow concept of their role as lawyers and of the function of law in our society, nor with an inward looking, inbred intellectual perspective. Teaching students to learn to think like a lawyer is not incompatible with teaching them to think.

This relocation serves the interests of the profession, of the University and of the broader community that both serve. The profession benefits if its members have intellectual horizons beyond the law and acquire a broader range of knowledge and experience to bring to the resolution of legal issues. The University benefits from the greater engagement of legal academics and law students in the intellectual and social life of the University. There are few spheres of discourse which do not benefit from a legal perspective. There are no areas of the law that cannot be informed by other perspectives.

The relocation of the Law School brings to this campus the institutional rigour which the law imbues by reason of its traditionality. Perhaps more so than other disciplines, the law is marked by traditionality.¹ A sense of continuity has a salience for lawyers that it may not have in other disciplines. In some spheres

of conduct only the founders of an institutional tradition and subsequent innovators are valued. However, in the law those who have maintained the traditions, which the founders and innovators have created, are also highly valued.²

The traditionality of the law recognises that not all change is progress and not all innovation is improvement. However, legal traditions do not simply reflect the continuation and repetition of past rules and practices. All aspects of the law manifest the omnipresence of continuity and change. The law is like an eagle in the sky: it can only be stable when it is in motion.³

The significance of tradition for lawyers is of the same character as T S Eliot identified for tradition in literature. He said:

“If the only form of tradition, of handing down, consisted in following the ways of the immediate generation before us in a blind or timid adherence to its successes, ‘tradition’ should positively be discouraged. We have seen many such simple currents soon lost in the sand; and novelty is better than repetition. Tradition ... cannot be inherited, and if you want it you

must obtain it by great labour. It involves, in the first place, the historical sense ... and the historical sense involves a perception, not only of the pastness of the past, but of its presence; ... This historical sense, which is the sense of the timeless as well as of the temporal and of the timeless and of the temporal together, is what makes a writer traditional. And it is at the same time what makes a writer most acutely conscious of his place in time, of his contemporaneity.”⁴

So it is with lawyers. The traditionality of the law both gives us a rootedness to the past and a sense of the contemporary contribution that the law makes.

The traditionality of the law is of value in its own right. It provides a sense of continuity and of stability in fundamental social relationships. However, the traditionality of the law also has significant practical functions. The law represents the accumulated wisdom of the past which has developed for reasons that are not always obvious to those who have not lived through the development or studied it with a high degree of intensity.

Furthermore, the traditionality of the law enhances the sense of predictability and the certainty which is such an important aspect of the law in its practical operation in our society.⁵

The value of traditionality is a significant contribution that this law faculty will make to the University by closer integration with the community of scholars on this campus.

* * * * *

The design of this building has been described by one of the architects as “uncompromisingly modern”⁶. It is a striking example of that tradition. The significance of the built environment for the life of those who must experience it cannot be understated. As one of the founders of the Bauhaus Movement, Walter Gropius, said in 1949 of then contemporary developments in architecture on the Harvard campus:

“If the college is to be the cultural breeding ground for the coming generation, its attitude should be creative, not imitative. Stimulative environment is just as

important to free the students' creative talent as vigorous teaching. ...

How can we expect our students to become bold and fearless in thought and action if we encase them timidly in sentimental shrines feigning the culture which has long since disappeared?"⁷

This building feigns nothing. It *is* uncompromising and I look forward to the 'bold and fearless' contribution of its current and future students and staff.

¹ See the analysis in P Parkinson *Tradition and Change in Australian Law* (3rd ed) Law Book Company, Sydney (2005) Pt 1.2.

² C/f Edward Shils *Tradition* Faber & Faber London (1981) p 2.

³ I owe this simile to A Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harvard Law Review* 16 at 29.

⁴ T S Eliot "Tradition and the Individual Talent" in *The Sacred Wood: Essays on Poetry and Criticism* Methuen, London 1920.

⁵ See generally A T Kronman "Precedent and Tradition" (1990) 99 *Yale Law Journal* 1029; D Luban "Legal Traditionalism" (1991) 43 *Stanford Law Review* 1035; "Losing Sight of Hindsight: The Unrealised Traditionalism of Law and Sabermetrics" (2003-2004) 117 *Harvard Law Review* 1703.

⁶ Richard Francis-Jones "Law School Building" (2009) *JuristDiction* 5

⁷ Walter A Gropius "Not Gothic But Modern for Our Colleges" *New York Times* 23 October 1949.

**THE HAGUE CHOICE OF COURT CONVENTION AND
INTERNATIONAL COMMERCIAL LITIGATION
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
COMMONWEALTH LAW CONFERENCE 2009
HONG KONG, 7 APRIL 2009¹**

The *Hague Convention on Choice of Court Agreements* is the counterpart for litigation of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Promulgated on June 30 2005, its further progress awaited, as is usual with the Hague Conference, on the publication of a detailed Explanatory Report. This was published in September 2007.²

The global patchwork quilt of rules and practices for recognition and enforcement of foreign judgments is, by reason of its limited scope, a significant barrier to world trade and investment. Some mitigation of these disadvantages has proven possible on a regional basis, e.g. in Europe, through the Brussels Convention of 1968, now reflected in an EU Regulation³, supplemented by the Lugano Convention open to a wider range of countries. It has never been possible to achieve a multilateral

treaty, because of the diversity of substantive and procedural laws and of legal cultures. Courts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth.

The most recent attempt to negotiate a broader based Convention on the recognition and enforcement of judgments proceeded unsuccessfully for a decade and ultimately broke down. The participants could not agree on seemingly straightforward bases of jurisdiction, such as habitual residence and the place at which the tort occurred. The impasse on a range of issues – broadly between Europe and the United States – proved insurmountable. Nevertheless, consensus could be and was reached on choice of court provisions in international commercial agreements.

