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The Hon. Justice A G J Whealy**

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Terrorism and the Right to a Fair Trial

Can the Law Stop Terrorism?

A Comparative Analysis

By Justice Anthony Whealy

A Judge of the Supreme Court of New South Wales

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The destruction of the Twin Towers in September 2001 shattered the confidence of the western world. In many countries, there followed the rapid enactment of legislation designed to prevent such a catastrophe occurring again. Ironically, the passing of this legislation spawned a flood of criticism against the new laws, suggesting that the very freedoms to be protected were being put at risk. Personal liberty, the right to a fair trial, the presumption of innocence and the right to confront one's prosecutor – all concepts enshrined in western law - were said to be now at risk.

A compelling comparison of the situation as between the United Kingdom and the United States is contained in Lord Bingham's book "**The Rule of Law**"(1) in a chapter dealing specifically with terrorism. It is interesting to observe that many of the author's observations are similar to a number of the criticisms levelled at Australian legislation following September 11. Critics included barristers, academics, civil libertarians and a number of retired Judges. This paper does not intend to follow precisely the track pursued by Lord Bingham. I will mention, albeit briefly, several of the legislative measures enacted in Australia, especially those which have excited particular comment and criticism. But my main focus will be to examine aspects of the terrorism legislation, which are most likely to confront trial and appellate Judges. I have published an earlier paper which examined the issue of the difficulty facing an accused person in obtaining a fair trial in a terrorism related matter(2). That paper focused on prejudice and bias, among other things. It is not

my intention to repeat the detail those matters although I have drawn on my earlier paper in contemplating problems arising from non-disclosure, secrecy and public interest immunity claims. In the final part of this paper I comment briefly upon the law's capacity to prevent or control the commission of terrorist related offences.

Two aspects of Australian Terrorism legislation that have drawn criticism and comment

(i) Sedition

One response to the terrorism "situation" in Australia has been the creation of new sedition laws. This has prompted much comment and criticism. The law of sedition prohibits words and conduct intended to incite discontent and rebellion. Statutory sedition offences were introduced into Commonwealth law in 1920. This was at a time when western powers were starting to exhibit concerns following the Russian Revolution, and when self-determination issues were being experienced in various parts of the British Empire. The Commonwealth enacted offences for the uttering of seditious words and for engaging in a seditious enterprise. These offences required the presence of "seditious intention" which was defined by the then legislation as an intention: -

- (a) To bring the Sovereign into hatred or contempt;
- (b) To excite disaffection against the Sovereign, Government or Parliament of the UK;
- (c) To excite disaffection against the Government or Constitution of any British Dominion;
- (d) To excite disaffection against the Australian Government, Constitution or either House of the Parliament;
- (e) To excite disaffection against the Imperial ties of the British Dominions;
- (f) To excite others to alter Commonwealth laws by other than lawful means;
or
- (g) To promote feelings of ill-will and hostility between different classes of subjects so as to endanger the peace, order or good Government of the Commonwealth.

There were exceptions to this regime including the proposition that it was lawful to “endeavour in good faith” to show that Government policy was mistaken, and to “point out in good faith” errors or defects in the Government or Constitution of the UK, any British Dominion, or the Commonwealth of Australia.

Not surprisingly, there was much criticism at the time of these laws on the basis that they had the power to compromise seriously freedom of speech.

It is not without interest to note that two successful prosecutions under the **1920 Commonwealth Seditious Offences** were upheld in 1949 by the High Court. Each case involved the prosecution of a Communist Party member by the Chifley Government. The High Court held that convictions could be sustained despite the lack of incitement to violence and public disorder. The last Commonwealth seditious trial was in 1953. The Menzies Government was responsible for an unsuccessful prosecution against three members of the Communist Party. The charges were all dismissed in September 1953. The focus of the trial was an article published in the Communist Review about the time of the Coronation of the Queen. The article criticised the Monarchy and asserted that it was “an instrument of class rule”. It is reported that the Sydney Morning Herald, hardly a vehicle for left wing views, described the outcome of the case as “a verdict for freedom of speech in Australia”.

In September 2005, the Howard Government announced that it would “modernise” the seditious offence and adapt it to the counter terrorism context. Schedule 7 of the **Anti-Terrorism Act (No 2) 2005 (Cth)** repealed s 24A of the **Crimes Act 1914 (Cth)** and replaced it with five new offences in s 80.2 of the **Criminal Code Act 1995 (Cth)**. The new seditious offences proscribe the following activities, (with the elements of the offence further defined): -

- (a) Urging the overthrow of the Constitution or the Government by force or violence
- (b) Urging another person to interfere by force or violence in Parliamentary elections;

- (c) Urging a group or groups to use force or violence against another group or groups within the community;
- (d) Urging a person to assist the enemy; and
- (e) Urging a person to assist those engaged in armed hostilities.

In the case of each offence, the maximum penalty is seven years imprisonment. In addition, the specific “good faith” defences to the sedition offences are listed in s 80.3 of the **Criminal Code Act 1995 (Cth)**. They include, but are not limited to: -

- Good faith efforts to show that various Governments officials are mistaken in their “counsels, policies or actions”;
- Pointing out in good faith errors or defects in the Government, Constitution, Legislation or Administration of Justice with a view to its or their correction;
- Urging in good faith a person to attempt to lawfully procure a change in law, policy or practice;
- Publishing in good faith a report or commentary about a matter of public interest.

It appears that the principal aim of the new sedition offences may have been to overcome the difficulty of prosecuting an individual who advocates terrorism, but who fails to advocate a specific terrorist act, or who fails to connect his or her speech to a specific terrorist organisation.

In his article “**Speaking of Terror: Criminalising Incitement to Violence**”(3), Dr Ben Saul makes the point that propaganda has long been the handmaiden of violence. It “ploughs the ground” for violence by softening our psychological defences to it and desensitising us to its brutalising effects. Terrorist trials in Australia have shown that, on occasions, young Muslim men have in their possession, often shared between members of a radical group, media material that contains disturbing images of executions of hostages, the death and wounding of soldiers and glorification of the September 11 “martyrs” and Osama bin Laden. This media material often contains exhortation to Muslims, in the name of religion, to kill

or drive out those who have invaded Muslim lands. Dr Saul asks “How does – and how should – the law respond to words or images that encourage a climate conducive to terrorism, without directly inciting specific terrorist acts?”(4).

The article traces the development of European and United Nations Conventions leading at least in temporal terms, to the decisions by the UK Government to create a new “offence of condoning or glorifying terrorism” whether in the UK or abroad. This proposal was undoubtedly influenced by the July 2005 terrorist bombings in London. The original proposal however, was altered in the final UK Terrorism Bill with a narrower offence of “encouragement of terrorism”. This plainly is a wider offence than that contemplated by the existing law of criminal incitement (5).

While I have not, for the purposes of this paper, made a close study of the UK legislation, I note that it was originally contemplated in 2005 that there would also be enacted a “power to order closure of a place of worship which is used as centre for fomenting extremism” and the listing of non-citizen Muslims “not suitable to preach, who will be excluded from Britain”. As I say, I do not know whether these proposals ever came to fruition, but I would be interested to know whether there is a civil power to close Mosques or to shut down “unsuitable” preaching.

Returning to the Australian legislation, it is fair to note that, in some respects, the new law “narrows” the vague concepts involved in the 1920’s legislation. On the other hand, the legislation widens the existing law of sedition in ways that have drawn criticism and adverse comment. For example the old offences required an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance. The new offences do not appear to require any such further intention to cause violence. The first three offences may be committed where a person recklessly urges others to commit violence, without any specific intention to cause violence. The burden of proof in relation to the “good faith” defences lies on an accused person. Although the defences may appear wide in their content, it is fair to say that most of the defences are directed towards protecting political speech at the expense of other types of expression. The defences do not, for example, appear to extend to statements made in good faith for academic, artistic, scientific, religious or

other public interest purposes. They may be construed to have a wider ambit than the expressions used, but it is impossible to say that a wide construction will be given. Dr Saul argues that “the range of human expression worthy of legal expression is much wider than these narrowly drawn exceptions, which appear more concerned about not falling foul of the implied constitutional freedom of political communication than about protecting speech as inherently valuable”. A number of commentators have also noted that the defences provide no express immunity for members of the media who simply report, in good faith, the statements made by others.

Where does the situation now stand in Australia? On 12 August 2009, the Government released a Discussion Paper containing proposed legislative reforms to Australia’s Counter-Terrorism and National Security legislation(6). This included proposed reforms relating to the sedition laws. The recommendations made by the Australian Law Reform Commission (ALRC) in the report accompanying the Discussion Paper recommended: -

- (a) Removal of the word “sedition” and its replacement with a more accurate description of the offences; (“urging violence”)
- (b) Repeal of offences (d) and (e) above, namely, “urging a person to assist the enemy”; and “urging a person to assist those engaged in armed hostilities”. The ALRC noted that the equivalent already exists under the treason offences. Nevertheless, it also recommended that those treason offences be amended to make clear that “mere rhetoric or expression of dissent, is not enough and that the prosecution must prove that the defendant has materially assisted an enemy wage war”.
- (c) Importantly, the ALRC recommended that in a prosecution for sedition, the prosecution will be required to prove that the defendant intended that the force or violence urged would occur. (This first recommendation was, as I understand it, adopted by the Government as a proposal in its Discussion Paper).

- (d) The ALRC rejected arguments that all five sedition offences be repealed and argued that it is necessary to retain a number of sedition offences because the existing incitement laws would not be “sufficient”. According to the ALRC, the Government had made a deliberate policy decision to criminalise general exhortations to use force or violence for broadly political or anti-social ends. Accordingly, there needed to be sedition offences that were less constrained than the existing offence of incitement.
- (e) Finally, the ALRC recommended that the Government consider expanding the “urging violence within the community” sedition offence. Currently, it is limited to instances in which:
- A person urges a group or groups distinguished by race, religion, nationality or political opinion
 - To use force or violence against another or groups as so distinguished, and
 - The use of that force or violence would threaten the peace, order and good Government of the Commonwealth.

The ALRC recommended that the Government consider expanding the offence to cover the situation where a person urges another person, in addition to a group, or urges another group not distinguished by race, religion, national origin or political opinion, to use force or violence against a group or groups in the community distinguished by any of those factors.

Considerable input has been made by many groups and organisations into the future fate of the Discussion Paper. Indeed, a Reform Bill has recently been introduced in which a number of these changes have been adopted. (**National Security Legislation Amendment Bill 2010**). As I understand it, Law Reform Commissions in England and Wales have recommended abolition rather than modernisation of their nation’s sedition offences. I am unaware at the present time whether those submissions have met with approval in the UK. It remains to be seen what will finally

emerge from the proposal for legislative reforms in Australia, at least so far as these sedition offences are concerned.

(ii) **Detention and Question, Control Orders and Preventative Detention**

Loss of liberty in the absence of a judicial order following a finding of guilt is rightly to be abhorred. Detention without trial, it has been said, smacks of the practices of a totalitarian regime. Laws of this kind, enacted throughout western countries following September 11, have excited considerable controversy, debate and criticism. The position in Australia is no different.

In response to 9/11, the Australian legal landscape has been radically altered with a number of preventative measures governing questioning and detention. These were first adopted in 2003(7). The same laws were enlarged in 2005(8) to authorise orders for the control or the preventative detention of a person. I will briefly outline the current law as to the powers of ASIO in relation to both questioning and detention.

Questioning and detention warrants - Generally

ASIO has extensive powers to question and detain people for up to seven days. This extends to those who are not terrorist suspects, but who may provide security information. ASIO can apply to an 'issuing authority', who is a Federal Magistrate or Judge to issue the warrant, with the consent of the Attorney General. In giving consent and in issuing the warrant, both the Attorney and issuing authority must be satisfied that reasonable grounds exist for believing that the warrant will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'. The Attorney must be satisfied that 'relying on other methods of collecting that intelligence would be ineffective'. As I have said, a person may be the subject of these warrants even if he or she is not suspected of a terrorism offence.

Questioning warrant - Procedure

ASIO can obtain a questioning warrant under which they can question a person and require him to provide records or other things. The warrant may be issued for as long as 28 days.

ASIO can question for as long as 24 hours, however individual periods of questioning must generally be limited to eight hours.

Questioning with an interpreter, however, can last for 48 hours. In general terms, a lawyer is permitted to assist the person during the questioning.

A person can be punished for up to five years if he or she refuses to answer questions or give false or misleading answers. The right against self-incrimination cannot be asserted. However, the answers given may not be used in a criminal prosecution against the person, save as a basis for a perjury charge.

Questioning and detention warrant - Procedure

This warrant authorises a police officer to take a person into custody for questioning before a prescribed authority. Before giving its consent, the Attorney-General must be satisfied that 'if the person is not immediately taken into custody and detained, the person:

- (i) may alert a person involved in a terrorist offence that the offence is being investigated; or
- (ii) may not appear before the prescribed authority for questioning; or
- (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce'.

Detention under this warrant is authorised for as long as seven days and enables questioning for periods of no longer than eight hours. Upon expiry, ASIO can obtain a further warrant if the Attorney and the issuing authority are satisfied it is necessary

as there is 'information that is additional to or materially different from that known to the Director-General' to the previous warrant request.

While the warrant is in force, a person cannot give any other person any information about the warrant, not even that it has been issued. Furthermore, with limited exceptions, for two years after a warrant has expired, a person cannot inform any other person of 'operational information' that was obtained under the warrant.

I now turn to describe the operation of preventative detention orders.

Preventative Detention

Preventative detention is aimed at either preventing an imminent terrorist attack from occurring, or preserving evidence relating to a recent terrorist act. The order can be used to detain persons suspected of some involvement with terrorism but where there is insufficient evidence to justify a formal charge.

A senior Australian Federal Police (AFP) officer may apply to an 'issuing authority' for a preventative detention order. The 'issuing authority' can be a present or retired judge or a federal Magistrate. A preventative detention order can be issued ex parte in two situations:

- (a) An order is made when the issuing authority consider it "reasonably necessary" and is satisfied that making the order would substantially assist in preventing a terrorist act, which is imminent and expected to occur within 14 days, from occurring and there are reasonable grounds to suspect that a person is involved either by way of planning or participation.
- (b) A preventative detention order can also be made if the issuing authority is satisfied that it is reasonably necessary to detain the person in question for the purpose of preserving evidence relating to a terrorist act which has occurred within the last 28 days, and that the period of detention is necessary for that purpose.

Once the order has been made, the AFP can take a person into custody and detain him or her for 24 hours. The order can be extended for another 24 hours. Further extension is then possible, under State law, which operates in conjunction with the Commonwealth Criminal Code. The **NSW Terrorism (Police Powers) Act 2002**, for example, enables detention for a maximum of 14 days.

(This type of detention has not been addressed in the Reform Bill I mentioned earlier).

If the order is disclosed to anyone, by the person the subject of the order, there is a maximum penalty of five years imprisonment. This is to ensure that other members of terrorist organisations do not learn that the individual is being detained under a preventative detention order. However the order must allow contact with a family member (but solely for the purposes of saying that he is safe, but unable to be contacted for the time being) or another person or lawyer (for advice and representation) at specified times while in detention. These communications would be monitored by police officers. There is limited access to reasons for detention.

The use of preventative detention and control orders is believed to have been limited. The exact number of orders for questioning is not precisely known. There has been no reported case of abuse of such powers, although the case of **Mohammad Haneef** is one such case which, in an allied area, has raised considerable controversy in recent years(9).

Dr Haneef was an Indian national who graduated with a degree of Bachelor of Medicine from a Medical College in Bangalore. He travelled to the United Kingdom where he worked in a number of hospitals between mid-2004 and August 2006. He returned to India and then decided to undertake post-graduate training in Australia. He and his wife arrived in Australia in September 2006. Dr Haneef secured employment with the Southport Hospital in Queensland.

On 29 June 2007, an event occurred in London which set off a chain of events that led to the detention of Dr Haneef and ultimately the cancellation of his visa and his

confinement in immigration detention. In the early morning of 29 June 2007, a bomb was discovered in a green coloured Mercedes car parked outside a nightclub in Haymarket. The explosive device was manually defused. Later that day a second car was found in Park Lane in Mayfair containing a similar device. It was also defused.

On the following afternoon a Cherokee Jeep was driven into the front doors of Terminal 1 at Glasgow Airport. The vehicle burst into flames and two persons were found at the scene.

Arising out of these events, authorities in the United Kingdom arrested a number of people on suspicion of having been involved in the commission of/or preparation for an act of terrorism contrary to the United Kingdom legislation. Advice was provided to the AFP by the English authorities that Dr Haneef was a person of interest to their investigation because of his alleged association with two of the suspects who had been detained in the United Kingdom. These men were second cousins of Dr Haneef. There was, it seems, a significant volume of security information passing between the UK Counter-Terrorism Command and the AFP in Australia.