It is unkind to characterise the process, as one commentator has done, as: “The elephant that gave birth to a mouse”.⁴ Although partly accurate, this characterisation understates the potential significance of the new Convention. Furthermore, as another observer has noted:

‘[C]hanging the subject from *judgments* to *agreements* was a brilliant move. By replacing the thorny and intractable questions of the original project with the more comfortable regime of contract, the negotiators managed to hide many of the difficult issues under the umbrella of consent ... Of course, the court receiving the judgment is still lending sovereign force to the judgment of the court of a different sovereign, but the intervening agreement removes much of the pressure of scrutiny from the receiving court.’⁵

To date the Convention has attracted one ratification and, significantly, the signature of the United States, from which nation much of the stimulus for this process came. The Convention contains express provision for ratification by regional groups. As I understand the position, it is likely that the European Union will accede. This would, in effect, extend the Lugano Convention in this particular respect to a broader group of nations. The United Kingdom is likely to become a party to the Convention through this indirect route.

In the past, an arrangement of this character could have emerged by Commonwealth nations adopting a uniform approach, as in the parallel statutes for registration of foreign money judgments⁶ or in the parallel ratification of the *Hague Evidence Convention*.⁷ Today, Commonwealth nations are more likely to proceed through regional arrangements such as ASEAN or the African Union.

The potential advantages of arrangements of the character contained in the Hague Choice of Court Convention, have been recognised here in Hong Kong. There are commercial parties who would very much wish to have disputes with corporations operating in the People's Republic of China heard in the courts of Hong Kong, which are regarded as displaying a higher level of independence.

Hong Kong, as a Special Administrative Region of China, has implemented a bipartite arrangement in the form of its legislation, enforced on the side of the People's Republic by a Judicial Interpretation issued by the Supreme People's Court.⁸ This reciprocal arrangement applies to exclusive choice of court agreements which lead to a money judgment by a court of either

jurisdiction. Pursuant to the arrangement, judgments can be registered and enforced in the other jurisdiction. The difficulty of enforcing judgments of courts in the People's Republic is well-known. This may limit the commercial value of the arrangement. I note that a recent survey of relevant Chinese rules and practices suggests that there is no obstacle to Chinese signature and ratification of the Hague Choice of Court Convention, in the negotiations for which representatives of the People's Republic participated.⁹

The Commercial Imperative

The Choice of Court Convention has the same core justification as the New York Convention on Arbitral Awards. Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons as such autonomy is respected by all of those numerous nations that have adopted the New York Convention.¹⁰ 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.¹¹

Part of the background to the development of the Hague Convention on Choice of Court Agreements was a survey conducted by the International Chamber of Commerce amongst its members on the use of choice of court clauses and arbitration clauses. This survey revealed that a complementary instrument to the New York Convention would be welcomed by the global business community.

Ratification of the Hague Choice of Court Convention can make a contribution to reducing the transaction costs and uncertainties associated with the enforcement of legal rights and obligations in international trade and investment.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment, by imposing additional and distinctive burdens including:

- Uncertainty about the ability to enforce legal rights;
- Additional layers of complexity;
- Additional costs of enforcement;
- Risks arising from unfamiliarity with foreign legal process;

- Risks arising from unknown and unpredictable legal exposure;
- Risks arising from judicial corruption;
- Risks arising from lower levels of professional competence, including judicial competence;
- Risks arising from inefficiencies and delays in the administration of justice.

Many of these transaction costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, in the case of intra-national trade and investment. Such increased transaction costs impede mutually beneficial exchange by means of trade and investment.

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.¹²

The essential precondition for venue disputation, i.e. legal controversy about the appropriate jurisdiction in which litigation

should occur, is the fact that all nations make claims from exorbitant or long arm jurisdiction. In civil law countries, this generally turns on citizenship or residence, and in common law countries, this generally turns on service of process. The net is cast deliberately widely in all cases, but in common law nations 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 growing frequency and intensity of battles over venue indicates clearly that parties and their lawyers attribute considerable significance to where a case is decided. 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.¹³ An anti-suit injunction may be commenced as the first action in order that a prospective defendant will acquire first mover advantage. Inevitably, in this battle for first mover advantage prospective plaintiffs have resorted to the pre-emptive strike of an anti-anti-suit injunction.¹⁴ Such litigation has emerged in common law jurisdictions, especially the United States, England and Australia but not, it appears, in civil law nations.¹⁵

In civil law nations concepts such as *forum non conveniens*, conferring a discretion upon courts to hear and determine cases, and perhaps even more so the kind of discretion that is exercised in the course of determining anti-suit injunction litigation, is so inconsistent with their conception of the judicial role as to verge on an anathema. Their entire judicial culture is based on a denial of any such extensive judicial discretion, or at least upon a refusal to accept that it exists.

Although the differences between common law and civil law systems are breaking down, in a process of convergence upon which comparative law scholars have commented over recent

years, the civil law tradition remains comparatively inclined to proceed on the basis that the law, both substantive and procedural, is set out with perfect clarity in a code or equivalent document requiring merely its application by a judge without the judge making a policy choice or exercising a discretion. Accordingly, in lieu of anything remotely like a *forum non conveniens* principle, civil law nations prefer to mechanically apply a non-discretionary *lis alibi pendens* approach, by which one court will refuse to exercise jurisdiction if proceedings have already been instituted in another court. This results, in substance, in a rush to start litigation in a forum thought to be more favourable to the moving party.

This preference of civil law systems has become, understandably, the policy of the European Court of Justice and has significantly complicated, perhaps destroyed, the ability of English courts to restrain transparent attempts of commercial litigants to avoid justice.¹⁶

As Sir Anthony Clarke, the Master of the Rolls, pointed out:

“I have spent much of my professional life both at the Bar and as a judge dealing with cases in which parties,

usually defendants, have done their utmost to avoid having the dispute tried on the merits in England. Arguments of every kind have been deployed over the years to persuade courts that the interests of justice lie in the issues being determined elsewhere, although in very many cases the true position is that the defendant's real interest is to ensure (if at all possible) that the issues will in practice never be determined at all."¹⁷

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, a party to a commercial dispute that believes 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".¹⁸ The European Court of Justice has indicated that, as a matter of practical reality, no European court will be permitted to prevent such conduct as all European courts

are equal. Those of us with experience of federalism recognise the European Court of Justice doctrine of mutual trust as a full faith and credit clause.

In contrast, 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 motivation to ensure delay would be universally condemned and the motivation to ensure expedition, would be accepted as legitimate. 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.

I refer to such matters as the scope 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 advantages unique to a particular jurisdiction.

Many of these matters only become apparent after the prospect of litigation has arisen. Of particular commercial significance at the time that a contract is entered into is a judgment about the quality of the judges and the efficiency of the courts in different jurisdictions.

The quality of the judiciaries and delays in the courts of different nations vary considerably. Although this is difficult to discuss in international conferences, let alone in negotiations, in some nations the skill, learning and efficiency of judges is greater than in others. Indeed, in 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 in commercial dispute resolution.

These differences must be recognised as legitimate commercial concerns. A nation which does not perform well in these respects can, in pursuit of an enlightened self-interest, recognise that its economic welfare can be promoted by reducing this barrier to mutually beneficial trade and investment but only by accepting the right of parties to avoid its judicial system. Most nations have accepted such a right with respect to international commercial arbitration. There are real benefits in extending that acceptance to international commercial litigation.

The Convention

The *Hague Convention on Choice of Court Agreements* is concerned with exclusive choice of court agreements in international civil or commercial matters. This terminology was adopted because in some jurisdictions there is a distinction between “civil” and “commercial”. There is an optional extension for the recognition and enforcement of judgments given by a court designated in a non-exclusive choice of court agreement.

The Convention applies to all international cases, as explained in Article 1(2) in the following terms:

“ ... [A] case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”

Article 3 of the Convention defines an exclusive choice of court agreement as the designation of a court, to the exclusion of the jurisdiction of other courts, for the purpose of deciding disputes arising in a particular legal relationship. Article 3 also establishes a presumption that where a choice of court agreement designates a particular court, then that designation is deemed to be exclusive unless the parties have expressly provided otherwise.

The Convention has three principal provisions. First, the chosen court must act in every case, if the choice of court agreement is valid. That is to say the court has no discretion on *forum non conveniens* or other grounds to refuse to hear the case. Secondly, where another court, which is not the chosen court, has relevant proceedings commenced before it, it must dismiss the case, unless one of the exceptions in the Convention applies. Thirdly, and perhaps most significantly, judgment rendered by a

chosen court, that is valid according to the standards of the Convention, must be recognised and enforced in other contracting states, again unless one of the exceptions established by the Convention applies.

The Convention contains a list of exclusions encompassing: disputes about employment, consumer, family and domestic matters, bankruptcy and insolvency, transportation, anti-trust, personal injury and property damage, real property and tenancy, intellectual property rights and certain other matters.

The Convention also has a list of grounds for not exercising jurisdiction, or for non-recognition of a judgment, including:

- the choice of court agreement is null and void in the State of the chosen court (Article 5) (Article 6(a)) (Article 9(a));
- a contracting party lacked capacity in the law of the State of the chosen court (Article 6(b)) (Article 9(b));
- proceedings were commenced on improper notice (Article 9(c));
- judgment was obtained by procedural fraud (Article 9(d));
- it would be manifestly incompatible with the public policy of the requested state (Article 6(c)) (Article 9(e));

- preference should be given to an earlier inconsistent judgment from the requested state or another state (Article 9(f) and (g)) ;
- the agreement cannot reasonably be performed (Article 6(d));
- the chosen court has decided not to hear the case (Article 6(e));
- exemplary or punitive damages have been awarded (Article 11).

The central weakness of the Hague Choice of Court Convention is that it adopts, as its paradigm case, an arms length commercial arrangement between parties who are capable of some level of bargaining over the terms of contract, including the exclusive choice of court term. It assumes the existence of autonomous parties with freedom to choose. However, the narrowly defined exclusions in the Convention are such that it applies to a contract where one party is in such a dominant position as to have imposed all relevant terms, including the choice of court term, on the other party, in circumstances where there was no practical choice about entering into the agreement at all.

From my first contribution to this debate in 2006, I have been particularly concerned with the fact that, although the Convention does exempt consumer transactions, it does not exempt small businesses which are often the subject of protective legislation identical to that made available by law to consumers.¹⁹ There have been other expressions of concern to similar effect.²⁰

The Convention applies to a wide range of contractual arrangements into which individuals, small businesses and non-profit organisations will enter from time to time. Contracts by such persons with an international element have become more and more significant, primarily because of the explosion of internet commerce.

The Convention does apply to agreements that have never been the subject of any possibility of negotiation, including standard form printed contracts of a character with which the courts have long been familiar. However, of growing significance is that it applies to online purchase agreements, referred to as “click-wrap” agreements, where a purchaser is asked to click a yes or I agree button on a computer screen to assent to terms and conditions. It also applies to “shrink-wrap licences” that are

contained on or inside a software box which are only capable of being read after purchase. Such non-negotiated contracts are of increasing significance and may well contain exclusive choice of court clauses.

The problem arises primarily because of the narrow definition of a consumer transaction in the Convention. Article 2 provides:

“This Convention shall not apply to exclusive choice of court agreements –

- (a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party ...”

This is an exceptionally narrow definition, fails to exempt a wide range of small businesses, including individuals acting in the course of a business, and not-for-profit organisations. Such persons will acquire, from time to time, particularly online, goods and services in circumstances where there is no practical opportunity to decide whether or not to enter into an agreement with an exclusive choice of court clause. These are persons who are treated as “consumers” in a wide range of consumer protection legislation and whom most states would be reluctant to expose to

compulsory submission to the courts of another jurisdiction. This is a matter which requires each state to consider its policy position in this respect prior to ratification.

The formal mechanism for exclusion by a ratifying state is found in Article 21 which provides:

“Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.”

There are a number of general terms in this Article which lack definition and which could very well give rise to controversy in its application. Specific statutes, which are designed to protect small businesses as well as consumers, in Australia, include the *Trade Practices Act 1974 (Cth)* and the *Insurance Contracts Act 1984*. Such statutes may be the subject of precise specification. However, the terminology of “specific matter” can be broader than a particular statute.