There was enormous media interest in the 'affair', this interest being greatly increased by leaks of apparently sensational aspects of the investigation and the extended detention of Dr Haneef. Dr Haneef was held in pre-charge detention for 12 days by the AFP on suspicion of committing a terrorism offence, namely of providing resources to a terrorist organisation. During that time, the initial investigating period was extended to 48 hours and the AFP also obtained an order for a specified reasonable period of time (a 'dead time period') during which the suspension or delay of questioning could be disregarded. Haneef was then charged with providing resources, namely a SIM card to those involved in the UK incidents. It was believed, it seems, that the SIM card had been found in the burnt-out vehicle in Glasgow, although this "fact" was later found to be untrue. Dr Haneef was granted bail but was immediately issued with a detention order under the migration laws. The Minister for Immigration was later found to have acted unlawfully, although by then, Dr Haneef had left the country. He was later acknowledged by the AFP to be "no longer a person of interest".

The **National Security Legislation Amendment Bill 2010** now posits a maximum seven-day period for disregarded or “dead” time following arrest. This is a direct response to the **Haneef** situation.

Control Orders

Control orders were introduced with the 2005 amendment to terrorism laws ‘to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist attack.’ However, the issue of a control order does not depend on an imminent risk of terrorist attack. It can operate for as long as a year and can be renewed at the end of the year. A person does not have to be convicted of a terrorist offence or other offence to be the subject of a control order. It is not even necessary for there to be a finding that the person concerned is suspected of committing a crime.

Operation

Control orders are issued for the purpose of monitoring, restricting and directing the activities of persons who may engage in acts of terrorism.

The terms of a control order can vary from minor restrictions, to far reaching interferences with, a persons’ freedom. For example, an order can prohibit an individual from being at specified areas or places, from communicating or associating with a particular person or persons, or from using certain forms of telecommunication or technology.

It can require a person to do things such as wear a tracking device or remain at a specified place for certain periods or to report at specified times and places. It can impose a curfew.

Issuing Authority

An interim control order may be sought from the Federal Court, Family Court or Federal Magistrates Court by a senior member of the AFP with the Attorney General's written consent. This initial application is heard ex parte.

Types

1. For an interim control order to be issued the Court must be satisfied on the balance of probabilities that 'making the order would substantially assist in preventing a terrorist act'; or
2. 'that the person the subject of the order has provided training to, or received training from, a listed terrorist organisation.'

The court may declare, at a confirmation hearing, that an order be void, if it is satisfied that there were no grounds for making the original order. The order may be confirmed, varied, or some of its restrictions or obligations altered. The person the subject of the initial order is entitled to be heard and represented at the confirmation hearing.

Punishment

Breach of a control order is an offence punishable by up to five years imprisonment.

Issue of Control Orders

So far there have been very few situations in which control orders have been issued. There have, however, been two somewhat controversial illustrations of the use of control orders, those of Jack Thomas and David Hicks.

Jack Thomas was detained by Pakistani authorities for five months during which time he was kept in cells, including a kennel-like cell for approximately two weeks, where he was deprived of food for about three days. He was interrogated throughout this by Pakistani, American and Australian officials. He claimed he was interviewed by

AFP and ASIO officers during this time. He was often blindfolded, hooded and shackled. Initially, he had claimed that he was a student who had been travelling and visiting Pakistan but after a second questioning session he decided to cooperate, whereupon he was given food and his circumstances of detention changed.

Thomas was then held for three weeks and interrogated on a daily basis by Pakistani officials and a CIA representative. He was returned to Australia and then interviewed by a joint team of Australians on 24 and 26 February. The interview by the AFP, was later admitted as evidence at Thomas' trial.

During the course of questioning, American and Pakistani officials frequently resorted to threats. However, it was acknowledged by the trial judge that Thomas had been treated properly by Australian officers. Threats included water boarding, electrocution and execution.

Thomas was arrested at his home in Melbourne some 17 months after his return. He was charged with terrorism offences including intentionally receiving funds from a terrorist organisation and intentionally providing support to a terrorist organisation and possessing a fraudulently altered passport. He was acquitted of intentionally providing support to a terrorist organisation, although the jury found him guilty of intentionally receiving funds from a terrorist organisation. Thomas was sentenced to five years imprisonment for this offence. His conviction was quashed on 18 August 2006 by the Victorian Court of Appeal on the basis that the crucial evidence had been given under duress.

On 28 August 2006 Jack Thomas became the first person to be subject to a confirmed control order issued by the Federal Magistrates Court. This included restrictions such as not being allowed to use phone or email, having to be home between 5am and midnight (unless he notified the AFP of his change of address), not being able to contact certain people and having to report to police three times a week and have his fingerprints taken. The order had been originally issued ex parte on the basis that "Mr Thomas had admitted that he trained with Al Qaeda in 2001 and that while at the training camp, he undertook weapons training". Thomas was prohibited from leaving Australia without police permission. He was prohibited from

acquiring or manufacturing explosives, communicating with named individuals and using certain communications technology. The constitutionality of the control order was challenged, however this was upheld by the High Court(10). Freedom and liberty, absent conviction, were, it seems, not absolutes.

Thomas had participated in a televised interview in which he made the same admissions as those previously considered to have been made under duress. This led to his being re-charged. On 23 October 2008, Thomas was found not guilty of the terrorism offences but guilty of a passport offence. He was released after his sentence took into account the time already served, ie some nine months. The public controversy that ensued arose perhaps from the unique situation of Thomas' second trial, rather than from the issue of the control order itself.

David Hicks

A control order was also issued in relation to David Hicks. This was imposed after his release from detention in an Australian prison.

David Hicks was a person who had a history of militant activity including joining the Kosovo Liberation Army, applying but failing to join the Australian Armed forces, converting to Islam and training with LeT, training in weapons and war strategy, and eventually, so it was alleged, graduating to Al-Qa'ida's training camps in Afghanistan where he met Osama bin Laden.

In the wake of 9/11, Hicks was assigned by Al-Qa'ida to various military operations within Afghanistan against the Coalition and Northern Alliance forces. In early December 2001, he was captured in Afghanistan, and was transferred to Guantanamo Bay. Hicks was detained in that notorious institution, without charge, for two and a half years. The first charges laid against him in August 2004 failed when the United States Supreme Court held that the military commissions were unconstitutional.

Hicks was detained at Guantanamo for a further two and a half years before new charges were laid in January 2007. One month later, he negotiated a plea of guilty

to the single charge of “providing material support for terrorism”. He was sentenced to seven years’ imprisonment, all but nine months of which was suspended. He was repatriated to Australia to serve out the nine months in an Adelaide prison. Prior to Hicks’ release from prison, the AFP sought and obtained a control order to restrict Hicks’ movements and activities upon release. The order prohibited overseas travel; required him to report to a police station three times a week; restricted his use of telephones; prohibited any involvement with explosives and weapons; prohibited communications with “member[s] of a terrorist organisation”; required impressions of his fingerprints to be recorded; and imposed a curfew. An important condition of Hicks’ guilty plea was the “gag order”, which prohibited him from discussing his detention and conviction with the media for a period of one year. Hicks’ control order expired in December 2008. The AFP did not apply for it to be renewed. Hicks, so far as is known, now leads a secluded existence, far removed from the controversial circumstances of his past.

Control Orders and the UK Experience: The Belmarsh Case(11)

In the UK, detention is only allowed where deportation is pending under Article 5 of the **European Convention of Human Rights**. To redress the situation where foreign national suspects are at risk of torture in their homeland, the UK provided the avenue of opting out of Article 5 obligations in times of war and public emergency, with Parliament’s blessing. There was a challenge to the lawfulness of the legislation. This regime was constituted with the creation of control orders under the **Prevention of Terrorism Act 2005**, which allowed the Home Secretary (subject to High Court review) to impose obligations to protect the public against terrorism where necessary.

The control orders imposed restrictions such as confining the suspect to an allocated, unfamiliar place. Restrictions may be imposed as to who the person can associate and communicate with, and an electronic tag may be required to be placed on the suspect, making him liable to a search at any time.

A breach of a control order can result in five years imprisonment. At least eighteen such orders have been made. The **Belmarsh** case challenged the legality of control

orders. An 18-hour curfew was considered to infringe the legislation, but a 10-12 hour curfew was considered to be a less rigorous restriction and deemed not to be incompatible. The regime was not, in absolute terms, condemned. A maximum time limit for how long terrorist suspects could be detained without charge was considered to be 28 days.

The Australian situation

In Australia, thus far, there is no reliable indication that ASIO has abused its questioning and detention powers. Up until November 2005, ASIO had obtained 14 questioning warrants. Within a short time, the number had grown to more than thirty. The longest period for which a person was questioned had been 42 hours 26 minutes, which involved use of an interpreter. The longest period of interrogation without an interpreter was 15 hours and 57 minutes. The **Haneef** experience, however, highlighted the difficulty where the authorities, having detained a person for questioning, are urgently seeking further information from overseas to sustain the investigation in the expectation of a possible charge,

National Security Information Act – Secrecy and Non-Disclosure

This legislation was passed, in part, to protect information whose disclosure in Federal criminal proceedings would be likely to prejudice national security. It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial. I shall now say something about the detail of the legislation. I regret to say that it is impossible to summarise it in other than a discursive manner.

In general, it may be said that the legislation seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. Specifically, the Act seeks to protect information the disclosure of which would be likely to prejudice Australia's defence, security, international relations or law enforcement interests. These expressions are given very broad meanings in the definition sections 8, 9, 10 and 11 of the Act. For

example, “international relations, means political, military and economic relations with foreign governments and international organisations” (s 10).

It appears to have been the concern of Parliament that the existing rules of evidence and procedure may not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a federal criminal proceeding (**Explanatory Memorandum 2004**).

The operation of the Act, will ordinarily be “triggered” when the prosecutor contemplates the brief of evidence necessary for the trial. The prosecutor may notify the Court and the parties that a particular case falls within the provisions of the legislation. In fact, however, such notice can be given at any time during the proceedings.

At the commencement of Part 3 the Act contemplates that either the prosecutor or the defendant may apply to the Court for the Court to hold a conference of the parties to consider issues relating to any disclosure in the trial of information that relates to national security or may effect national security. This conference may include consideration as to whether the prosecutor or defendant is likely to be required to give notice under s 24; and whether the parties wish to enter into an arrangement of the kind mentioned in s 22 (s 21(1)(a) and (b)). At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure in the proceeding of information that relates to national security or that may effect national security (s 22(1)). The Court may make such order (if any) as it considers appropriate to give effect to the arrangement (s 22(2)).

Relevantly, the central aspect of the operation of the Act is the requirement that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. This information includes information that may be introduced through a document or a witness’s answer to a question, as well as information disclosed by the mere presence of a witness (s 24(1) (2) and (3)). On

receiving the advice that the Attorney General has been so notified, the Court must order that the proceedings be adjourned until the Attorney-General gives a copy of a certificate to the Court under sub-s 26(4) or gives advice to the Court under sub-s 26(7) (which applies if a decision is made not to give a certificate).

In a similar fashion, the prosecutor or defendant must advise the Court if he or she knows or believes that a witness may give an answer to a question in a federal court criminal proceeding that will disclose information relating to national security or may affect national security. In those circumstances the Court must adjourn the proceeding and hold a closed court hearing in which the witness provides a written answer to the question. This answer must be shown to the prosecutor. The obligation then falls on the prosecutor, in stipulated circumstances, to advise the Court that he has formed a knowledge or belief that the question relates to or may affect national security. In those circumstances the prosecutor must give the Attorney-General notice in writing of that knowledge or belief. Again, the obligation on the court is to adjourn the proceedings until a certificate is given or not as the case may be (s 25).

Upon notification, the Attorney General considers the information and determines whether disclosure of the information or the calling of the witness is likely to prejudice national security (s 26(1)).

Where the Attorney-General has given a potential discloser a certificate under s 26, the Court must, in any case where the certificate is given to the Court before the trial begins, hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3a)) or the calling of the witness.

Where the certificate has been given to the Court after the trial begins, the Court must continue the adjournment formerly granted to hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3)) or the calling of the witness.

Any certificates that have been issued must be considered at a closed hearing of the trial or pre-trial court (ss 27(5) and 28(7)). The Attorney-General may intervene in

the proceedings to take part in the closed hearing. If the Attorney-General does intervene in the hearing, he or she is treated as if he or she is a party to the hearing (s 30 sub-ss (1) and (2)).

While the Court has a discretion to exclude the defendant, non security cleared legal representatives of the defendant or non security cleared court officials from the closed hearing, the defendant and his or her legal representative must be given the opportunity to make submissions to the court on arguments relating to the disclosure of information or the calling of witnesses (s 29(2) (3) and (4)). The discretion to exclude only arises where the Court considers that the information would be disclosed to the defendant, the legal representative or the court officials and determines that the disclosure would be likely to prejudice national security.

After holding a hearing required under sub-s 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of sub-ss (2), (4) and (5) of s 31. In general the court may -

- (a) Agree with the Attorney-General that the information not be disclosed at all or be disclosed other than in the particular form; or
- (b) Disagree with the Attorney-General and order the disclosure of the information either generally or in a particular form. (s 31(1), (2), (4) and (5)).

After holding a hearing required under s 28(5) the Court must order that:

- (a) The prosecutor or defendant must not call the person as a witness in the federal criminal proceeding; or
- (b) The prosecutor or defendant may call the person as a witness in the federal criminal proceeding (s 31(6)).

In deciding what order to make under s 31, the Court must consider the following matters (s 31(7) and (8)):

- “7(a) Whether, having regard to the Attorney-General’s certificate there would be a risk of prejudice to national security if:
- (i) Where the certificate was given under sub-s 26(2) or (3) – the information were disclosed in contravention of the certificate; or
 - (ii) Where the certificate was given under sub-s 28(2) – the witness were called.
- (b) Whether any such order would have a substantial adverse affect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence;
- (c) Any other matter the Court considers relevant.”

In making its decision, the Court must give greatest weight to the matter mentioned in s 31(7)(a) (s31 (8)).

The legislation provides for a potential series of appeals. They may take place concurrently or, it seems, they may be brought piecemeal. The form of the record itself may generate an appeal if it is thought to pose a threat to national security. So too with the reasons of the Court for its decision. There is, of course, an appeal on the merits of the decision. Each of these requires the adjournment of the proceedings until the appeal points have been determined.

An order made by the Court under s 31 does not come into force until the order ceases to be subject to appeal. It remains in force until it is revoked by the Court (s 34).

Section 19 deals with the general powers of a court in a federal criminal proceeding. It provides: -

- “19(1) The power of a court to control the conduct of a federal criminal proceeding, in particular in respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.
- (2) An order under s 31 does not prevent the Court from later ordering the federal criminal proceeding be stayed on a ground

involving the same matter, including that an order made under s 31 would have a substantial adverse affect on a defendant's right to receive a fair hearing."

General Comments

It is, I think, fair to make the following general observations: -

1. This legislation poses a very significant challenge to the efficient running of a criminal trial. At the same time, it has, as I shall explain later, the capacity, in an indirect sense, to create a situation where the defendant's right to a fair trial may be significantly impaired.

2. The Act imposes highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning national security.

3. There is also an obligation on the Court's staff and Court reporters to obtain National Security clearances. The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individuals be scrutinised but so also their spouses and partners. Details of their financial and personal lives are examined.

4. As mentioned, if, before or during a hearing, either the prosecutor or the defendant knows or believes that information which relates to or may affect national security will be disclosed, he or she is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment for up to two years.

5. Delay and disturbance to the trial process is perhaps the most practical potential problem created by the legislation. As I have explained above, there is the possibility of a disruption to the trial itself while the Attorney-General contemplates whether to issue a Certificate. Where a Certificate is issued, there is a need to hold a Closed Court hearing in the absence of the jury. This will presumably take place

days, or perhaps weeks, after the initial adjournment. If the Court decides to make orders after the Closed Court hearing, there are three possible appeals. The first is an appeal relating to the records to be kept. The second is an appeal relating to the reasons for the decision. The third is an appeal against the merits of the decision. In each of these cases there is the capacity for delay and the trial cannot proceed until the appellate court has resolved the issues arising under the various appeals.

It may be appropriate if I mention at this stage that during the trial of **Faheem Lodhi** (in which I was the trial judge), there were a number of strategies selected which, I believe, prevented these delays from intruding unfairly on the trial process. First, it was generally agreed that all aspects of national security disclosure (including the imposition of protective orders) would be dealt with entirely during pre-trial hearings. This had the effect of elongating the pre-trial stage of the proceedings. It had the advantage, however, of ensuring that there was very little delay, if any, in the hearing of the trial itself. In those circumstances, the jury were not inconvenienced by adjournments or appellate delays.