Despite Australia's federal system, most of the statutes which could give rise to such issues are national or uniform. The position in the United States is much more complicated. Ratification by that nation, if it occurs at all, will be subject to significant exclusions.²¹

The other mechanism for narrowing the effect of the Convention, in the case of a small business or non-profit organisation, is the authority provided to a court of a requested state as to whether it should refuse enforcement pursuant to Article 9 of the Convention, which relevantly provides:

“Recognition or enforcement may be refused if –

...

- (e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that State.”

The determination of what “public policy” is applicable, may very well be informed by principles of both common law and statute which turn on contracts involving inequality of bargaining power or lack of bargaining. Further, the principles of procedural fairness, in a context where it was inconceivable that a person purchasing goods or services of modest expense could possibly attend a hearing in a foreign state, could invoke the second limb of this provision.

The issues that arise in this treaty context are similar to the issues that have long arisen in conflict of laws situations with respect to the determination of what is a mandatory rule of the forum and its application. No doubt greater certainty is available if there is a reservation under Article 21.²² The application of Article 9 occurs only in the course of litigation which is not desirable on such a policy laden area.

Conclusion

It is the express provision in the Convention for recognition and enforcement of judgment of the chosen court which attracts to commercial litigation one of the critical advantages that

international commercial arbitration has received, by reason of the widespread adoption of the New York Convention.

There is, however, a second advantage which is not replicated. Commercial arbitration can occur in private or, if one adopts a slightly different perspective, in secret. Commercial parties are frequently reluctant to wash their dirty linen in public. This is not one of the commercial advantages that a court, subject to the principle of open justice, can deliver to a commercial party.

Although it is often said that international commercial arbitration is preferable because it is capable of delivering a quicker and cheaper dispute resolution procedure, I am not convinced that that actually occurs in practice. Indeed, users of international commercial arbitration are increasingly expressing the view that they prefer alternative mechanisms such as mediation, by reason of the costs of arbitration. Survey evidence in the United States indicates that a surprisingly low proportion of international and national commercial contracts contain arbitration clauses.²³ In any event, the underlying principle of the New York Convention is party autonomy. If contractual parties chose litigation rather than arbitration, that choice should be respected.

The widespread adoption of expeditious proceedings for commercial dispute resolution by courts has meant that there is often no significant difference in terms of cost and delay. There can be but, in practice, there does not seem to be. However, one cost advantage of arbitration, in comparison with international commercial litigation, which has accurately been described as a “jungle”,²⁴ arises from the proclivity of parties to engage in venue disputation to which I have referred above.

Perhaps the most important matter which will determine whether the *Hague Choice of Court Convention* succeeds, is the extent to which nation states adopt the perspective that the autonomy of commercial parties should be respected, as distinct from adopting the approach that regards any impingement on the jurisdiction of national courts as an affront to national sovereignty. In short, will the *Hague Choice of Court Convention* be widely accepted to be the equivalent for litigation of the *New York Convention on Arbitral Awards*.

To some degree this will be influenced by the understandable apprehension that national corporations will

receive a 'home-town' advantage in their national courts. 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.²⁵

Where there is a robust independent judiciary, which has a global perspective and which understands the significance of commercial expectations for economic welfare, a home town advantage is unlikely to exist either at all or, perhaps more often, to any significant degree. Unfortunately, the nations of whom this is least true are often the most likely to project their failings on others and reject the self-proclaimed independence of other judiciaries.

One cannot reject the possibility of a home-town advantage out of hand. There is evidence that it exists, even in United States Federal Courts.²⁶ Questions of fact and degree arise. However, where two arms length commercial parties of more or less equal bargaining power, in which I do not include government controlled corporations, do agree on an exclusive choice of court clause, it can reasonably be assumed that they are satisfied that neither

party will obtain any such advantage. Governments should respect such a choice.

As I have said, the issue is, ultimately, one of enlightened self-interest. Even nations which suspect that their courts are unlikely to be chosen – because of issues of corruption, competence or delay – should understand that it is to their economic advantage, even if not to that of their legal professions, to remove such barriers to trade with, or investment in, their own commercial corporations who are prepared to agree to submit to the jurisdiction of another court. Failure to do so is, in economic terms, a form of protection of the State's domestic legal system, which has the same kind of adverse effect on other parts of their economy as such protection usually has. Over recent decades, the benefits of globalisation have become manifest as numerous restraints on trade and investment, that had been imposed in the exercise of national sovereignty but which reduced the standards of living of the nation's citizens, have been modified.

The efficacy of this Convention depends upon its widespread ratification. Lawyers who are involved in international commercial transactions have an interest in ensuring that their domestic

decision-makers give this matter attention. Law reform, particularly of a long-term structural nature, is often overwhelmed by the transient enthusiasms and necessities of the political process. I commend this Convention to delegates as a matter worth pursuing in each of the nations from which we come. Unless the commercial legal communities promote this reform, it is unlikely to be given priority.

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- ¹ The author has discussed these and related issues in several previous addresses. See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 438; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 35 *Australian Business Law Review* 318 also published (2007) 37 *Hong Kong Law Journal* 859; J J Spigelman “Cross-Border Insolvency: Co-operation or Conflict?” (2009) 83 *Australian Law Journal* 44. All of these addresses are accessible on the website of the Supreme Court of New South Wales at www.lawlink.nsw.gov.au/sc, see under “Speeches”.
- ² See T Hatley and M Dogauchi “Explanatory Report on the 2005 Hague Choice of Court Convention” www.hcch.net/index_en.php?act=publications.details&pid=3959. The most complete treatment of the Convention is R A Brand and P M Herrup *The 2005 Hague Convention on Choice of Court Agreements: commentary and documents* (2008) Cambridge University Press which appends the Explanatory Report. The background to the Convention is discussed in more detail in R A Brand and S R Jablonski *Forum Non Conveniens: History, Global Practice and Future under the Hague Convention on Choice of Court Agreements* (2007) Oxford University Press.
- ³ See Council Regulation 44/2001 OJL 12/1.
- ⁴ J Talpis & N Krnjevic “The Hague Conference on Choice of Court Agreements of June 30 2005: The elephant that gave birth to a mouse”(2006) 13 *Southwestern Journal of Law and Trade in the Americas* 1.
- ⁵ W J Woodward “Saving the Hague Choice of Court Convention” (2008) 29 *University of Pennsylvania Journal of International Law* 657 at 661-662.
- ⁶ See J J Spigelman “Transaction Costs and International Litigation” (2006) above n1 at 449.
- ⁷ See J D McClean and C A McLachlan *The Hague Convention on the Taking of Evidence Abroad: explanation documentation prepared for Commonwealth jurisdictions* (1986, reviewed ed) Commonwealth Secretariat, London.
- ⁸ See S McConnell “Legislation on the Mutual Recognition of Judgments between the Mainland People’s Republic of China and Hong Kong” (2008) 19 *Journal of Banking and Financial Law and Practice* 155.
- ⁹ See G Tu “The Hague Choice of Court Convention – A Chinese Perspective” (2007) 55 *American Journal of Comparative Law* 347.
- ¹⁰ See generally P Nygh *Autonomy in International Contracts* (1999) Clarendon Press.
- ¹¹ J W Yackee “A Matter of Good Form: The (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements” (2003) 53 *Duke Law Journal* 1179.
- ¹² 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* (2003) Oxford University Press; and see particularly the references at 2, fns 8 and 9; also M Keyes *Jurisdiction in International Litigation* (2005) Federation Press.
- ¹³ See A S Bell, above, n 12, at Ch 4 (defendant strategies).
- ¹⁴ See A S Bell, above n 12, at [4.137]-[4.142].
- ¹⁵ See C Kessedjian “Dispute Resolution in a Complex International Society” (2005) 29 *Melbourne University Law Review* 765 at fn 134.

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- 16 See generally the discussion by The Right Honourable Sir Anthony Clarke, “The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales”, Institute of Advanced Legal Studies, 23 February 2006; *Erich Gasser GmbH v MISAT Srl* [2005] QB 1; *Turner v Grovit* [2005] 1 AC 101; *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* [2005] QB 801; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd’s Rep 67; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (‘The Front Comor’)* [2007] 1 Lloyd’s Rep 391; *Allianz SpA and another v West Tankers Inc* (Case C-185/07); [2009] 1 All ER (Comm) 435, [2008] 2 Lloyd’s Rep 661.
- 17 The Rt Hon Sir Anthony Clark, in his address above n16.
- 18 Widespread dissatisfaction in Europe resulted in Italy adopting a new model for Company and Commercial cases. See F Carpi “The Parties and the Judge in the New Commercial Proceedings in Italy and the Ideological Choices” (2006) 25 *Civil Justice Quarterly* 70.
- 19 See J J Spigelman (2006) “Transaction Costs and International Litigation”, above n 1, at 451.
- 20 See eg A E Kerns “The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match” (2006) 20 *Temple International and Comparative Law Journal* 509 esp at 522; K Bruce “The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?” (2007) 32 *Brooklyn Journal of International Law Journal* 1103 esp at 1105, 1109, 1123-1125.
- 21 See W J Woodward “Constraining Opt-Outs: Shielding Local Law and those it Protects from Adhesive Choice of Law Clauses” (2006) 40 *Loyola of Los Angeles Law Review* 9 esp at 61-79; Bruce above n22, at 1127-1128; Kerns at 521-527.
- 22 See M Keyes, above n12, at 29-34 and 80-90.
- 23 See T Eisenberg and F P Miller “The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies” (2007) 56 *De Paul Law Review* 335.
- 24 See *Airbus Industry GIE v Patel* [1999] 1 AC 119 at 132 (Lord Goff).
- 25 For recent discussion of variations in the quality of national judiciaries see J Dammann and H Hansmann “Globalizing Commercial Litigation” (2008) 94 *Cornell Law Review* 1. See also generally E A O’Hara and L E Ribstein *The Law Market* (2009) Oxford University Press.
- 26 See U Bhattacharya, N Galpin and B Haslem “The Home Court Advantage in International Corporate Litigation” (2007) 50 *Journal of Law and Economics* 625.

OPENING OF LAW TERM DINNER, 2009
THE LAW SOCIETY OF NEW SOUTH WALES
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 2 FEBRUARY 2009

In August last year, the third Corporations Law Conference organised jointly by the Supreme Court and the Law Society was held on the topic of “The Credit Crunch and the Law”. It is difficult to imagine a conference theme that was more timely. As the universal response to the quality of the papers presented at that conference attests, the Conference made a significant contribution to the understanding of the profession in this State, and beyond, to the range of important corporations law issues that have arisen as a result of the global economic downturn.

In April last, the Supreme Court initiated the first Asian Judicial Seminar on Commercial Litigation. It was attended by senior commercial judges from China, India, Japan, South Korea, Singapore, Hong Kong, The Philippines, Malaysia and Papua New Guinea. I am pleased to say that the Seminar was such a success that it will be repeated in Hong Kong next year, again to be jointly

organised by the High Court of Hong Kong and the Supreme Court of New South Wales.

I circulated the published papers of our Credit Crunch Conference to the attendees at that Commercial Seminar. They universally expressed their admiration for the publication. We have begun planning for next year's joint Supreme Court/Law Society Conference and I have no doubt it will be equally well received, both in Australia and beyond.

This downturn of the economic cycle is of such prospective severity that, on this annual occasion, I wish to address my remarks to the implications of this global development for the legal profession.

Our focus must be on the quality and efficacy of the services that the legal profession will be called upon to provide for the resolution of the disputes that necessarily arise in such a context. The downturn is already having an effect on the flow of litigation.