Secondly, there was a considerable degree of co-operation between counsel for the prosecution and the defence. It was plainly the desire of all parties to ensure that the trial proceeded as normally as possible. There was, it must also be said, a degree of co-operation on the part of those representing the Attorney General although their concerns focused, as might be expected, more on the protection of national security and were less concerned with the trial process. Thirdly, a clear dichotomy was maintained between the issue of disclosure of sensitive information on the one hand and the issue as to whether protective orders should be made, or the manner in which evidence was to be given during the trial. There was, during the pre-trial procedures, an appeal to the Court of Criminal Appeal brought on behalf of the defendant in relation to protective orders. There was some delay in relation to this but it was relatively limited. For example, the orders I made (relating to Closed Court hearings and the like) were made on 15 March 2006. The Court of Criminal Appeal heard the appeal on 24 March and dismissed the appeal on 4 April 2006. The important point to note, however, is that the appeal process occurred during the pre-trial proceedings and not during the trial itself. In that way, the jury did not experience the frustration and disruption of an interrupted hearing.

The **National Security Legislation**, in some academic quarters, was said to be unconstitutional. Commentators argued that it purported to usurp the judicial power of the Commonwealth

In **Faheem Lodhi v Regina** (12), the Court of Criminal Appeal had to confront this argument directly. This was an appeal from conviction and sentence arising from the **Lodhi** trial. It was asserted that s 31(8) of the **National Security Information Act** was invalid because it breached Ch iii of the Australian Constitution by usurping the judicial power of the Commonwealth which was vested solely in the judiciary. It was submitted on the appeal that by requiring the Court to give “greatest weight” to the risk of prejudice to national security, the Parliament had usurped the judicial function by directing the Judge hearing the case as to how the case must effectively be decided. The Court decided that the use of the word “greatest” meant no more than that “greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed”. If only two circumstances were weighed, it would be construed to mean “greater”. The effect of the sub-section, however, was not to usurp judicial power by requiring that the balance must always come down in favour of the risk of prejudice to national security. Accordingly, sub-section (8) of s 31 was held to be constitutionally valid.

It may be of interest to note that, as trial Judge, I had prohibited disclosure of certain material to the defence after considering the balancing discretionary exercise required by s 31(8). I had, however, ruled that other material sought by the defence should be disclosed notwithstanding the statutory tilt in favour of the risk of prejudice to national security. In my decision I said: -

“(108) The mere fact that the legislation states that more weight, that is the greater weight, is to be given to one factor over another does not mean that the other factor is to be disregarded. ...Read fairly it seems to me that the legislation does no more than to give the Court guidance as to the comparative weight it is to give to one factor when considering it along side a number of others. Yet the discretion remains intact...the legislation does not intrude upon the customary vigilance of the trial Judge in a criminal trial. One of the Court’s

tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level, would not apply to the Court's scrutiny of the Attorney's certificate in a s 31 hearing".

The principal appellate decision on the point was given by Chief Justice Spigelman in the Court of Criminal Appeal. Three of his Honour's comments are especially noteworthy. Spigelman CJ said: -

"(66) A similar approach is, in my opinion applicable to s 31(8) of the **NSI Act**. The legislative has "struck a different balance". It has, to some degree, "put to one side, the public and private interest in obtaining all potentially relevant information" in favour of "the public interest in national security". This, in my opinion is constitutionally permissible.

(72) The modification of judicial procedures by legislation should not be characterised as a legislative usurpation of judicial power, unless it affects the integrity of the judicial process. As noted above, in certain contexts the common law tilts a balancing process without effect on the integrity of the process. Legislation can also do so, without necessarily having such an effect.

(73) This focus on whether the integrity of the process has been compromised confirms the conclusion to which I have come above. Tilting the balance with respect to the formulation of a broad evaluative judgment, upon which reasonable minds may differ, does not impinge upon the integrity of the process by which the judgment is formed. It may affect the outcome of the process but not in such a way as to affect its integrity."

Spigelman CJ went on to find additionally that the guarantee, contained in the Australian Constitution, of the right to a fair trial was not infringed by s 31(8) of the Act. In that regard his Honour said: -

“I repeat, and emphasise, that all claims for privilege, which the common law had long recognised, necessarily involved the withholding of potentially relevant evidence, even from defendants in a criminal trial. ...a successful claim for public interest immunity does not contradict such a right to a fair trial as may exist under the Constitution. The legislative tilting of the balancing process by s 31(8) of that Act, in my opinion, does not constitute so significant a change as to have such an effect”.

Areas of potential unfairness for an accused in a terrorism trial

The barriers to disclosure in the **National Security Act** will not necessarily pose an unfairness problem for an accused person if those issues can be clarified and resolved during pre-trial session. A more important practical problem, however, arises from the way in which the legislation requires the Court’s discretion to be weighted. On its face, the question as to whether there is a risk of prejudice to national security can, in practice, plainly trump the defendant’s right to receive a fair hearing, including, in particular, on the conduct of his or her defence. This is precisely because the statute requires that “greatest weight” be given to the question as to whether there would be a risk of prejudice to national security if the information were disclosed in contravention of the Certificate, or the witness were to be called. For my part, however, I do not think that the statutory weighting of the discretion in this way necessarily works to the practical disadvantage of the accused. There are two reasons for this. First, the object of the Act, (s 3(1)), is to prevent the disclosure of information where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. It is not difficult to prove in a particular case that, where a refusal to make a disclosure would have a substantial adverse effect on the defendant’s right to receive a fair hearing, this may be sufficient to “seriously interfere with the administration of justice”. Secondly, where disclosure is not made, the Court maintains the capacity, in an appropriate case, to stay the proceedings (s 19).

Special Counsel

Before leaving the issue of disclosure under the **National Security Act**, I should refer to one other matter: there is a capacity under the legislation for part of the argument addressed in a Closed Court hearing to be taken in the absence of the defendant or his or her non-security cleared legal representative (s 29). There is also the capacity, as occurs in ordinary public interest immunity claims, for affidavit material to be received from the Director of Security on a confidential basis. In either situation, the Court and the defendant may well be assisted by the appointment of special counsel.

In **Lodhi** [2006] NSWSC 586, I addressed the possibility of the appointment of special counsel to represent the interests of the defendant and to assist the Court in the area of national security claims. I traced the development of the practice of the appointment of special counsel in the United Kingdom (see paras 13-16). In particular, I was satisfied that the provisions of the legislation did not prohibit the appointment of special counsel during, or for the purposes of, a hearing under sub-s 25(3), s 27(3) or 28(3). I was satisfied that the language of s 29(2) was sufficiently wide to allow a person appointed as special counsel to take part in a s 31 hearing.

The appointment of special counsel in Australia is a novel concept. So far as I am aware, special counsel has not been appointed in Australia, either within or outside the confines of the **National Security Act**. Although the utility of the appointment of special counsel has been doubted (see Sir Anthony Mason in a paper given in Brisbane to the ISRCL "**Justice for All**" 2 July 2006), I consider that it could be a useful weapon in the armoury of a trial judge in a situation where there is a clash between a national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case. The problem is that defence counsel may not be entitled to look at the document, which is the subject of the national security claim. Special counsel, on the other hand, will be entitled to do so. One reason will be because he or she has a security clearance. In addition, special counsel will understand the nature of the defence case but will not have had any direct contact with the accused himself. This means that submissions, helpful to the defendant and of assistance to the trial judge, will be forthcoming to counter the arguments advanced on behalf of the Commonwealth.

For a broad discussion relating to the issue of the appointment of special counsel in the United Kingdom, see **R v H; R v C** [2004] 2 AC 134 at 150-151 per Lord Bingham and the remarks of Lord Woolf CJ in **M v Secretary of State** [2004] 2 All ER 863 at 868. It is, however, worthwhile recalling the cautionary words of Lord Bingham in **R v H; R v C** at para 22: -

“None of these problems should deter the Court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant”.

Lord Bingham stated in the same case: -

“The problem of reconciling an individual defendant’s right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime is inevitably difficult to resolve in liberal society governed by the rule of law.”

Australia lacks, of course, a domestic Bill of Rights at the Federal level. This is of course, the jurisdiction in which public interest claims based on national security are most frequently invoked. It was my view in **Lodhi** that a staged approach, incorporating the appointment of a special counsel (in appropriate circumstances), could operate to provide a defendant with greater fairness in cases involving public interest immunity claims based on national security.

In **Lodhi**, I concluded, however, that it was premature to appoint a special counsel at the time when the point was raised. As it happened, I later concluded that it would not be necessary to appoint a special counsel at all, as it seemed clear to me that the accused was entitled to receive disclosure of the majority of the material it sought. While I took the initial view that it was premature to appoint special counsel, I considered that three crucial steps might be undertaken before making a final

decision whether extraordinary circumstances existed so as to justify the appointment of a special counsel. These were: -

- (a) The Court should receive the material relied upon by the Government to support the public interest claim;
- (b) The Court should inspect the material over which the claim was made and the reasons for the claim; and
- (c) The Court should invite the prosecution and defence to address the Court on their respective cases with a view to ascertaining whether, and how, the material over which the claim was made could be relevant to those cases.

In relation to the first point, Australian law makes it clear that an affidavit that purports to set out the basis of a claim for public interest immunity should state with precision the grounds on which it is contended that documents or information should not be disclosed. The courts must insist that affidavits claiming public interest immunity contain a precise statement of the harm the Government claims will flow from disclosure. The Court should require the deponent to examine the question whether it is possible to have “layered” levels of disclosure.

In relation to the second point, I am conscious that this represents a significant point of distinction between United Kingdom and Australian practice. As I understand it, United Kingdom courts remain extremely reluctant to inspect documents over which public interest immunity has been claimed. By contrast, in Australia, courts have long accepted the ability to inspect such documents. This is particularly true in criminal matters where the courts have adopted a very liberal approach to inspection.

To my way of thinking, judicial inspection has considerable value. Not only does it assist the Court in its determination of the public interest immunity claim. It also has the capacity to give an accused person reassurance that the judicial officer has independently tested the Government’s claim for immunity. Thirdly, it may be said that judicial inspection may reveal that the appointment of special counsel is not needed at all. The risk of highly prejudicial material being revealed to the Judge is, on balance, one worth taking.

The third point really requires no comment. As a trial Judge in Australia, however, it is often difficult to persuade counsel for the accused to be frank about the nature of the defence case. This is a tendency rooted in tradition that I fear will have to change particularly in the area of complex trials. I am conscious of the fact it has changed already in the United Kingdom but we are presently lagging behind in this area. Change is in the air, but we have a distance to travel before this problem is solved.

The final matter I would mention under this heading is the mechanics of the appointment of special counsel. As to qualification, it can be assumed that the Attorney-General will consider only those counsel who have security clearances as being appropriate to act as special counsel. In the absence of agreement between the parties, the Court may be able to consult the Bar Association of the local State. In **Lodhi**, I suggested that, although the appointment of special counsel was then regarded as premature, there should be consultation between the parties so that the Attorney General might, on a preliminary basis, select a suitable Senior Counsel and notify the defence of the identity of the special counsel so selected. Further, I suggested that appropriate arrangements should be made between the lawyers for the defence and the nominated counsel so that an appropriate briefing in relation to the issues likely to arise could be promptly placed before special counsel, if it became necessary to do so. These were preliminary suggestions only but they indicate that significant delays can be avoided, especially if there is co-operation between the parties.

Can the Law stop Terrorism?

To many Europeans and the British, Australia seems, no doubt, at a very distant remove. Yet the people “down-under” have had an exposure to the evils of international terrorism. While no terrorist attack has actual taken place in Australia itself in the years since September 11, Australians have been killed or injured in overseas attacks. For example, close to home, 88 Australians died tragically in the Bali nightclub bombings in 2002. Many were injured. Australians were injured in the London bombings and more recently in the Jakarta bombings and in Mumbai. True it is, the number of deaths and the number of those injured has been comparatively

small compared to resultant losses elsewhere. But the effect of those deaths and injures has been profound on the families who have had to endure the resultant loss and suffering. Moreover, the effect on our national psyche has been equally profound.

So the question I pose is a real one. It is a question that requires argument and discussion at an international level. If the laws I have been discussing are worthy of some degree of justifiable criticism, if they threaten our democratic ideals and call into question the rights of citizens (as many maintain they do), is not their practical efficacy an important matter to bring into the equation?

Can the Law stop terrorism? I suppose the first point to make is that the opinion of a sitting Judge may not be any more useful than the opinion of another citizen. Indeed, some of our media, our politicians and academics might argue that the opinion of a sitting Judge is of less value than the opinion of an ordinary citizen. Be that as it may, I would like to offer some comments from my own experience and perspective.

A preliminary observation may be made. As Richard Maidment SC argued in a recent paper “the capacity of law enforcement agencies and the criminal justice system to facilitate successful prosecutions against those engaged in terrorist activity must surely be considered an essential component of the protective shield”(13). Assuming, for the sake of argument, the guilt of a person charged with a terrorism offence, it is plainly important that the investigative activity of police authorities and the agencies responsible for national security be effectively employed against a background of utter probity and integrity. Australia has a myriad of Federal and State laws which govern the way in which investigations are to be carried out. The laws are concerned with the way people are to be interviewed, the situations in which they are detained and the procedure under which searches and surveillance are conducted. It is very important that those investigating a terrorist offence understand fully the dictates of the particular statutory regime under which the investigation is carried out. This has not always been the case in the past. Blunders in the investigative process, even unintentional blunders, have the capacity to derail a trial. The education and training of investigative officers and security agencies should be an important feature of our national program in connection with present and future

terrorist investigations. Equally, international cooperation between the overseas and local agencies needs to be at a high level with a system of double checks in place to ensure mistakes do not occur. The recent **Haneef** case is a good example of the existence of a potential misunderstanding between Australian police and overseas agencies in situations where care is not taken.

Similarly, there is an ever-present need for trial Judges to ensure that a person charged with a terrorism offence obtains a fair trial. There is probably no such creature as a “perfect trial”. The trial Judge, however, carries the heavy burden of ensuring that practical and effective fairness is afforded to a defendant. In this area, the trial Judge can do much to ease the problem of bias and prejudice. It is his task to make sure that those selected for jury duty in a criminal trial are persons who do not bring with them the baggage of unreasonable prejudice. It is his or her task to ensure that the much publicised round of terrorist activities in other countries does not colour or taint the accused in a local trial. Where the police or other agencies have acted unfairly against an accused, the trial Judge has the capacity to exclude evidence obtained as a consequence. It has been my general observation in the trials I have dealt with that considerable care has been taken by the police to ensure that persons accused of terrorism offences were treated fairly, courteously and with dignity. This may not always be the case. It is the duty of a trial Judge to detect and eliminate unfair prejudice and to reject evidence obtained unfairly.

What then is the task of a sentencing Court once an offender has been found guilty of a terrorism offence? It is clear that the common law concepts that are especially important in such a sentencing exercise are punishment, denunciation, deterrence and incapacitation. (The last matter is often described as “protection of the community”). In **R v Martin** (1999) 1 Cr App 477 (at 489), Lord Bingham CJ, as the Senior Law Lord then was, said: -

“In passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate: rehabilitation is likely to play a minor (if any) part”.

In dealing with preparatory terrorism offences, I have myself stated the principal in the following terms in **R v Baladjam** [2009] NSWSC 449 at 105: -

“The broad purpose of the creation of offences of the kind involved in this sentencing exercise is to prevent and deter the emergence of circumstances which may render more likely the carrying out of a terrorist act. It is to punish those who contemplate action of the prohibited kind. It is to denounce the activities of terrorists and their adherents. It is to incapacitate them so that the community will be protected from the horrific consequences contemplated or made possible by their actions. The legislation is designed to bite early, long before the acts connected with terrorism mature into circumstances of a deadly or dangerous consequence.”

There is an observation made by the Court of Appeal for England and Wales in **R v Barot** [2007] EWCA Crim 1119 at [45] which is germane to this discussion. There the Court said:

“Terrorists who set out to murder innocent citizens are motivated by perverted ideology. Many are unlikely to be deterred by the length of the sentence that they risk, however long this may be. Indeed, some are prepared to kill themselves in order to more readily kill others. It is, however, important that those who might be tempted to accept the role of camp followers of the more fanatic, are aware that, if they yield to that temptation, they place themselves at risk of very severe punishment. Punishment is the other important element of the determination of the sentence for offences such as this.”

This observation was, of course, made in the context of terrorist activity designed to kill innocent people. It has a relevance, however, for terrorism in all its aspects. Specifically, it includes in its ambit those who, intentionally assume, in some form or other, the role of a camp follower and those who may be of a more extreme terrorist bent. Terrorists cannot adequately function without followers, acolytes or assistants. Deadly and lethal acts of terrorism cannot occur without the intentional activities of

those who, motivated by extremist religious fervour, determine to carry out acts in preparation for such acts.

There can be little doubt about the capacity of Australian terrorism laws to achieve punishment, denunciation and protection of the community, at least so far as those who have sentence passed upon them are concerned. The more difficult question is whether conviction and the imposition of a substantial penalty will have a deterrent effect on those sentenced, or on other persons who are minded to be involved in a criminal terrorist act. There is a strongly held view that the imposition of stern penalties has no impact on a committed terrorist. Moreover, the same view tends to suggest that the imposition of strong penalties serves only to inflame the radicalism of the extremists in the Islamic community. They see long gaol sentences as a “badge of honour” for those who endure them. They see Courts as the instruments of repression utilised by an unfair Government. The outcome of the Court proceedings is viewed by extremists as an illustration of the unfairness of democratic countries towards Islam.

As to the position of those in prison for terrorist offences, there is conflicting anecdotal evidence at least in the southern hemisphere. For example, there are significant reports from Indonesia that de-radicalisation programs have been carried out on the many hundreds of prisoners who have been jailed for terrorism offences of one kind or another in that country. It is, of course, impossible to obtain any reliable evidence to suggest that programs of this kind have been universally successful, or for that matter successful at all. Time alone will tell. On the other hand, there is anecdotal evidence emerging from Australian prison conditions to suggest that Islamist radicalisation is occurring among prisoners within the gaol population. Once again, it is impossible to know how accurate reports of this kind are.

As to the position of extremists at large in the community, the position is again uncertain. In February 2010, I sentenced five men who had been found guilty of being participants in a conspiracy to do acts in preparation for a terrorist act or acts. The convictions and sentences are likely to be the subject of appeals to the New South Wales Court of Criminal Appeal. For that reason, I do not propose to make any specific comment about the trial. It was, however, a matter of disappointment to

me that, after the imposition of the sentences, a number of senior Imams in the local Muslim community arranged a meeting to consider the outcome of the trial. They published a notification to the Australian Federal Police describing the trial as “a travesty of justice” and demanded to be shown evidence that would substantiate the proposition that each of the offenders had terrorist intentions in relation to their collection of chemicals, weaponry and ammunition. Public statements of this kind are disappointing. They reflect that some of the “leaders” of the Muslim community are in denial concerning the activities of a minority in their own community. The remarks show an entrenched attitude of hostility to our Court system and to the fairness of jury determinations. An opportunity was missed that might have enabled the senior members of the Muslim community to state publicly that they did not sympathise with terrorist activities, that they did not condone them, and that such activities were to be condemned by the great majority of Australian Muslims. Their remarks inexplicably overlooked the very public fact that four other men, associates of the convicted offenders, had pleaded guilty to serious preparatory terrorist actions involving the same or similar evidence.

Do heavy sentences act as a deterrent for those convicted? My view is that they probably do not. Religious extremism and fundamentalism thrive on the unfounded proposition that our system of justice is unfair. Do heavy sentences act as a deterrent generally within the local Muslim community? Once again, probably they do not.

Indeed, there is some danger that the imposition of stern sentences, no matter that it may be completely justified, has the capacity to inflame resentment and may encourage young Muslim men into an extremist position. But the court’s duty is nevertheless a duty to denounce serious criminality. It would fail in its duty to the community if it did not do so.

What then is the way ahead? In a Canadian paper Elaine Pressman gives chilling examples of early radicalisation in young school children (14). For example, Parvis Khan, the ringleader of a plot to kidnap and behead a British soldier, exposed his extremist views to his three children. He had already indoctrinated his son in Al Qaeda “cultural values” by five years of age. The child is asked “Who do you love?”

he responds "I love Sheikh Osama bin Ladin". He is asked "Who do you kill?" he responds, "America kill, I kill Bush, Blair". The child had already seen violent videos of killings and had been taught the values and attitudes of his father. The author noted that in Canada, which has generous immigration and refugee protection policies, there has been ironically a burgeoning of terrorist organisations. It was described (CBC News April 26 2002) as a "wealthy and modern country that has everything for the discriminating terrorist". Their hardline views, the author said, are being passed from father to son, from generation to generation. The characteristics of the radicalised are that they are second or third generation in western countries, and primarily men. They are 15 to 35 years of age and live in male dominated societies within liberal western democracies. They come mainly from middle class families, and are often students with at least a high school education and some have university education. Some are recent converts to a new faith or ideology. They have little or no criminal history and live ordinary lives. The observations in these studies are plainly relevant to both Australia and Europe, where similar patterns are emerging.

Against this background, western countries will have to give attention to the task of developing effective and reliable counter radicalisation strategies. It is my understanding that programs of this kind have already begun in a number of the Muslim communities in the heavily populated cities of Northern England. I would be interested to learn more about these programs and particularly whether they are meeting with any success. Integration, tolerance and self-help within local communities, especially developing a better understanding of the law, are undoubtedly a valuable step towards preventing radicalisation. The potential for charismatic extremist leaders to radicalise small groups in local communities can be offset surely by a deeper understanding within the community itself. Experience shows that there are a number of contextual risk factors that are often brought to bear on an individual who may be predisposed to radicalisation. Those factors might properly be thought to include the Internet, training and social contacts with extremist religious or politically motivated groups. It will also include factors such as anger at governmental political decisions or other anger directed at the government. Although it is a contentious area, my experience in the trials I have been involved with is that the Internet is a particularly dangerous factor. Extremist websites are easy to access

and they provide a very wide range of radical content. It varies from horrifying videos showing the execution of hostages to precise and detailed instructions in bomb making and the like. Many of these extremist websites overtly promote and justify the use of violent action to achieve ideological goals. Individuals who make frequent use of these websites are clearly at risk of radicalisation, particularly if their close friends and associates share the websites with them.

Considerations of the proposals for de-radicalisation programs presently being considered in many countries of the world must give us cautious hope for optimism. Regrettably, there is a contrary point of view which is quite pessimistic. While it does not express my view, perhaps I should let it have the last word.

In the Spectator (January 2010) the Editor commented: -

“It is time to dispense once and for all, with the delusion that poverty incubates extremism. Or, that the Islamist that would kill us could be in any way assuaged by concessions in foreign policy. The jihadist menace is not born of poverty, or rationality, or any indigenous culture – Arab or otherwise. It is a separate phenomenon, more psychological than political. It does not care if British Ministers do not now refer to a “war on terror”, or if America now has a black President. It does not respond to brinkmanship of any kind.

The simple fact is that, for a whole range of complex reasons, there are people out there who want to kill us and who have not stopped trying. We hear less about it partly because of the work the security services do – but as the IRA said after the Brighton bomb, terrorists only have to be lucky once. We may all be tired with the war on terror. But it is not, alas, yet tired of us”.

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BEACH SAFETY – THE LAW OF NEGLIGENCE

By The Honourable Justice Anthony Whealy

November 2007

A Paper delivered under the auspices of the Queensland Law Society

AN INTRODUCTION

On the afternoon of 7 November 1997, Guy Swain went to Bondi Beach for a swim. Weather conditions were generally fine. It was a little overcast but the surf was light. There were lifeguards employed by Waverley Council at the beach that afternoon. They had assessed the conditions at the beach earlier in the day and had placed flags on the beach opposite a sandbar to indicate the best place for swimming. The Council's employees patrolled the areas between the flags and kept the conditions under review. They did not alter the position of flags during the day. Mr Swain was swimming between the flags. He was about 15 metres from the shore when he attempted to dive through a wave, a common enough procedure in the surf. It appears he struck the face of a sandbar hidden from his view and suffered very serious spinal injuries. This was a tragic accident but in the short term, it had no great resonance beyond its own circumstances. Mr Swain, however, sued the Council for negligence. The trial was heard before a four-person jury. It ran over about six days and the principal part of the evidence appeared to be concerned with the question of whether Mr Swain had been swimming between the flags or outside them. In a decision which reverberated around the country, both in the media and discussions elsewhere, the jury found for the plaintiff, although it reduced his damages by 25% for contributory negligence.

The Council appealed to the New South Wales Court of Appeal. In the view of most sections of the media, sanity was restored by the appellate decision. The Court of Appeal (Handley and Ipp JJA, Spigelman CJ dissenting) allowed the appeal on the basis that there was no evidence upon which the jury could find that the Council had been negligent in placing the flags where it did. The Court also held, unanimously, that there was no evidence to support a verdict against the Council on the basis of

the Council's failure to warn that it was dangerous to dive in the surf due to the presence of sandbanks. Mr Swain appealed to the High Court of Australia. The appeal, as it turned out, was successful. Gleeson CJ Gummow and Kirby JJ, McHugh and Heydon JJ dissenting, held that there was evidence capable of sustaining the jury's findings that the Council was negligent in placing and maintaining the flags. The question for the Appellate Court was whether it was reasonably open to the jury to make an assessment unfavourable to the Council, not whether the Appellate Court agreed with it. (1)

The reaction to this decision was as vociferous in Queensland as it was in other parts of Australia. Two days after the decision was announced, Stateline Queensland interviewed David Power of the Gold Coast City Council about the Court's decision. Mr Power said his initial reaction was "absolute horror". "We have", he said, "something like 38 patrol beaches on average". The implications for Gold Coast City Council, Mr Power maintained, were "quite horrific", particularly "in terms of our public liability". Mr Power added: -

"Now that we are responsible for shifting sands underneath the ocean surface, I think that our insurers in London will be taking a long hard close look at this and I shudder to think what it will do to our Surf Clubs...clearly you can't warn every single person that comes to every patrolled beach that the sand underneath the ocean surface may be shifting".

Towards the end of the interview, Mr Power expressed grave concern about whether the Council would be able to effectively patrol the many thousands of people who use Gold Coast beaches in summer.

Of course, the views expressed by Mr Power were those stated by many concerned persons in the community. They probably had no real cause for alarm. The High Court's decision was in fact based on a very narrow premise, namely whether there was evidence upon which the jury could reach the decision it had made. The ultimate issue, undoubtedly, was not one based on the failure to give a warning to people at the beach about the presence of sandbanks. Rather, it was a case that succeeded in relation to evidence about where the flags had been placed. In particular, it succeeded because the defendant council did not call evidence to explain why the

flags remained where they were. Nor was there any evidence from the defendant to explain why the flags could not have been moved elsewhere on the beach, if that were necessary.

There was another reason, however, why Mr Power need not have worried to the extent he did. After all, the High Court decision was given in 2005. It was nearly eight years since Mr Swain had been injured. In that time, a sweeping movement for Tort Reform in Australia had already led to the enactment in most States and Territories of a broad platform of reform, addressing the very issues mentioned by Mr Power in the interview.

AN OUTLINE OF THE PAPER'S CONTENT

The objects of this paper may be briefly stated as follows: -

1. To describe briefly the background to the broad movement for Tort Reform that emerged in Australia during 2001-2002.
2. To mention, as an important reference point, a number of the recommendations of the **Ipp Report** especially in relation to actions for negligence likely to involve Beach Safety issues.
3. To categorise the reforms that have been introduced by legislation particularly in Queensland and New South Wales, especially those that have a bearing on Beach Safety issues. In this regard, the paper will focus on: -
 - (a) The concept of "obviousness"
 - (b) The effect of obviousness of risk of harm on the need to warn
 - (c) The concept of obviousness in relation to dangerous recreational activities
 - (d) Volunteers and good Samaritans

In preparing this paper, I would like to acknowledge the assistance I have obtained from a considerable number of Papers, Publications, Articles and Speeches that are available in the public arena. May I make particular reference to the Papers prepared and delivered by the Chief Justice of New South Wales, the Honourable James Spigelman AC; by the Honourable Justice David Ipp, a Judge of the Supreme Court of New South Wales and the Court of Appeal. My special thanks also to Professor Barbara McDonald of the Sydney University Law School for her invaluable advice and assistance.

A brief history – a change in emphasis

When I began practice in the early 1960's, there was still a discernable bias in court decisions in negligence actions. It was generally in favour of the defendant. This was especially so in the case of actions against professional people and in particular members of the medical profession. "Dr Knows Best" was not merely a moral truth embraced by patients and practitioners alike. It was, in the majority of cases, a starting point in cases where it was alleged that a doctor had been negligent in the treatment of his patient.

But this trend was not confined to medical negligence cases. Local Councils and community groups were not found to have been careless, save in fairly extreme circumstances.

Gradually, over the course of the following thirty years, I noticed, as did many of my fellow practitioners, a significant swing in favour of plaintiffs. Anecdotally, it appeared that nine out of ten plaintiff's cases resolved in favour of the plaintiff or at least led to a generous settlement. Why was this so? The answer seems to be rooted in two major considerations. The first was the inevitable historic swing away from a defendant-orientated system. The second factor appears to have undoubtedly related to the emergent underlying assumption, generally correct, that a defendant had the benefit of insurance. Spigelman CJ, in one of the papers to which I have earlier made reference, suggests that Judges may have proved more reluctant to make findings of negligence, if they knew the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. It is hard to quarrel with this assumption. As our Chief Justice put it, given a situation involving an injured plaintiff on the one hand and a bucket of money on the other, the bucket seldom won.

The practical result of the major two factors I have identified, was this: a burgeoning number of both judge and jury decisions began to incur the wrath of the community generally. This mounting wave of concern, especially in the last 15 years or so, was reflected in heated editorials in the newspapers and talkback radio commentary. Once it was accepted that insurance was generally available to defendants, an enlightened compassion for the injured and a desire to compensate handsomely

those injured by the negligence of others tended to outweigh practical considerations as to the cost these attitudes might perhaps have on the community generally.

In this climate, public concern was expressed about a number of court outcomes. For example, as I mentioned in my introduction, Mr Swain recovered damages against Waverley Council when diving into a sandbank on Bondi Beach. A number of pedestrians fell over and injured themselves on public roads or on footpaths in circumstances where it might have been thought that, by keeping their eyes open and their wits about them, they would not have been injured. In 1996, a general practitioner was held liable in these circumstances: he had been at his surgery one morning when a young woman, a stranger, knocked on his door and asked him to examine her brother who was lying on the roadway some three hundred metres away, he having had a seizure. The doctor declined to attend to the young man on the basis that he was not his patient but, as I say, was held negligent nevertheless. In a celebrated diving case, a young man was injured when he dived into water at Rottneest Island. He hit his head on a submerged rock. It was a popular holiday spot and people had been diving there for a considerable period of time. The majority of the High Court held that the diver's injury was caused by the Authority's failure to warn of the presence of submerged rocks that were ordinarily plainly visible. (2)

Public concern with judicial decisions

It will be seen that community attitudes had changed markedly by the early 2000's. It is fair to say that undisciplined findings in relation to liability and what were perceived as overly large damages awards, fanned no doubt by political statements and somewhat hysterical media coverage, excited a degree of fierce public resentment. Judges were perceived – myself included no doubt - as being unduly generous with insurers' money. Whether this criticism was justified or not, premiums rose sharply and insurance cover became difficult to obtain. In the areas of health care, sporting events, charitable fund raisings and public recreation there arose a degree of panic. There was much public consternation over the early retirement of medical practitioners and their refusal or threatened refusal to perform certain services, particularly obstetrics, in country areas. There was a concern that community groups would be unable to carry out their useful and benevolent work. Developments in the

insurance industry brought the matter to a head. As Chief Justice Spigelman noted in his paper – “by 2002 what had for many years been a buyers market in insurance had become a seller’s market. At an international level there had been a series of natural disasters which had drawn down the capital of insurance companies, particularly that of re-insurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom, which further reduced the capital available to insurance companies. Quite quickly, demand exceeded supply in the Global re-insurance market. This was immediately reflected in premiums and in decisions as to what kind of businesses to write and where.”

In this country there were, in addition, the problems sustained following the collapse of HIH. In the area of medical insurance, Australia’s largest medical indemnity insurer was faced with insolvency and was only saved by the financial support of the Commonwealth Government. In addition to a package of other remedies, the government indicated it would subsidise premiums in certain fields of practice where the damages were large, such as obstetrics.

I have thus far dealt with this history but briefly and in a very generalised way. There are some qualifications that need to be made. For example, although it was rarely reflected in the media reports of the time, there were, during the same period, many instances, particularly in the appellate courts throughout Australia, where extravagant findings on both liability and damages were overturned. This can be seen in fact on a regular basis over the last 20 years. Secondly, there have been in existence for some time legislative schemes, which had endeavoured, as one of their aims, to keep down, for example, third party insurance premiums in relation to motor vehicles. Thirdly, by 2001, New South Wales had also sought to make important changes to the common law for recovery in medical negligence cases. This legislation had the unfortunate consequence, in the short term, of promoting a spate of claims before the cut-off date, a factor which threatened the liquidity of UMP. There remained, however, a clear need for reform on a broader basis.

The Ipp Committee Report

Because of the reality of the insurance crisis, and for that matter the problems it spawned in the community, the Australian Government convened a series of meetings with ministers from all jurisdictions and a representative of municipal government. With surprising rapidity, a non-partisan accord was reached by all jurisdictions to consider the implementation of major reforms to Australian law, in a consistent manner, in an endeavour to restore confidence and a degree of affordability and predictability.

In Australia, there are six States and two Territories. Each has its own government with powers and responsibilities within its own jurisdiction. Then there is the Commonwealth with its range of powers and responsibilities in respect of all Australian jurisdictions.