Proceedings instituted in the Supreme Court to enforce obligations under mortgages reflect the economic stress of the

times. Our monthly figures for matters entered into the Court's Possession List are sought as an economic indicator by the Reserve Bank of Australia. The Governor of the Bank has told me that the Bank appreciates our cooperation in this regard.

The major increase in Possession List filings occurred in 2005 and 2006 i.e. before the current nationwide downturn. In 2007 and 2008 they plateaued. (See Annexure.) Analysis of the figures indicates that in the first six months of 2008 there was a decline of some 11 percent in Possession List filings (2519), when compared with filings for the first six months of 2007 (2834). However, the second six months of 2008 were completely different: filings (2953) were up by 13 percent on the previous corresponding period (2620). Although overall, on an annual basis, there was no increase, it does appear from the figures for the second six months that difficulties are emerging and they are emerging notwithstanding the substantial decline in interest rates that occurred during that period.

One of the reasons why what has come to be known as sub prime mortgages – which we used to call “low-doc loans” – never reached the dimensions that they have overseas is because of the

particular legal regulation available in this State. The Supreme Court of New South Wales has on numerous occasions exercised the powers conferred upon it under the *Contracts Review Act* to set aside as “unjust” aspects of low-doc loans where a mortgage, often by an elderly person over the family home, had been advanced without any consideration of the capacity of the borrower to repay.

One of the foundational judgments of this character,¹ frequently applied subsequently, led to significant change in the practice of lenders with respect to controlling their brokers who originated such loans. As the *Financial Review* reported under the heading “Court ruling forces overhaul of low-doc lending”, the judgment led to warnings to members by the Mortgage Industry Association of Australia and to a change of practice by what was described as a \$5 billion mortgage finance company owned by major banks with respect to its brokers, leading to some 20% of the brokers being removed from their panel.²

This line of authority has received considerable publicity in the financial media leading to another article in the *Australian Financial Review* which said:

“Public awareness about the plight of families caught in the debt trap through low-doc lenders is only starting to emerge as consumer groups raise their concerns. But judges in NSW have been on to it for several years. As the number of mortgage defaults escalates, courts have closely examined the conduct of loan intermediaries in the low-doc industry – solicitors, accountants and brokers – and made a number of critical findings. Judges are increasingly prepared to look at the circumstances behind the loan documentation ...”³

I think it likely that the regulatory regime as enforced in this State has played a role in limiting the exposure of Australian banks and other lenders in the manner which has proven to be so disastrous elsewhere.

The second area of the Court’s jurisdiction which will reflect economic conditions to a significant degree are filings for insolvency. Statistics on these matters are kept for Australia by ASIC and reveal an interesting comparison between this State and other States.

In New South Wales the number of companies entering external administration for the first time were up by 11 percent from 2007. However, the national average was up by 21 percent. This was because of a 27 percent increase in Victoria, a 40 percent increase in Queensland, a 20 percent increase in South Australia and a 43 percent increase in Western Australia.

It does appear that in 2008 stress in the corporate community was greater in other States than in New South Wales. This State may have been affected by adverse conditions before other States, but the effects of last year's global credit crunch has not yet impacted quite as significantly here as in other States.

I wish to emphasise the long-term significance of the global shift in the economic tectonic plates which will lead inexorably to social tremors and quakes. These effects will test many aspects of our social infrastructure, including our legal infrastructure.

As many of you are aware, from the time of my swearing-in speech in May 1998, I have consistently emphasised the significance of the professional dimension of legal practice and, in

particular, the need to resist recasting the profession solely in terms of its commercial dimension. My swearing-in speech has recently been reprinted as the opening chapter of the collection of my speeches, of which the Law Society sponsored the launch by the recently retired Senior Law Lord, Lord Bingham. Please accept my gratitude for the support the Society gave on that occasion.

It is appropriate to reiterate some of the themes I raised at my swearing-in and which I have consistently repeated in the decade since. The salience of commercial values in discourse about legal practice, which threatened to overwhelm all other values, is now in secular retreat. We will, I believe, as a direct result of the extraordinary events we are now experiencing, re-emphasise the central significance of the professional dimension of legal practice.

Permit me to commit the sin of self-quotation and repeat some observations from my swearing-in speech:

“The independence and integrity of the legal profession, with professional standards and

professional means of enforcement, is of institutional significance in our society. ...

The ideology of the free market forces, which I do not doubt has a significant and appropriate role in many spheres of discourse, has been elevated by some to a universally applicable orthodoxy. It should not be accepted to be such.

Economic rationalism has its place. In the administration of justice that place is a limited and subsidiary one. A plurality of organising principles for our social institutions is as important to the health of our society as biodiversity is to our ecology.”⁴

In subsequent addresses I elaborated on that last proposition by emphasising that a society which adopts a single organising principle for its basic institutions is inherently unstable. That is why I adopted the analogy of biological diversity.

In every sphere of discourse, including the law, the end of an era which treated commercial values as of overriding significance will lead to the reassertion of more traditional values.

It is a tribute to the strength of the traditions of our profession that so few chose to abandon, or to significantly qualify, those traditions in accordance with the values of the era that has now passed. Multi-disciplinary partnerships have not become significant. Incorporation has not become the norm. Only one or two firms have taken the ultimate step of listing on the Stock Exchange. Furthermore, the large firms definitively asserted their connection with the profession. A special constitutional provision was adopted at the level of the Law Council of Australia and those firms continued their involvement with the State Law Societies. This is symbolised notably by you, Mr Cantanzariti, in your many years of involvement on the Executive culminating in your ascendancy to the presidency of this Society.

As many of you will recall, a few years ago, in an insightful address on the subject of “Lawyers and Money”,⁵ Brett Walker SC raised the possibility that the major commercial law firms should, in effect, leave the profession and join their business clients. Now, of

course, the idea that law firms should reinvent themselves as merchant banks would not be high on anyone's agenda.

At the time of the last recession, following the economic boom of the 1980s, my corporate law practice turned into a criminal practice. I was briefed by the Australian Securities Commission, as ASIC then was, and the Commonwealth Director of Public Prosecutions, to pursue criminal charges against a number of accused, including Laurie Connell in Western Australia. I remember a delightful exhibit that had been tendered at the Royal Commission into what became known as "WA Inc". It was a tombstone ad that read:

"ROTHWELLS LIMITED

ONE DAY ALL MERCHANT BANKS WILL BE LIKE OURS."