The common law, including the law of negligence, falls within the jurisdiction of the States and Territories. States and Territories also have responsibility for the administration of their own court systems including the hearing of claims falling within their jurisdictions and the implementation of statutes relating to civil liability in their areas. There is, although there is no need for me to attempt to detail it here, an overlapping of responsibility between the Commonwealth and the States in certain areas of insurance. For example, the States and Territories have the control of compulsory third party motor vehicle insurance.

This level of potential disparity highlighted the need to have some sort of partisan or uniform approach to tort reform, otherwise it would be likely to achieve very little.

A significant contribution to setting the reform on the right path was the 2002 report commissioned by ministers to review the law of negligence. (3) The committee was chaired by the Honourable Justice David Ipp and included Professor Peter Cain, Professor Don Sheldon and Mr Ian Macintosh. The report made sixty-one recommendations to governments on a principled approach to reforming the law.

At the Fourth Ministerial meeting in November 2002, ministers made a significant breakthrough, agreeing to a package of reforms to put in place a number of the main recommendations of the Ipp Report. Each jurisdiction agreed to introduce the necessary legislation as a matter of priority. The Australian Government confirmed that, within its own jurisdiction, it would amend the **Trade Practices Act 1974** to underpin the changes being made by States and Territories so as to avoid plaintiffs circumventing the range of reforms in other jurisdictions. The resultant legislative reforms in the various States and Territories of Australia, subsequently enacted, are at the core of this keynote address. The topic of tort reform is however a vast one; and it will certainly be the case that certain parts of it only are of interest to this conference. But may I preface a brief analysis of the reforms of most interest to this conference by a brief overview of the changes. They may be broadly grouped into three types: -

First, there were changes to the law governing decisions on liability, including contributory negligence and proportional liability. Secondly, there were changes to the amount of damages paid or payable to an injured person for personal injury claims or for economic claims against a professional. Thirdly, there were new time limits and methods for making and resolving claims, including improved court procedures, control of legal conduct and legal costs. Each of the groups of reforms has elements that focus on, but are not limited to, personal injury claims thus impacting both on issues of public liability and medical indemnity.

The reforms generally – an example

May I give an example of the first category: prior to the reforms, critics argued that the negligence arena in Australia had altered so that events with a very low probability of occurring could still be held to be foreseeable. In tort law, a basic principle is that a person owes another person a duty of care if the first person could reasonably have foreseen that, if he or she did not take care, the other would suffer either physical or economic injury or death. In **Wyong Shire Council v Shirt** (4), nearly 30 years ago, the High Court had found that persons could be held liable for failure to take reasonable precautions to avoid foreseeable risks, that is risks which were other than farfetched or fanciful. Critics argued, perhaps not entirely correctly, that this

benchmark may have required a person to take precautions against a risk of very low probability simply because it was foreseeable.

In general terms, the reforms were designed, first, to replace the test of foreseeability as established by **Wyong Shire Council v Shirt** with a test that persons could only be held liable for risks that were “not insignificant”. In addition, the legislative changes were fashioned to reinforce the situation where foreseeability is a necessary but not a sufficient condition for a finding of negligence. A person will not be liable merely by reason that a risk was foreseeable.

Under Part 1A Division 2 of the **Civil Liability Act 2002** – the New South Wales legislation – there are certain general and other principles relating to liability and negligence resulting from a failure to take precautions against a risk of harm. Under s 5B, a person will not be liable for harm unless the person knew or ought to have known of the risk; the risk was not insignificant and, in the circumstances, a reasonable person in that person’s position would have taken precautions against the risk. Section 5C sets out the matters that the Court is to consider when determining whether a reasonable person would have taken precautions against the risk.

The matters in s 5C are a reference to what has been described as “the negligence calculus”. This is a statement of the factors which have to be balanced out in establishing whether failure to guard against a foreseeable risk should be deemed negligent (ie, determining whether the standard of care has been breached). The calculus has also been described as providing a framework for deciding what precautions a reasonable person would have taken to avoid the harm that has occurred; and what precautions the defendant could reasonably have been expected to have taken. There are four named components:

- The probability that the harm would occur if care were not taken
- The likely seriousness of the harm
- The burden of taking precautions to avoid the risk of harm; and
- The social utility of the risk creating activity (that is, is it more worthwhile to take risks for some activities than for others – for example, if life is at stake).

The calculus involves weighing the first two matters against the last two. It should be noted that there is nothing new or novel in these matters. They were essentially the very matters mentioned by Mason CJ as relevant factors to be taken into account (see **Wyong Shire Council v Shirt** at 478).

The High Court of Australia had, in relatively recent times, prior to the reforms, emphasised again the need to bring considerations of this kind to account especially in the context of assessing foreseeability (**Tame v New South Wales; Annetts v Australian Stations Pty Limited**) (5).

In any event, reforms of the kind I have set out above are now in place in all States and Territories.

Reforms – Legislation around Australia

This paper is, of course, concerned primarily with tort reform and its impact in the specific area of beach safety. Participants in this conference will be aware, no doubt, that the raft of reforms that came about following the **Ipp Report** embraced a very wide area indeed. For example, medical negligence was singled out in a significant way. A medical practitioner was not to be regarded as negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the Court considered that the opinion was irrational (Recommendation 3; see s 50 of **NSW CLA**; s 22 **CLA 2003 (Qld)**). Policy considerations were introduced into the causation test in determining whether responsibility for harm should be imposed on the negligent party or whether it should be left to lie where it fell (Recommendation 29; sections 5D, 5E of **CLA Act (NSW)**; Queensland sections 11, 12). The limitation periods for commencement of proceedings were tightened up; the contributory negligence of a plaintiff, if it were sufficiently extensive, might defeat altogether a claim brought against a wrong doer. A threshold for damages was created and damages themselves were capped or scheduled in a number of respects. Claims for gratuitous services were significantly curtailed. I do not propose to examine any of these matters in this paper.

The areas of special interest to this Conference emerging from the **Ipp Report**, are the recommendations relating to the protection of “Good Samaritans”, when assisting injured persons in an emergency; the protection of volunteers from liability for work carried out for community organisations; and the significant limitation placed on the right to recover damages for injury arising from participation in dangerous recreational activities. This limitation arose from the **Ipp Report’s** concern as to the need for implementation of a strong form of personal responsibility in circumstances of dangerous recreational activity. Whilst all activity carries some level of risk of physical injury, the **Ipp Report** authors were of the view that the level of risk must be “significant” to satisfy the definition (Recommendation 12). The legislation enacted in both New South Wales and Queensland exempts a defendant from liability in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm (section 19 **CLA 2003 (Qld)**); see 5L of **CLA 2002 (NSW)**. Moreover, in New South Wales, a duty of care is not owed to a plaintiff in certain circumstances where, in relation to a recreational activity the risk has been the subject of a “risk warning” to the plaintiff. (Section 5M **CLA 2002 (NSW)**).

The concept of “obviousness”

Let me put this part of the discussion in some kind of realistic context. I have a brother-in-law who is a doctor in Forster. Like many medical professionals, he is markedly anti-lawyer. We often have heated discussions on topics of interest where he considers that the law and lawyers are acting in a bizarre way. One such lively discussion centred upon an unfortunate young boy, one Phillip Dederer. He was 14 years of age when he dived off the Forster/Tuncurry Bridge into the water below. Forster/Tuncurry is a busy tourist area. For many years young people, particularly in the summer months, had jumped and dived off the bridge into the estuary below. Mr Dederer had spent many holidays in the area since he was a very small boy. He had frequently observed children and adults jump and dive from the bridge. The day before his accident he had dived or jumped from the bridge without mishap. On the next day, he dived off the bridge at a point that was about 9 metres from the surface of the water. Unfortunately for him, on this occasion, he dived into approximately 2 metres of water and struck his head on a sandbar. As a consequence, he became a

paraplegic. There were pictographs signs at or on the approaches to the bridge prohibiting diving. There were also signs in words prohibiting climbing on the bridge. Prior to diving, Mr Dederer had seen and understood these signs but he simply ignored them.

Mr Dederer brought a claim against the Roads & Traffic Authority. It had, either in its own right or that of its statutory predecessor, designed and constructed the bridge and exercised a significant degree of control over the bridge. In the subsequent proceedings brought by Mr Dederer as plaintiff, there was no argument but that the RTA owed a general duty of care to the users of the bridge. The plaintiff also joined the local Council in the proceedings. However, for reasons that will become more significant in a later part of this discussion, the local Council was not joined until after the **Civil Liability Act (NSW)** had been passed. In other words the new legislation applied to Mr Dederer's action against the Council but it did not apply to the action against the RTA.

The trial Judge (Dunford J) found for the plaintiff as against both the RTA and the Council. The parties had agreed on quantum of damages. The plaintiff was, however, held to be guilty of contributory negligence. The trial Judge apportioned his share of responsibility for his own injury at 25%. On appeal, by majority (Ipp and Tobias JJA, Handley JA dissenting) the trial Judge's finding against the RTA was confirmed although the plaintiff's contributory negligence percentage was increased to 50%. On the other hand, the Council's appeal was successful on appeal and it was exempted from liability, having regard to the provisions of the **Civil Liability Act (NSW) 2002**(6)

As you would expect, my brother-in-law, the doctor from Forster, thought the Court of Appeal's decision in relation to the proceedings against the RTA (and that of the trial judge) was preposterous. He said "It must have been completely obvious to the plaintiff that he could be seriously injured by diving from the bridge into the estuary below". Now, as a matter of interest the trial judge didn't think so, although the Court of Appeal did, at least in the proceedings against the Council. My point, though is, that my brother-in-law's point of view was a clearly permissible one. It is perhaps a view that would be shared by many of the people in the room here. After all, most

people do not look at all the facts and they don't hear all the evidence. More significantly, however, I think the real danger is that there can be a very basic misconception about this notion of "obviousness".

Well, let me assume that the plaintiff in Dederer's case was, in a general sense, aware that there was a risk of serious injury. That might well have been obvious to him, even if he didn't think about it to any great extent. Plainly enough, he wouldn't have dived, if he thought that he was going to be injured. But the possibility of harm probably occurred to him as he leapt from the bridge. Many 14-year-old boys can be foolhardy in such situations.

If I may leave to one side, for the moment, the effect of the new legislation on the situation, what, might it be asked, as a matter of logic, should follow from the proposition that the risk may have been obvious to him? Surely it cannot follow, as a matter of logic, that just because a risk of harm may have been obvious to the plaintiff, that the defendant, who owes him a duty of care is entitled, because of the obviousness of the risk, to do nothing at all. This would be something of a paradox. After all, if the risk was obvious to the plaintiff, wouldn't it be equally obvious (perhaps more so), to the defendant? How then can it be argued that the defendant is under no duty whatsoever to take some steps to minimise or reduce that risk to a plaintiff?

This, I venture to suggest, may be thought to be the logical misconception to which I have referred. After all, a careful reading of the facts in the case will show that the RTA probably knew, and the Council did know, that scores of young people jumped from the bridge regularly, particularly in the summer months. There had never been a serious accident but, during the holiday periods, scores of young people went over the bridge and into the water. This was common knowledge. What the trial judge found was that the pictograph did not tell anyone what the danger was. Yes, it appeared to indicate that diving from the bridge head-first was not permissible. But it did not make clear what the danger was when the diver entered the water. In particular, it did not tell the hordes of young people who jumped regularly from the bridge that the water was of shifting depth from time to time. Secondly, the construction of the main railing of the bridge positively encouraged people to climb up on it and then jump over the side. The trial judge found that, with very little expense

involved, the railing could have been changed and the horizontal railings could have been replaced by vertical pool type railings. These structures were commonly found in modern bridges and could have easily been incorporated into the subject bridge without undue expense. With those improvements, young people would have found climbing and jumping from the bridge much more difficult. Changes of this nature would have discouraged the practice. The judge found that the situation of the bridge was “an accident waiting to happen”. That was his view of course, whereas it was probably not the view of the many young people who leapt from the bridge in their scores every summer.

So the first proposition I would enunciate is this: The obviousness of the possibility of harm in diving from a structure into the river, the creek or the ocean, is not something that, as a matter of logic, should obviate altogether the need for the controller of the structure to make sure it is safe or that it is not an encouragement for dangerous diving or jumping into the water. At the very least, any sign or pictograph should alert people as to the real reason for the danger that lurks below. The second proposition is that the logical role of “obviousness” is that it properly informs the concept of contributory negligence. It does not eliminate the need for a defendant to carry out its reasonable responsibilities. But it does mean that a plaintiff’s claim for damages should be reduced, and perhaps significantly so, depending upon the failure to take care for his or her own safety involved in the particular circumstances.

Putting this in legal terms, one might say that the notion of obviousness is not destructive of the existence of a duty of care but is relevant to whether a defendant is in breach of his duty of care. Secondly, it is relevant to questions of whether a plaintiff should have his claim reduced for contributory negligence. There is presently no binding authority, at the level of the High Court, to suggest that obviousness in itself, without more, can be a complete answer to the breach of duty question.

In **Consolidated Broken Hill Limited v Edwards**, Ipp JA has provided a very useful and careful summary of the current High Court situation in relation to the concept of obviousness (7). Ipp JA articulated the position as follows: -

“Obviousness of risk is not a phrase that denotes a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care. I make no comment as to whether it is relevant also to the existence of a duty of care as that was not an issue in this case...The weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances it may be of such significance and importance as to be effectively conclusive”.

Professor Barbara McDonald has some criticisms of this summary. (8) For present purposes, she has pointed out that the last sentence in the summary, presumably extracted from the joint judgment of Callinan and Heydon JJ in **Mulligan**, (9) goes much further than any of the other judges in the High Court and may only serve to tempt, in cases where the risk is highly obvious, an incomplete consideration of the circumstances of the case and the various factors relevant to a determination of breach.

A case with somewhat extreme factual circumstances in the realm of “obviousness” is the decision of Moynihan J in **Enright v Coolum Resort Pty Limited**. (10) This was a case decided in November 2002. Accordingly, it pre-dates the reform legislation in Queensland. I shall take a moment or two to look at the facts of the case and the decision of Moynihan J.

The plaintiff was the widow of the unfortunate Mr Enright who drowned at Yaroomba Beach on 3 March 1993. The claim was one for the loss of dependency. The principal issue was the liability of the defendants. They included the Resort and its interests. The second defendant was the local council. It sued on the basis that Yaroomba Beach was under its control. There was no dispute in the case that each of the defendants owed a duty of care to Mr Enright. The issue was as to the nature and extent of the duty and, in particular, whether there was a breach of duty. The plaintiff’s case was essentially one of failure by the defendants to warn Mr Enright of the dangers of swimming at un-patrolled Yaroomba Beach. In the case of the Council, there was an alleged failure to provide a warning sign in the park area from which Mr Enright had accessed the beach. In the case of the Resort interests, it was the failure to warn the swimmer of the hazards of entering the surf at an un-patrolled beach.

In the course of his careful judgment, Moynihan J referred to a number of cases dealing with the issue of reasonableness in the context of whether a defendant had or had not breached its duty of care towards a plaintiff. One of those was the decision of the Full Court of the Supreme Court of Western Australia in **Prast v Town of Cottesloe** where the issue was whether the local authority ought to have provided a warning to surfers of the dangers of suffering a serious injury as a consequence of being dumped by a wave. (11) Moynihan J quoted a well-known passage from the judgment of Ipp JA (with whom Wallwork and Parker JJ agreed): -

“Sea conditions often change. Currents, rips and surges unexpectedly materialise. Large and unexpected waves materialise out of the deep. These phenomenon are all capable of causing serious injury or death. The currents and rips can take an unsuspecting swimmer far out to sea and result in drowning. Surges and unexpected large waves can hurl an unsuspecting swimmer against rocks or on to the seashore, with serious damage to body and limb. And yet the suggestion that signs should be placed on all beaches in Australia indicating that swimming in the sea could lead to serious injury or death would, I suggest, be absurd. The absurdity lies in the obviousness of the danger that attaches to the common everyday, activity of swimming in the sea...

In my opinion, the risks attendant upon body surfing fall into the same category. Of course, where there are dangerous currents or rips or surges or rocks, or the possibility of occasional “king” waves or other dangers that are peculiar to a particular beach or part of a beach, special warnings may be called for, but that is not the case...As a matter of law, there is a point at which those who indulge in pleasurable but risky past times must take personal responsibility for what they do...that point is reached when the risks are so well known and obvious that it can reasonably be assumed that the individuals concerned will take reasonable care for their own safety”.

The facts found by Moynihan J were quite unusual. It seems that the unfortunate Mr Enright went off on a frolic of his own. For example, on his way to the Resort, he had been told that Yaroomba Beach was not a safe place at which to swim. In fact, he had been advised that he should swim only at Coolum Beach where it was safer, or in one of the Resort’s swimming pools. Secondly, it seems that Mr Enright ignored all of the hotel brochures and signs indicating that there was a patrolled beach available at which pleasurable swimming might be had. He and a companion walked to a deserted beach area which was remote from the Resort Beach Club area. The two men made their own assessment of the water conditions there and swam and surfed

at the un-patrolled beach area for some 30 or 40 minutes. Moynihan J found that Enright was familiar with water based recreational activities and had experience of surfing conditions. The trial Judge rejected the plaintiff's case that the two men were caught unexpectedly in a rip and swept out of their depth. Rather, he found that the weather conditions had deteriorated while they were swimming. When they decided that they would return to the beach, they found that they were now some 80 to 100 metres from the beach area. One of the men, Mr Hickey was able to make it to shore although he experienced a strong undercurrent during the process. Mr Enright, who was not in good physical condition, did not manage to get back into shore and drowned.