And so it has proved.

Reassertion of the conduct of a profession as the basic paradigm for the practice of law, rather than the adoption of a business paradigm, will be an important structural effect of the present crisis.⁶ The business paradigm regards the lawyer/client relationship as primarily a commercial relationship. The

professional paradigm emphasises that the lawyer/client relationship is a personal bond created in the context of a high degree of personal responsibility, with an overriding ethic of service to clients and to the public. There will now be renewed emphasis on the moral code that underpins the traditional authority of our profession, so that that ethic of service, which emphasises honesty, fidelity, diligence and professional self-restraint, will now resume its salience over the pursuit of commercial gain at the core of legal practice. In this our profession will reflect changes that affect all other professions.

The second matter to which I wish to refer this evening is closely related to the reassertion of professional values. As this audience is well aware, I have over a number of years emphasised the need to control legal costs. As I have said on previous occasions, the legal profession is in danger of killing the goose.

Economic adversity will increase cost consciousness at all levels and the profession must be prepared to respond to the demands of its clients and of the public at large in this respect. Unless the profession recognises that the period of economic

adversity we are entering requires a significant reduction in the cost of legal services it will be marginalised.

When, five years ago, major reforms were instituted to change the culture of personal injury litigation, they were driven to a substantial degree by the significant proportion of damages awards that were taken up by the costs of administering the system. No one should assume that there is any sphere of legal practice that is immune from similar intervention.

There are signs that other areas of practice are already being affected by the need to minimise costs. Even one of the few growth areas – corporate insolvency – will be more cost conscious. It is noticeable that in the case of some of the biggest examples of corporate stress – Centro, Allco, Babcock and Brown – major creditors who trust the existing management are letting them liquidate the assets rather than appointing receivers or liquidators with the additional level of costs and delays, including legal costs, that appear to be endemic with external administration.

The warning signs are clear.

Over the last decade or two substantial progress has been made in reducing delays in the courts and some progress has been made in controlling costs. However, we must continually re-engineer the process of dispute resolution because the pressures on the process are in a continual state of flux. The scope and speed of changes in the economy and in society, which the law is designed to serve, will never permit us to declare victory and sit back content. We must proceed on the basis that there is always scope for improvement. The period of economic adversity which we are entering makes this constant endeavour more pressing than it has been in recent decades.

Judges are able to contribute to the process of controlling legal costs, especially in terms of delay and length of trial. However, there are limits to the degree of supervision and intervention which are consistent with the continuation of an adversary system. Although that system has been modified in many respects, it remains the case that the principal role in controlling costs lies with the profession.

I recognise of course that there may be a perception of a conflict of interest in this respect. What a client regards as costs, a

lawyer, in large measure, regards as income. It is here that the re-emergence of a professional paradigm over a business paradigm for legal practice is of potentially great significance. Recognition of the centrality of the ethic of service for our profession is the most effective means to ensure that this conflict of interest is satisfactorily resolved.

The judiciary and the profession have to co-operate to ensure that all of the areas in which costs can escalate unreasonably, areas that have been well identified over the years, are controlled even more strictly than we have come to do in the past.⁷ That is not only in the public interest, it is in the enlightened self-interest of all legal practitioners. If the profession is too greedy it will end up with less and, in some fields, with nothing.

This requires careful attention to the matters of which we are all aware such as:

- Minimising the number of times matters are brought before the Court by maximising agreement on procedural and evidentiary matters that would otherwise involve interlocutory motions and attendances, together with the more extensive use of telephone and electronic directions hearings;

- Minimising the length of trials by exercising professional judgment as to what the chances of success on particular points of evidence and law are, and abandoning those in which the chances are low;
- Maximising co-operation on expert evidence to reduce the scope of disputation, recognising that a biased expert does your client harm.
- Further and more extensive use of the Supreme Court's practice in commercial disputes of a chess clock or stopwatch system for trials so that litigants have a higher degree of certainty about their costs exposure;
- Focussing the issues so that extensive discovery is not required and recognising that the faint hope that a smoking gun may exist to revive a weak case is simply not worth the costs involved;
- Applying with renewed vigour the test of proportionality, expressed in s60 of the *Civil Procedure Act* 2005, to the

effect that costs to the parties of dispute resolution must be proportionate to the importance and complexity of the subject matter in dispute.

Primarily through its series of committees involving the profession, on which the representatives of the Law Society serve, the Court has well-established mechanisms for ensuring that its practices remain responsive to the changing needs and concerns of legal practice. The Court remains open to changing its structures and practices in accordance with the ideas thrown up in these consultations.

The Court has a range of powers that are now almost a decade old and which more recent legislative reform in other jurisdictions has by and large replicated. Similarly, we have a series of specialist lists which ensure judges of particular skill and experience deal with particular cases, including in commercial matters for the best part of three decades and in corporations matters for about a decade. The use of ADR has long been encouraged, and for over two decades, we have successfully operated a system of external referees.

The Court is determined to ensure that the costs of legal proceedings are minimised. It remains ready and willing to continue to pursue changes in our practices in consultation with the profession.

In one area, in my opinion, legislation is required. The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes. Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay. The delay with respect to the reform of the Commercial Arbitration Acts is now embarrassing. This is not an area in which harmonisation based on the lowest common denominator principle is appropriate.

In my opinion, the way out of the impasse is to adopt the UNCITRAL Model Law as the domestic Australian arbitration law. It is a workable regime, itself now subject to review at the

Commonwealth level. Its adoption as the domestic Australian arbitration law would send a clear signal to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration. Our competitors in this regard, such as Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems. Nor should we.