Moynihan J also found that, even if there had been a sign erected at Yaroomba Beach, Mr Enright would have entered and remained in the surf as he, in fact, did on the day in question. In any event, the trial Judge was satisfied that the defendants did not create the risk of Mr Enright drowning in the surf or have any control over or responsibility for the conditions, which created it. The choices Enright made, in the events leading up to his death, were made without reference to or reliance on the defendants. The choices were those of Mr Enright alone. His Honour said: -

“A sign which said for example, “surfing dangerous, it is dangerous to get out of your depth” is simply a statement of what already ought to have been obvious to Enright. Since in is my view Enright did not drown because of a rip, a sign warning against rips would not have been to the point.

I have spoken about the inherent dangers of surfing. No doubt there may be circumstances in which it is foreseeable that potential surfers do not have the experience to be aware of and to make judgments about the inherent risks. This might well give rise to an obligation to warn them or even to safeguard against their entering the surf unsupervised. On the basis of the findings I have made Enright was not such a person”.

In the ultimate, the trial Judge held that Enright had determined, notwithstanding advice he had received to the contrary, to surf while he was at the Resort. He took no attempt to acquire any relevant information at the Resort. He entered the water without locating the Beach Club and without the prospect of assistance other than from his companion if they got into trouble. He was experienced in risks associated with water based recreational activities and the decisions he took to enter remain in

and leave the water were his own. The risk which led to his drowning was within his knowledge and within his competence to deal with had he been paying proper regard to conditions and the depth of water and distance from the shore and his state of fatigue and fitness. For these reasons, he found that the plaintiff had failed to establish breach of duty by any of the defendants causing Enright's death.

Some might argue that this was a hard decision. But it fell within orthodox lines of legal approach. The plaintiff essentially failed on the causation issue. The defendants' conduct was examined to determine whether there was breach of duty. The role of "obviousness" fell within the parameters of the examination of breach. One has to be careful, however, to distinguish between inherent risks and obvious risks. Clearly, as in **Prast**, there was an inherent danger that surfers might be dumped on the seabed by a breaking wave but was it obvious? That would of course, depend upon the circumstances.

One final case on obviousness in Queensland is the decision in **Lynch v Kenny Shoes (Australia) Limited** (12)

This is a Queensland illustration of a trend, which appears to be cementing itself throughout most parts of Australia. Whether he or she be a road user, or simply a person in a domestic situation, the plaintiff who trips or falls may find it very difficult to win. In **Lynch's** case, the plaintiff, while in a shoe shop, tripped on the carpet covering the protruding base of a shoe stand. At the time, she was looking into the distance to another display stand. McMurdo P said: -

"Whilst a reasonable shopkeeper should be aware that a shopper might be distracted by the display of goods in the shop, a shoe shop like the respondent's is distinguishable from a supermarket with aisle shopping. It should have been obvious to shoppers in the shoe store that they must negotiate their way around stands and trays of stock to reach other stock. It ought also have been obvious to customers that if they looked only at displays of shoes and not where they were walking they might walk into or trip over platforms displaying other shoes and injure themselves. This should have been apparent to a reasonable person in the appellant's position exercising ordinary perception, intelligence and judgment. It follows that the risk of injury from the display platform was obvious but unlikely. This conclusion is supported by the evidence that no-one fell over the platform in at least eight years. The risk identified by [the expert] Mr Kahler did not require a response

from the respondent. People who do not look where they are going can inadvertently fall over obvious items anywhere; living is not risk free and the community does not want nor expect courts to attempt to make it so by imposing unreasonable and unrealistic standards”.

The reform legislation – the role of “obviousness”

Let us now turn to the reform legislation. I propose to confine my remarks to the New South Wales and Queensland statutes. There are a number of publications detailing the legislative schemes in other places throughout Australia.

The **Civil Liability Act 2002 (NSW)**, in s 5F, provides:

“Meaning of “obvious risk”

5F Meaning of “obvious risk”

- (1) For the purposes of this Division, an "obvious risk" to a person who suffers [harm](#) is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) [Obvious risks](#) include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an [obvious risk](#) even though it has a low probability of occurring.
- (4) A risk can be an [obvious risk](#) even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.”

In Queensland, s 13 of the **CLA Act 2003** makes provision in similar terms to the New South Wales legislation. There is an additional sub-section 5 in the following terms: -

“(5) To remove any doubts, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

Examples for subsection (5) -

1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.

2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.”

The concept in s 5f(1) is one that is well known to lawyers: for example, in the criminal law in the law relating to provocation, a factor that can reduce murder to manslaughter. It is not an easy concept for many lay people. This is because it requires, at the one time, consideration of both objective and subjective attributes. I shall give four examples of its operation in New South Wales, although only one of these has to do with risks emanating from aquatic recreation.

The first case was that of Doubleday v Kelly. (13) Here, the plaintiff was a seven-year-old who had stayed overnight at a friend's home. She and the friend went out early in the morning where a pair of roller blades and a trampoline were situated. The defendant, who was the parent of the other child, was asleep at the time. The plaintiff put on the roller blades and moved onto the trampoline, believing that it was a hard surface. The little girl fell and was injured. The New South Wales Court of Appeal did not accept the defendant's argument that there was no liability because the risk in question was “an obvious risk”.

The argument put before the Court was that s 5L applies to children as though they were adults. Bryson JA rejected this outright. He said: -

“In my view this submission does not accord with the meaning of s 5F(1), which requires consideration of the position of the person who suffers harm and whatever else is relevant to establishing that position. The characteristics of being a child of seven with no previous experience in the use of trampoline or roller skates, who chose to get up early in the morning and play unsupervised, is part of that position”.

This conclusion might have been thought reasonable enough in the case of a small child. What, one asks, would its application be in the case of a naive tourist visiting a

Queensland beach? Or perhaps far north Queensland in areas where, for example, crocodiles in swimming areas can be dangerous? The answer, in each case, would require a careful examination of the attributes and knowledge of the plaintiff. The second example appeared in **C. G. Maloney Pty Ltd v Hutton-Potts**. (14) There, the plaintiff was injured when she fell on unbuffed liquid polish on a floor in the hotel which the defendant contractor's employee had not completed cleaning.

Again, Bryson JA (with whom McColl JA agreed) observed: -

“Much depends, in the application of provisions dealing with obvious risk, upon the degree of generality or precision with which the risk is stated. Rejecting more highly generalised statements, such as that bad things sometimes happen in hotels or that people sometimes fall over when walking on floors, the risks which confronted Mrs Hutton-Potts can be stated at several different degrees of intensity. In a room in a hotel where a cleaner is polishing the floor with a buffing machine, there is a risk that a recently polished floor will be slippery, because it is polished. I do not think it would be correct in fact to see this as the risk which matured...a higher degree of intensity is required in stating the risk. Her injury was caused by there being polishing material on the floor which was not visible, and which had not been removed in the buffing process.”

Once again, all this states no more than that one has to examine the factual situation of a particular case very carefully to understand the nature of the risk, which has eventuated. It is only when that is appreciated that one can ask whether it is a risk “that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff”.

The third case (**Smith v Perese**) involved a plaintiff who was engaged in spear fishing at sea. He was an experienced spear fisherman. He was fishing in company in an area in which he was familiar in reasonably good conditions. He was using a float which he believed to be conspicuous. The area was one which was commonly used by spear fisherman. Both he and his companion were in reasonable proximity to the shoreline. The plaintiff was, however, struck and injured by a vessel. Studdert J held that he was not persuaded that the risk which eventually materialised was an obvious risk. It was not a risk, based on the plaintiff's evidence, of which he was aware. (15)

One could readily imagine a different factual scenario, which would require a finding that being struck by a vessel whilst spear fishing may well have been quite obvious to a reasonable person in the position of the injured plaintiff. Each case, it is suggested, must invariably turn upon its own facts and circumstances.

A final example I will give is **Dederer's** case itself. Here the Court of Appeal overturned the trial judge's finding that the risk to the plaintiff was not "obvious" within the meaning of section 5F of the **New South Wales Act**. The result is, perhaps, not surprising, although the Court of Appeal's reasoning, with respect, is not beyond reproof. Basically, the trial judge had found that the risk of serious permanent physical injury would not have been obvious to this particular plaintiff, even if it would have been obvious to a mature adult. Ipp JA reasoned that some of the trial judge's finding on contributory negligence were "inconsistent" with his Honour's finding that the risk was not obvious. These findings included the plaintiff's knowledge that the depth of water was variable; that jumping from heights could result in injury; and that part of the thrill the plaintiff obtained from diving and jumping from the bridge was "the risk". These matters, it might be argued, were not necessarily inconsistent with his Honour's ultimate finding in relation to section 5F. Ipp JA also thought that the trial judge's finding, based on his inspection of the accident scene, that the situation at the bridge was "in effect an accident waiting to happen" was also inconsistent with his finding that the risk was not obvious. It might however, be thought that the views of a 70 year old trial judge, especially one with some 20 years of experience, reflecting upon the event in the light of all the evidence he had absorbed, including his inspection of the accident scene, would be of little moment in determining what may have been obvious to a reasonable person in the position of the 14 year old plaintiff.

In the ultimate, however, Ipp JA (with whom the other members of the Court agreed) stated that, in his opinion, even without the sign on the bridge, it should have been obvious to a reasonable 14 and a half-year-old that such a dive was dangerous. And it should have been obvious that it could lead to catastrophic injuries. Here, Ipp JA was on surer ground. The dive was from a height of some nine metres into the estuary. The point of entry was about 10 metres from a visible sandbar. In addition, the plaintiff conceded that he was aware that sand on the sandbar moved with the

current and that, in the channel, the depths were hard to judge and some parts were more shallow than others.

Overall, it needs to be kept in mind that the statutory definition of “obvious risk” is a stepping stone to the operation of other provisions of the tort reform legislation. In particular, for the purposes of this paper, it is a provision that is highly relevant to the duty to warn itself and to the liability for harm encountered in dangerous recreational activities. I shall consider each of these separately.

No duty to warn of obvious risk

Section 5H of the **CLA Act 2002 (NSW)** provides:

- (1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an [obvious risk](#) to [the plaintiff](#).
- (2) This section does not apply if:
 - (a) [the plaintiff](#) has requested advice or information about the risk from [the defendant](#), or
 - (b) [the defendant](#) is required by a written law to warn [the plaintiff](#) of the risk, or
 - (c) [the defendant](#) is a professional and the risk is a risk of the death of or [personal injury](#) to [the plaintiff](#) from the provision of a professional service by [the defendant](#).
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

The **CLA 2003 (Qld)**, in section 15, provides in similar terms to section 5H of the New South Wales legislation except that, in sub-section (2)(c) there is a proviso that the professional be “other than a doctor”.

The position at Common Law, prior to the enactment of the reform legislation, was that the proper discharge of a person’s duty to another may require that there be a warning of risk. If an incident were caused by such failure to warn of the risk, the

person found to have the duty to warn would be liable. It was relevant, but not fatal, if the risk was an obvious one.

Superior Courts have held, however, that a plaintiff might well need to prove a more fundamental departure from reasonable care other than simply saying a warning should have been given. This may be seen in **Vairy v Wyong Shire Council** (16) where Gleeson CJ observed: -

“If a public authority, having the control and management of a large area of land open to the public for recreational purposes, were to set out to warn entrants of all hazards, regardless of how obvious they were, and regardless of any reasonable expectation that people would take reasonable care for their own safety, then signs would be either so general, or so numerous, as to be practically ineffective. If the owner of a ski resort set up warnings signs at every place where someone who failed to take reasonable care might suffer harm, the greatest risk associated with downhill skiing would be that of being impaled on a warning sign...Often the answer (to the question as to whether reasonableness requires a warning) will be influenced by the obviousness of the danger, the expectation that persons will take reasonable care for their own safety, and the consideration of the range of hazards naturally involved in recreational pursuits.”

The obvious intent of the new legislation, as set out above, is to preclude, in certain situations, reliance upon a duty to warn as a particular breach of duty.

It is not unimportant to observe that sub-section 1 says nothing of any remedial step, other than a warning, which, arising from the exercise of reasonable care in discharge of a duty of care, might be appropriate.

Two recent examples may be given of situations that have arisen in New South Wales. In the first, **Chotiputhsilpa's** case the plaintiff, a young man of 16, suffered severe injuries when he was struck by a motor vehicle while endeavouring to cross Anzac Bridge in Sydney. The bridge was heavily trafficked at the time. The plaintiff had alighted from a bus and endeavoured to head in the opposite direction back towards the city. He did not know the area well. Unknown to him, there was a pedestrian subway, which allowed safe crossing to the other side of the bridge. This was located underneath the bridge at about 60 metres from the bus stop. The RTA was the statutory authority which had responsibility for the design and construction of the bridge, including any necessary signage. There was no signage at the bus stop

or surrounding area that would have alerted a person in the vicinity of the bus stop to the existence of the pedestrian subway or that the footpath would provide access back towards the city.

The plaintiff failed before the trial court but succeeded on appeal against the RTA. Obviously enough, it might well have been argued that the plaintiff, in attempting to cross a heavily trafficked multi-lane bridge, would encounter an “obvious risk” so as to satisfy the statutory test. As the Court of Appeal found, however, the appropriate response of the road authority to that risk was not a warning of it, but the design and maintenance of a safe system of signage to draw the attention of people to the pedestrian subway beneath the bridge (17)

The second example is **Randwick City Council v Muzic** (18) The plaintiff in that case well knew of the risk in question, namely the danger of slipping on algae on a beach promenade. The algae was not safely removable by the defendant council for environmental reasons. The Court of Appeal held that it was not reasonable for the defendant to simply do nothing in the circumstances. It was clear that the provision of a notice warning that the surface of the promenade was slippery would have made no difference to the plaintiff in the case (because the plaintiff admitted that she was aware that it was slippery). Nevertheless, it would have been a reasonable response to the risk of injury for the council to close the relevant part of the promenade until it could undertake the remedial work.

The position in **Muzic’s** case has clear ramifications for councils and other statutory bodies with the control of beach promenades. This is particularly so where there are large crowds of tourists involved. The case highlights the fact that it is not simply enough to reason that there is no need to put up a warning in relation to an obvious risk. There may well be a need to do something else besides. It is the corollary, if you like, of the paradoxical situation suggested by Gleeson CJ in **Vairy’s** case. The Anzac Bridge case really illustrates the same point. In neither case would a warning about a particular risk have come as any surprise to the plaintiff. The risk of crossing the heavily trafficked Anzac Bridge would have been obvious to a pedestrian, even to a stranger to the city. The risk of slipping on the promenade was one of which Ms Muzic was well aware. What was required of the defendant in each case, however, was a different response dictated by the circumstances of the risk.

Let us now turn to “obviousness” in the context of “dangerous recreational activity”.

Dangerous recreational activity

In New South Wales, Division 5 applies in respect of liability and negligence for harm to a person resulting from a recreational activity engaged in by the plaintiff. Section 5K defines the relevant term as follows: -

“Dangerous recreational activity means a recreational activity that involves significant risk of physical harm”.

The expression “recreational activity” includes: -

- (a) any sport (whether or not the sport is an [organised](#) activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.”

The key provision is section 5L which provides as follows: -

“No liability for harm suffered from obvious risks of dangerous recreational activities

5L No liability for [harm](#) suffered from [obvious risks](#) of dangerous recreational activities

- (1) A person ("the defendant") is not liable in [negligence](#) for [harm](#) suffered by another person ("the plaintiff") as a result of the materialisation of an [obvious risk](#) of a [dangerous recreational activity](#) engaged in by [the plaintiff](#).
- (2) This section applies whether or not [the plaintiff](#) was aware of the risk.”

I have earlier set out the definition of “obvious risk” in Division 4 which is stated to have application for the purposes of Division 5. It is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff.

The New South Wales legislation also provides, in section 5M, that the defendant does not owe a duty of care to another person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff. I have not set out the full detail of this section since it is not applicable in Queensland. Generally, sections 17, 18 and 19 of the **CLA 2003 (Qld)**

provide in similar terms to sections 5J, 5K and 5L of the New South Wales legislation. The Queensland Act carries no discrete definition of “recreational activity”. The definition of “dangerous recreational activity” in section 18, however, does incorporate a de facto definition of “recreational activity” expressed simply as “an activity engaged in for enjoyment relaxation or leisure”. As I have said, the Queensland Act does not contain a section analogous to the risk warning section contained in the New South Wales Act.