It is of course difficult to predict the future development of the current economic crisis. Nevertheless its implications will clearly be profound. In the short term one can expect a significant increase in commercial litigation, but the scope and intensity of the current downturn is such that this may prove to be short-lived, as more and more parties realise they are in no position to undertake the costs and risks of full litigation. As a profession it is our collective duty to minimise this barrier to access to justice. Lawyers are not immune to the effects of such a development. Many of you will already be feeling the pain. All of you will be apprehensive. The ethic of service obliges us to respond despite the commercial pain that practitioners will inevitably suffer during this period.

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*, crafted these words for a perceptive aristocrat facing the oblivion of the Sicilian aristocracy: "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 book *Collapse: How Societies Choose to Fail or Succeed*,⁸ 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. It is our mutual task to ensure that we avoid this state.

¹ *Perpetual Trustee Co Limited v Khoshaba* [2006] NSWCA 41.

² See "Court ruling forces overhaul of low-doc lending" *Australian Financial Review* 20 December 2006 p 1.

³ See "Buyer beware: Home truths about low-doc loans" *Australian Financial Review*, 10 August 2007 pp84-85; see also "Buyer beware? Now its seller play fair" *Australian Financial Review*, 20 December 2006 p4.

⁴ See (1998) 44 NSWLR xxvii, reprinted in Tim D Castle *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008 p 3.

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- ⁵ See “Lawyers and Money” (2005) *Lawyers Lectures*, St James Ethics Centre, 24 October 2005 accessible at www.ethics.org.au.
- ⁶ For discussion of these matters see my address “Are Lawyers Lemons? Competition Principles and Professional Regulation” (2003) 77 *Australian Law Journal* 44 reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008 at p138.
- ⁷ See generally my address “Access to Justice and Access to Lawyers” (2007) 29 *Australian Bar Review* 136; (2007) 14 *Australian Journal of Admin Law* 158.
- ⁸ Diamond J, *Collapse: How Societies Choose to Fail or Succeed* (Viking, New York, 2004).

Companies entering external administration – number and per cent from each state and territory

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
2007	3764	1945	1103	269	275	43	15	107	7521
(% of Aust total)	(50%)	(26%)	(15%)	(4%)	(4%)	(1%)	(0%)	(1%)	
2008	4172	2472	1541	322	393	44	24	145	9113
(% of Aust total)	(46%)	(27%)	(17%)	(4%)	(4%)	(0%)	(0%)	(2%)	
% change within state/territory from 2007 to 2008	up 11%	up 27%	up 40%	up 20%	up 43%	up 2%	up 60%	up 36%	up 21%

These statistics show the number of companies entering administration for the FIRST time, based on documents lodged with ASIC in the given period. A company is only included in the statistics ONCE, regardless of whether it enters another form of external administration. The only exception occurs where a company is taken out of external administration, eg by a court order, and at a later date re-enters external administration. Voluntary windings up are EXCLUDED.

Insolvency appointments in Australia – number and per cent from each state and territory

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
2007	5691	2986	2076	475	490	81	36	183	12018
(% of Aust total)	(47%)	(25%)	(17%)	(4%)	(4%)	(1%)	(0%)	(2%)	
2008	6287	3831	2553	525	648	69	30	230	14173
(% of Aust total)	(44%)	(27%)	(18%)	(4%)	(5%)	(0%)	(0%)	(2%)	
% change within state/territory from 2007 to 2008	up 10%	up 28%	up 23%	up 11%	up 32%	down 15%	down 17%	up 26%	up 18%

This is the number of insolvency appointments recorded by ASIC. As a company can be under more than one form of insolvency administration at any one time and can progress from one type to another, a company can be included in these statistics MORE THAN ONCE. For this reason, the number of insolvency appointments will always be greater than the number of companies going into external administration for the first time. Voluntary windings up are EXCLUDED.

Source: Australian Securities and Investments Commission – figures available as at 2 February 2009.

B Kercher and B Salter (eds), *The Kercher Reports: decisions of the New South Wales superior courts*, Sydney, Francis Forbes Society for Australian Legal History, 2009

Foreword

**The Honourable J J Spigelman AC
Chief Justice of New South Wales**

Bruce Kercher's compilation of the early court records of New South Wales, first published on the Macquarie University website, is a major contribution to Australian legal scholarship. It was appropriately designated "The Kercher Reports" by Judge Gregory Woods and the appellation has been generally accepted. It is entirely fitting that this highlights package from the electronic database should adopt that terminology. This publication is particularly welcome by those who, like myself, are old fashioned enough to regard close reading, as distinct from scanning, to be a tactile experience.

The 40 year period covered by this volume reflects the development of the colony from a small open air prison, to a village and then to a town

and port servicing a cluster of villages. Over those four decades legal decision-making transmogrified from a haphazard process, almost entirely dependent on the idiosyncrasies of the participants, into the foundations of an institution that is recognisably the origin of the administration of justice throughout mainland eastern Australia to this day.

They were formative years, although much that happened had little lasting significance. The cases collected in this volume manifest the untidiness of a process of adaptation in a small society where personalities determined events as much as positions.

It does appear, however, that this unrepresentative slice of 18th Century British society, which had a great deal of experience with the British legal system – much of it involuntary – also had a generally accepted understanding of the role of law in society and how the law should work. It is this intellectual tool kit that ultimately proved most influential, although there were the understandable differences of opinion about the applicability of the basic principles to a convict and then emancipist population. The strength of the British institutional background

ensured that even an authoritarian, military tinged political structure allowed the diversity of approach and conflict of principle that emerged.

H.V.Evatt pointed out in his book on the Rum Rebellion of 1808:

"The courts were the true forum of the little colony. They had no competitors as a means of expressing individual or public grievances. There was no legislature, no municipal government, no avowed political association or party, no theatre, and no independent press."

Some of this changed during the period covered in this volume – a vigorous press emerged and an unrepresentative Legislative Council was created. However, even at the end of the period Evatt's general proposition remained accurate. Accordingly, this compilation is an essential resource for general Australian history, not just for legal history.

As the authors point out in their Introduction, the themes that emerge in these cases cover a wide range of matters that can help us understand the origins of our society. They have made an important and permanent contribution to that understanding.