Commentary on legislation

The term “recreational activity” is in New South Wales very broadly defined. It is an inclusive definition, as will have been seen. Although the expression is not discretely defined in the Queensland legislation, it is likely that it would receive a similar interpretation in your State. The scheme for dealing with risks emerging from “dangerous recreational activity” in each of the two States is essentially the same.

The breadth of the definition is indeed extremely general. The authors of **Civil Liability Australia**, in their commentary, note some 40 odd activities which might fall within the concept of “recreational activity” (19). It includes such innocent pastimes as a backyard barbecue, children’s parties, attendance of a group at a restaurant or hotel or sporting fixture; it would extend to library user patronage, concert patronage or patronage at a fete or festival. It might even extend to “recreational” browsing in shops. Liability is excluded altogether for breach of duty (NSW) or negligence (Qld), where the harm is a result of materialisation of an obvious risk of dangerous recreational activity engaged in by the plaintiff. This is defined, as has been seen, to mean a recreational activity that involves a significant risk of physical harm. Commentators have noted that this is a rather undemanding test. Professor McDonald has noted that perfectly legal and common activities can involve a significant risk of harm, as do foolhardy activities. This observation is clearly correct. One of the problems is to determine whether the harm arose out of a dangerous activity itself or out of an incidental aspect.

This is very much the type of argument that was considered by the New South Wales Court of Appeal in **Fallas v Mourlas** (20) This is an unusual decision in a number of respects. In that case, the injury occurred in the course of the activity of “kangaroo

spotting". This was, on its face, a dangerous activity as it involved the use of firearms. The plaintiff's task in the activity however, was to act as a "spotter". He held a spotlight from within the passenger's seat of a vehicle while the other men with firearms were outside. He was shot, not as someone was shooting at a kangaroo, but when the driver re-entered the vehicle with a loaded gun and began to attempt to unjam it while pointing it at the plaintiff. This was despite repeated requests from the plaintiff that the driver not enter the vehicle with a loaded gun; and despite assurances from the weapon holder that it was not a loaded weapon. As it happened, the gun went off and the plaintiff was shot in the leg. Even in this rather unusual situation, the unfortunate plaintiff was treated as engaged in the dangerous activity of kangaroo spotting with firearms. Ipp JA held that, although the risk of another person being negligent might be obvious in some circumstances involving dangerous recreational activities, it might not be obvious that the person would act in a grossly negligent manner. Here, the defendant had acted in a grossly negligent manner so that section 5L did not excuse him. On the other hand, Ipp JA (with whom Tobias JA agreed) held that the recreational activity in which the plaintiff was engaged carried with it a significant risk of physical harm and therefore was a dangerous recreational activity within the meaning of section 5K of the **New South Wales Act**.

There was disagreement between Basten JA and Ipp JA as to the appropriate test for determining when a recreational activity becomes a "dangerous" one.

According to Ipp JA's reasoning at paras [45] to [50], the application of ss 5K and 5L to the assessment of what constitutes a "dangerous recreational activity" should always be made with regard to "the particular activities engaged in by the plaintiff at the relevant time." Where a particular act is part of a broader or more general activity, it may become necessary to engage in a "segmenting" exercise, separating particular act from the general activity, to determine whether it is a dangerous recreational activity according to the legislation. By having regard to the particular activity, Ipp JA's test would therefore be wide enough to "take into account any risks created by the conduct of the plaintiff that would not ordinarily be part of the general activity", but not so wide as to be vague or uncertain. His Honour used the example of walking to demonstrate that an attempt to apply a test which is too narrow or, alternatively, too

vague would simply be unmanageable when one considers the myriad of risk factors attendant on such a simple recreational activity as walking, each or all of which may have the potential of turning it into a “dangerous” one. In his example, Ipp JA cites such factors such as the location of the walk, the time of the walk, the conditions of the walk, the atmospheric conditions, the walker’s experience, fitness level, and so on.

Ipp JA also expressed the view that the significant risk converting the recreational activity into a dangerous one need not be the obvious risk that materialises. His Honour disagreed with the opinion expressed by Basten JA, who had suggested that s 5L can only be engaged when at least one of those [significant] risks must materialise [as an obvious risk] and result in harm suffered by the plaintiff. Rather, Ipp JA saw nothing in s 5L which required the “obvious” risk to also be one of the “significant” risks of a particular recreational activity.

Basten JA, at paras [139] to [144], considered the idea of risk of harm and the factors elevating such risks to the realm of “significant” for the purposes of s 5L. Although there may exist certain categories of recreational activity which could commonly involve ‘inherent’ risks (such as motorcar racing and sporting activities), the risk would “need to be assessed according to whether incompetence or carelessness on the part of the particular participants rises above the level of a fanciful suggestion and constitutes a significant risk.” Determining which is the case may be a matter for evidence.

Basten JA went on to analyse different ways of determining whether or not a risk of harm was itself “significant”. Merely assuming a risk will be “significant” because of the catastrophic results which would occur if the risk were realised was considered by His Honour to be inappropriate in determining “significant” risk of harm. Basten JA further found there was insufficient evidence to support either an approach which took into account the characteristics of the plaintiff in relation to the particular activity (such as level of competence, sobriety, and reputation for being ‘careful’), or the use of statistical evidence to assist in determining the likelihood of the risks occurring with “sufficient frequency, or whether they are so rare as to constitute an insignificant risk.”

These conflicting views may themselves be the subject of a degree of critical commentary. The views of Ipp JA in relation to the nature of a “dangerous recreational activity” may be thought to extend the definition somewhat too far and render less certain that which is normally clear to most people. In particular, the distinction between an activity which is not the materialisation of a significant risk, but which may well be the materialisation of an obvious risk, is difficult to comprehend. Basten JA, on the other hand, thought that one of the significant risks of a particular activity must materialise as an obvious risk before liability will be excluded. His analysis of the characteristics of a dangerous recreational activity may be objected to the basis that it leaves or generates a good deal of uncertainty itself. One would think, for example, that any recreation involving the use of firearms might, in common parlance, be thought of as a dangerous recreational activity, notwithstanding that safe guards apply.

There are practical significances involved in these points of distinctions. In the area of beach safety, one would have thought that swimming was not, per se, a dangerous recreational activity. According to Ipp JA, it may be dangerous, depending on a great variety of circumstances relating to the particular incident. On the other hand, Basten JA would appear to demand some type of empirical evidence before being so satisfied. The situation is not a model of clarity in either case.

I think a clearer example of the situation that one might expect to find appears in the case of **Smith v Perese**. This case was heard by an experienced trial judge, Studdert J. I have earlier set out the facts. It will be recalled that the plaintiff was engaged in spear fishing at sea when struck by a vessel and injured. As I mentioned earlier, the trial judge concluded that the risk was not obvious in the statutory sense. His Honour however, went on to consider whether the recreational activity itself was dangerous. In a brief passage his Honour said:

“In determining whether a recreational activity is dangerous, that really depends on an assessment of all the circumstances in which that activity is undertaken. It does not seem to me that one could decide that to go spear fishing was always a dangerous activity or that it was never a dangerous activity. To fish alone in an area known to be infested with sharks where some

other fisherman had been taken by a shark earlier that day would plainly involve the undertaking of a dangerous recreational activity. To go spear fishing in company in a netted area exclusively reserved for spear fishermen, with notices displayed prominently notify that activity, would equally obviously not be a dangerous recreational activity. The need is to assess the particular circumstances in which the activity was being undertaken”.

Studdert J concluded that an examination of all the circumstances did not satisfy him that what was involved was a dangerous recreational activity. In particular, he was not satisfied that, in the circumstances, the activity involved a significant risk of physical harm. Finally, he did not accept that the plaintiff was injured as a result of the materialisation of an obvious risk of the activity in which the plaintiff was engaged.

Perhaps the result might have been different had the spear fisherman concerned been relatively inexperienced and the injury occurred in circumstances where one of the spear guns was negligently handled during the fishing expedition, resulting in a spear injury to the plaintiff.

Another relatively clear case was the decision in **Falvo v Australian Oztag Sports Association** (21). Oztag is a type of touch rugby game. The object is to rip a tag from the shorts of the opposing player who is carrying the ball. When that happens the player holding the ball must release it. The degree of physical contact between parties is correspondingly quite limited. Mr Falvo injured his right knee when playing a game of Oztag. The game was organized by the defendant at a local sporting fixture in Sydney. The plaintiff was running towards the opposing team’s try line with the ball in his hands when he moved to an area of the field that was ungrassed. His knee gave away and he collapsed. His evidence was that his foot had gone into an area of sand. Mr Falvo failed in his action because the condition of the field was “obvious to all” and no breach of duty had been established on the part of the defendant. In the course of the decision however, the Court of Appeal had to consider whether Oztag did or did not constitute a dangerous recreational activity. Once again Ipp JA was the voice of the Court. His decision was one in which Hunt AJA and Adams J agreed. His Honour said commencing at [28]:

“In my view, the definition of "dangerous recreational activity" in s 5K has to be read as a whole. This requires due weight to be given to the word "dangerous". It also requires "significant" to be construed as bearing not only on "risk" but on the phrase "physical harm" as well. The expression "significant risk of physical harm" is coloured by the word "dangerous" and the phrase "significant risk" cannot properly be understood without regard being had to the nature and degree of harm that might be suffered, as well as to the likelihood of the risk materialising.

[29] The view that a risk is "significant" when it is dependant on the materiality of the consequences to the person harmed is consistent with the views expressed by the High Court in *Rogers v Whitaker* (1992) 175 CLR 479 at 490.

[30] Thus, in my opinion, the expression should not be construed, for example, as capable of applying to an activity involving a significant risk of sustaining insignificant physical harm (such as, say, a sprained ankle or a minor scratch to the leg). It is difficult to see how a recreational activity could fairly be regarded as dangerous where there is no more than a significant risk of an insignificant injury.

[31] In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the "risk of physical harm" may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the "risk of physical harm " may not be "significant" if despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is "dangerous".

[32] Oztag, like touch rugby, is not what is normally understood as a contact sport. Oztag, in fact, is designed to reduce the extent of physical contact that might be experienced in ordinary touch rugby.

[33] A "dangerous recreational activity" cannot mean an activity involving everyday risks attendant on games such as Oztag, which involve a degree of

athleticism with no tackling and no risk of being struck by a hard ball. In my opinion, the trial judge erred in finding that Oztag was "a dangerous recreational activity".

In **Lormine Pty Ltd v Xuereb**, the New South Wales Court of Appeal concluded that section 5L of the New South Wales Act was not invoked in circumstances where a plaintiff was injured when standing, by invitation of the crew, on the front deck of a Dolphin Tour vessel. The plaintiff was washed overboard when the vessel was struck by a rogue wave but due to negligence of the master in the way the vessel was handled. The specific activity, Dolphin Spotting, was found not to be a dangerous recreational activity (22).

Finally, may I come back to our old friend **Dederer**. As I indicated at an earlier part of this paper, he failed in the Court of Appeal against the local council. He did so on the basis of the Court of Appeal's finding that the trial judge had erred in relation the relevant matters under Division 5 of the **CLA (NSW)**. All three judges agreed that the particular activity engaged in by Mr Dederer was a dangerous recreational activity and that it should have been obvious to him, even though he was only 14 and a half, that the contemplated dive was dangerous and could lead to catastrophic injuries.

So here we have a clear example of the way in which the **CLA (NSW)** has operated to exempt from liability a statutory body because of its precise terms. The RTA lost its appeal but it, of course, did not have the advantage of the provisions of the **CLA**.

The proof of the pudding, they say, is in the eating. The Court of Appeal decision in **Dederer** demonstrates the efficacy and reach of the Tort Reform provisions. Whether that is a good thing or a bad thing is for others to decide.

For completeness, I should mention that the High Court is, at the time of preparation of this paper (16 August 2007) reserved on the appeal brought by the RTA against the Court of Appeal's decision. It is possible Mr Dederer may lose altogether. My brother-in-law may be proved right yet again (23).

A final overview on “obviousness”

My final remarks on this part of the topic can be best understood in the context of the recent decision of Hislop J in **Bennett v Manly Council & Sydney Corporation** (24). The plaintiff was an experienced swimmer and surfer who sustained injury at Manly Beach at about 3.15pm on 8 October 2000. He was body surfing a wave into the shore when he hit his head on storm water pipes, which extended into the sea. He was surfing outside the designated safe swimming area when he was injured. The plaintiff suffered incomplete quadriplegia as a result of the accident. There was agreement as to the damages. In the ultimate, Hislop J awarded the plaintiff \$1,750,000. This verdict was reached after a deduction for contributory negligence of 50%.

Manly Beach is well known to residents of New South Wales. It may also be well known to some of the people at this Conference. It is a beach set in rather a spectacular position and is very popular with locals and tourists. For many years, there have been two 24-inch diameter storm water drainage pipes extending across the beach and into the water. At times, depending on the conditions of the sea, the pipes are not visible to a person swimming offshore. There were no signs or other markers on the beach or the pipes specifically indicating the position of the pipes to swimmers or surfers. Although the concentration of swimmers was between the flags on the beach, people swam all along the beach, including in the area opposite the pipes.

As I said earlier, the plaintiff was a very experienced swimmer and surfer. He knew Manly Beach well and had swum there on many occasions prior to the accident. On the day of the injury, he was in the company of a group of friends. They were all experienced tri-athletes. The group swam out beyond the breakers and took up a position about 100 metres off shore. Their intention was to do swim training in 200 metres repetitions, i.e. swimming parallel to the beach. It was too crowded to do training in the designated swimming area between the flags. The plaintiff was aware of the position of the pipes generally. Indeed, he warned his companions to keep a watch out for the pipes while they were doing their training. He said in his evidence that he was aware that the pipes were submerged and dangerous because the

actions of waves or current might take a swimmer closer to them. After completing his training repetitions, the plaintiff stopped about 100 metres from the beach. He waited for a brief period of time before deciding to catch a wave in. He saw no dangers in front of him and raced to catch a wave into the beach. This was his usual practice, that is to check that there was no person or board rider or any obstacle in his way before catching a wave into the beach. On this occasion he swam on to the wave, assuming a racing position with his arms above his head and his head tucked down. He did not lift his head as he was carried in towards the beach and he did not see the pipes until his head hit them.

How did this happen? The trial Judge found that the plaintiff had been carried further to the north than he had anticipated. Moreover, he did not take the trouble to look for any precise land marker to determine exactly where he was in relation to the pipes. The trial Judge accepted that, had there been any indicators or markers indicating the position of the pipes, the plaintiff would not have attempted to swim into the beach at that point.

Hislop J made a careful review of the relevant authorities including **Nagle's** case, **Vairy v Wyong Shire Council** and **Mulligan's** case. Hislop J acknowledged that recent case law had placed great emphasis on the personal responsibility of individuals for their own actions. Thus, where a risk was obvious and such that a normal adult would not incur it, this would be, he thought, a factor to be taken into account in determining the reasonableness of the defendant's response.

Hislop J found specifically that the risk in the present case was not that posed by a natural hazard commonly occurring at most Australian beaches. On the contrary, the risk of injury posed by the pipes was an unusual risk to encounter on an Australian beach. There was evidence to show that a similar storm water outlet existed only on two other Australian beaches. The pipes were a hazard that had been created by the actions of the defendants in constructing or agreeing to the construction of the pipes. Hislop J determined that the risk of injury was foreseeable; the magnitude of the risk was great; the degree of probability of injury occurring was not insignificant and the expense of erecting a sign was minimal. In those circumstances, the duty to take reasonable care required the provision of an appropriate sign or marker by each

defendant. The trial Judge apportioned liability equally between the defendants. As to contributory negligence, the plaintiff was found guilty of contributory negligence for the following reasons: -

- (a) He was swimming outside the designated safe swimming area.
- (b) He was aware of the existence of the pipes, that they entered the surf and were concealed or rendered difficult to see. He was aware that if he hit them he could sustain serious injury.
- (c) He was reminded of the presence of the pipes when he observed them in the surf.
- (d) He knew that there was a rip moving him to the north and that his position could also be altered by wave action. His method of judging accurately where he was imprecise.
- (e) It should have been apparent to him, if he had acted with reasonable care, that he may not have returned to his starting position at the end of each repetition and that he needed to orientate himself by reference to a marker on the beach before catching a wave in.
- (f) Additionally, he should have monitored his position as he surfed in by keeping his head up after he had caught the wave. If he had adopted this precaution, again it is probable he would not have sustained injury.

As I have said, contributory negligence led to a substantial reduction in the damages of some 50%. There was no appeal from Hislop J's decision.

The points I want to make about **Bennett's** case can be made very briefly. First, the Tort Reform legislation did not apply to this piece of litigation. Secondly, Hislop J correctly identified generally the role of "obviousness" in the particular circumstances of the litigation. Thirdly, the pipes, which the plaintiff struck on his way into the beach, were not "obvious". In fact, they were a concealed hazard. Fourthly, the plaintiff

knew there were pipes on the beach and that they represented a hazard but he did not know where they were in relation to his own position as he caught the wave into the beach. Fifthly, he was guilty of contributory negligence because, amongst other things, he did not take the time and care to line up his position with the flags on the beach or some other identifiable object, either on the beach or close to it.

Now, would it have made any difference if the reform legislation had applied to Mr Bennett's litigation? Minds could differ about this, I admit. But, it seems to me, that neither Mr Bennett's training for the triathlon in the sea or his catching a wave back into shore could, in the circumstances, be classified as a dangerous recreational activity. He was an experienced swimmer and there was nothing unusual about the conditions of the surf at that time. I suppose one could argue that swimming in the ocean well away from the flagged area involves, or could possibly involve, a significant risk of physical risk of harm. But it seems to me to be stretching it to suggest that this was a dangerous recreational activity. Secondly, I cannot imagine that the plaintiff's striking his head on the pipes could, in the circumstances, be classified as the materialisation of an obvious risk of a dangerous recreational activity, even if I were wrong about the nature of the activity itself. Thirdly, I would argue that the defendants were plainly in breach of their duty to the plaintiff by not placing some type of marker or sign on the pipes. The reasoning of Hislop J seems to be impeccable in this regard whether one examines the situation through the prism of the common law or the Tort Reform legislation.

Volunteers and good Samaritans

At common law, a volunteer enjoys no special position in negligence matters. The law will enquire as to whether, in the particular situation, a duty of care existed. If it did, the enquiry will then be whether that duty has been breached. Again, at common law, there exists no duty upon a person to come to the aid of another unless the first person has placed the other at a position of risk. There are some relationships, which may give rise to a duty to rescue, even where the rescuer did not cause the incident. But there is no need for these to be considered in this paper.

The **CLA 2002 (NSW)** deals with the voluntary actions of people in three ways. First, section 57 provides that a Good Samaritan does not incur any personal civil liability in respect of any act or omission done or made by the Good Samaritan in an emergency when assisting a person who was apparently injured or at risk of being injured. Section 56 provides that a Good Samaritan is a person who, in good faith and without expectation or payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured. Section 58 excludes from protection the situation where it is the good Samaritan's intentional or negligent act or omission that caused the injury or risk of injury in respect of which the good Samaritan comes to the assistance of the person. The protection from personal liability does not apply if the ability of the good Samaritan to exercise reasonable care and skill was significantly impaired by reason of being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication) and the good Samaritan failed to exercise reasonable care and skill in connection with the act or omission.

Secondly, section 58C protects food donors in certain circumstances. Thirdly, section 61 provides that a volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work organised by a community organisation, or as an officer holder of a community organisation. A volunteer is a person who does community work on a voluntary basis. A community organisation is one that organises the doing of community work by volunteers and is a body corporate, a church or other religious organisation, or an authority of the State. Community works means work that is not for private financial gain and it is done for a charitable benevolent, philanthropic, sporting, educational or cultural purpose.

A volunteer is not protected from personal liability if it is established at the time of the act or omission the volunteer was engaged in conduct that constitutes a criminal offence. Similarly, the protection will not apply if the ability of the volunteer to exercise reasonable care and skill when doing the work was significantly impaired by reason of the volunteer being under the influence or a drug voluntarily consumed, and the volunteer failed to exercise reasonable care and skill when doing the work. Finally, the protection is not available in respect of an act or omission of a volunteer if

the volunteer knew or reasonably to have known that he or she was acting outside the scope of the activities authorised by the community organisation, or contrary to instructions given by the community organisation.

In Queensland, the important sections are, first, sections 26 and 27. Section 26 protects persons performing duties for entities to enhance public safety. Section 27 protects the prescribed entities themselves. I shall set out section 26(1) of the **CLA 2003 (Qld)**:

“(1) Civil liability does not attach to a person in relation to an act done or omitted in the course of rendering first aid or other aid or assistance to a person in distress if--

- (a) the first aid or other aid or assistance is given by the person while performing duties to enhance public safety for an entity prescribed under a regulation that provides services to enhance public safety; and
- (b) the first aid or other aid or assistance is given in circumstances of emergency; and
- (c) the act is done or omitted in good faith and without reckless disregard for the safety of the person in distress or someone else.

Section 27(1) is in similar terms in relation to the provision of services by an entity prescribed under a regulation.

The entities for the purposes of section 26(1) are set out in Schedule 1 to the legislation. The entities for the purposes of section 27 are set out in Schedule 2. They include, for example, Surf Lifesaving Queensland and affiliated bodies; and the Royal Lifesaving Society Queensland Incorporated and affiliated bodies, providing services at places specified in the Schedule (including public swimming pools).

Sections 38 and 39 of the **CLA 2003 (Qld)** are provisions, which reflect, in general terms, the provision of the New South Wales legislation in relation the protection of volunteers.

It is satisfying, I suppose, that matters of this kind are codified in the Tort Reform legislation. In truth, however, the provisions do not create protection from liability, which differs very significantly from the position at common law. A lack of care, for example, still has to play a part in the statutory equation.

CONCLUSION

As this paper draws to a close, I remind myself that there are probably hundreds of people, if not more, out enjoying the sunshine and the beauty of Gold Coast beaches even as we speak. With the approach of summer, there will be thousands of people on these beaches, people from countries all over the world and from every walk of life. There will be children, teenagers, adults, the aged and the infirm. There will be people with adequate regard for their own safety and there will be the foolish. The task of guarding these beaches and the safety and lives of others will fall, at it has done for many years, on the shoulders of lifesavers and lifeguards. Many of those, as I understand it, are volunteers while others are employed by local councils or other statutory bodies. There will be surfing carnivals and recreational surfing events held on many of these beaches from time to time.

In all these areas of enjoyment, there will remain the undoubted fact that the seas surrounding Australia can very dangerous. The sea is cruel and people, even those who take the utmost regard for their own safety, can drown in these waters. Marine creatures, such as sharks and stingers can inflict serious, if not fatal, injuries on people enjoying the waters. Once again, the responsibility of patrolling and assuring the safety of our beaches falls on men and women whose busy days may leave little time for reading papers such as this, even if they had the inclination to do so.

What can one say? My firm view is that one should not be overly seduced by the raft of Tort Reform legislation. In particular, those concerned with public safety and the well-being of others should not think that the rules have so far changed that carelessness will be ignored or, for that matter, rewarded. Just as in matters of medical care, there is a strong need for those in control of lifesaving operations to assess and re-assess continually the protocols and safe guards in force that protect

the public, often as it happens, from their own folly. There is a passage well known to lawyers in the famous case of Donoghue v Stevenson (25) It is one of my favourite passages. It has a biblical echo to it that is both deeply felt and apposite to the questions raised in this paper. Lord Atken observed: -

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee that are likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

Whatever criticisms might be made these days of those words and the concepts that lie behind them, we do all have a duty to our neighbours. We are, to an extent, our brothers’ keepers, whether we like it or not. In the context of this Conference, those responsible for the safety of our beaches continue to have a responsibility to the multitude of visitors who pour onto our golden sands on an annual basis. The responsibility will be discharged, in the ultimate, only by reasonable vigilance and constant attention to the dangers that the sea poses for beach goers and visitors to our waters.

ENDNOTES

1. Waverley Municipal Council v Swain [2002] NSWCA 240
2. Swain v Waverley Municipal Council (2005) 220 CLR 517
3. Australia. Department of the Treasury, Review of the Law of Negligence Final Report 2002 ('Ipp Report')
4. Wyong Shire Council v Shirt (1980) 146 CLR 40
5. Tame v New South Wales (2002) 211 CLR 317; Annetts & Anor v Australian Stations Pty Ltd [2000] WASC 104
6. Great Lakes Shire Council v Dederer & Anor; Roads Traffic Authority of NSW [2006] NSWCA 101; Great Lakes Shire Council v Dederer & Anor; Roads Traffic Authority of NSW v Dederer & Anor [No 2] [2006] NSWCA 336
7. Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380
8. Barbara McDonald, "The impact of the Civil Liability legislation on fundamental policies of the Common Law of negligence" [2006] 14 *Torts Law Journal* 3, 268 at 283
9. Mulligan v Coffs Harbour City Council (2005) 223 CLR 486
10. Enright v Coolum Resort Pty Ltd & Ors [2002] QSC 394
11. Prast v Town of Cottosloe [2000] WASC 274
12. Lynch v Kinney Shoes (Australia) Ltd & Ors [2005] QCA 326
13. Doubleday v Kelly [2005] NSWCA 151
14. C G Maloney Pty Ltd v Hutton-Potts and Another [2006] NSWCA 136
15. Smith v Perese Ors [2006] NSWSC 288
16. Vairy v Wyong Shire Council (2005) 223 CLR 422
17. Chotiputhsilpa v Waterhouse & Ors [2005] NSWCA 295
18. Randwick City Council v Muzic [2006] NSWCA 66
19. Lexis Nexis, Civil Liability Australia/Richard John Douglas, Gerard Raymond Mullins, Simon Richard Grant, 1 (July 2007)
20. Fallas v Mourlas [2006] NSWCA 32
21. Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17

22. Lormine Pty Ltd Anor v Xuereb [2006] NSWCA 200; Lormine Pty Ltd & Anor v Xuereb (No 2) [2006] NSWCA 267
23. As indeed he was! See Roads & Traffic Authority v Dederer [2007] 234 CLR 330
24. Bennett v Manly Council & Sydney Corporation BC 200602069; (2006) NSWSC 242
25. Donoghue v Stevenson (1932) AC 562

Terrorism

The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials

Justice Whealy - Supreme and Federal Court Conference 2007

I would like to focus on an important aspect of terrorism. My principal concern will be with the impact the new terrorism related laws have on our duties and responsibilities as Judges in criminal trials. In Huddart Parker & Co Pty Limited v Moorehead (1909) 8CLR 330 at 357, Griffith CJ said that judicial power means:

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

The broad range of new anti-terrorist legislation has created a range of offences for acting in a variety of ways in preparation for a terrorist act, even though no terrorist act actually occurs. The offences carry very significant penalties including, in a number of cases, life imprisonment. Every person charged with a serious criminal offence under the terrorist legislation, as with every person who comes for trial on a criminal matter, has a fundamental right to a fair trial. It has been said that a fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree (Jarvie v The Magistrates' Court (1995) 1 VR 84 per Brooking J; Jago v The District Court (1989) 168 CLR 223 and Dietrich v The Queen (1992) 177 CLR 292). But the trial must in essence be a fair trial.

The new legislation, in all its manifestations, places special demands on the trial Judge. It raises special challenges to the need to ensure that a fair trial is maintained. This paper attempts to examine some of the reasons why this is so. It suggests a number of practical ways in which a trial Judge should seek to confront the legislative difficulties to ensure that the accused is dealt with fairly in the criminal justice system.

My own claim to fame in this area is, I candidly admit, very limited. I have been the trial judge in but one terrorist trial. It lasted for five months, however, during both the trial and pre-trial stages. It was a challenging experience. While I accept that my own performance as trial judge was no doubt far from beyond reproach, I trust that the experience entitles me to suggest, at least in a tentative way, some matters that may be of use to others at this Conference and beyond who may be confronted by the challenge of a large scale terrorist trial.

Prejudice and Bias

In every criminal trial, I like to give the jury an instruction of a general nature about prejudice. Normally, I do it during the summing-up. I like to say something along the following lines:

“The position of the accused, you might also think is a tragic one, charged as he is with a very serious crime. I repeat, however, that you must approach the task before you dispassionately and without emotion. You must carry out your tasks in this trial disassociating yourself from the natural emotional response of other people. You are the judges of the facts here, others are not. It is the duty of judges of the facts, no matter how difficult it is, to decide questions of fact free from the taint of emotional response.

It is also very important to free your mind of prejudice. Everyone has prejudice. Prejudice is no more than an attitude, a starting point from which we make all of our judgments in ordinary life. We make judgments from starting points of that sort all the time, day in, day out, really. But when you come to fulfil the role of being the judges of fact in a criminal trial, you have to put prejudice out of your mind altogether.

This, members of the jury, is not ordinary life. Here you are the judges; and it is the duty of a judge to free his or her mind from all preconceived ideas. It is the duty of a judge to try the case according to the law and according only to the evidence. Prejudice and moral judgments have no place in a court of law.

You should decide the matter on the issues without prejudice, without undue sympathy and without hostility.”

In the Lodhi trial, by the time I had completed nearly three months of pre-trial work, including the preparation of a considerable number of pre-trial judgments, I had come to realise that the issue of the accused receiving a fair trial was a matter of considerable importance and sensitivity in the particular circumstances of the matter. One has only to reflect on the frequent barrage of articles and commentary in the media, certainly on a weekly if not a daily basis, involving terrorism and terrorists to know that this is so. In addition, there are the endless articles and commentaries in relation to practitioners of the Muslim religion, extending not only to activities overseas but to Muslims in our own local communities. There are arguments about Muslim customs, laws, practices, dress, attitudes to women, attitudes to non-believers and the like. They are sometimes sensational and ill formed.

It became quite clear to me that I would need to give a special direction to the jury panel, even before the jury process selection had begun. I gave a direction to the jury panel, which is in the terms of the document that appears as Appendix “A” to this paper. I do not suggest that the direction I gave was perfect. Nor do I suggest that it could not be bettered, even substantially so. There are many criminal law judges at this Conference who have had considerably more experience than I have. But I have included it to highlight the need I felt to draw out from the jury panel people who felt that bias or prejudice might prevent them from approaching the issues in the trial fairly, but who might, without a degree of cajoling, be otherwise reluctant to come forward.

It will probably come as no surprise to you to know that I had more than a dozen people asking to be excused on the basis that they felt they could not judge the matter other than with a prejudiced mind. One or two said they were simply opposed to Muslims and were irrevocably prejudiced against them. Surprisingly, three persons applied to be excused on the basis that they knew people who had been killed or injured in the Bali Bombings. The bitter emotional experience involved in that association prompted these potential jurors to confront their own prejudices and admit that they could not approach the trial fairly and dispassionately.

Quite apart from focusing the jury panel on the possibility that individual members might in fact be prejudiced in this area of terrorism, the direction sought to reinforce among potential jury members the need, at the outset, to approach the issues in the trial dispassionately and free from emotional taint or bias.

I might say that the preparation and delivery of the direction also reinforced in my mind a matter which bears repetition: it is important, I think, that judges in terrorism trials carry out a little soul searching in relation to their own possible prejudices. Judges are just as capable as anyone else in the community of falling foul of racial ethnic or religious stereotyping in relation to the defendants who come before them. For my part, I determined that, throughout the trial, I would make every effort to demonstrate courtesy and politeness to the defendant and to his legal representatives and that I would do this in a way that would be plain and manifest to the jury. Where appropriate, I would address the defendant by name, although generally maintaining reference to him as “the accused”. It may be for others to judge whether I succeeded in relation to this endeavour. But I suggest that any judge who is selected to undertake a terrorist trial should reinforce the need to think impartially, to be impartial and be seen, at all times to be impartial and fair towards the accused. This is such a simple matter that it may indeed be offensive for me to remind judges of this point. I think it can be too easily overlooked and especially so where there may be multiple accused.

National Security Information (Criminal & Civil Proceedings) Act 2004

This legislation was passed, in part, to protect information whose disclosure in Federal criminal proceedings would be likely to prejudice National Security. It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial. I shall now say something about the detailed nature of the legislation. I regret to say that it is impossible to summarise it in other than a discursive manner.

In general, it may be said that the legislation seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. Specifically, the Act seeks to protect information the disclosure of which would be likely to prejudice Australia's defence, security, international relations or law enforcement interests. These expressions are given very broad meanings in the definition sections 8, 9, 10 and 11 of the Act. For example, "international relations, means political, military and economic relations with foreign governments and international organisations". (s 10).

It appears to have been the concern of Parliament that the existing rules of evidence and procedure may not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a federal criminal proceeding (**Explanatory Memorandum 2004**).

The operation of the Act, will ordinarily be "triggered" when the prosecutor contemplates the brief of evidence necessary for the trial. The prosecutor may notify the Court and the parties that a particular case falls within the provisions of the legislation. In fact, however, such notice can be given at any time during the proceedings.

At the commencement of Part 3 the Act contemplates that either the prosecutor or the defendant may apply to the Court for the Court to hold a conference of the parties to consider issues relating to any disclosure in the trial of information that relates to national security or may effect national security. This conference may include consideration as to whether the prosecutor or defendant is likely to be required to give notice under s 24; and whether the parties wish to enter into an arrangement of the kind mentioned in s 22 (s 21(1)(a) and (b)). At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure in the proceeding of information that relates to national security or that may effect national security (s 22(1)). The Court may make such order (if any) as it considers appropriate to give effect to the arrangement (s 22(2)).

Relevantly, the central aspect of the operation of the Act is the requirement that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. This information includes information that may be introduced through a document or a witness's answer to a question, as well as information disclosed by the mere presence of a witness (s 24(1) (2) and (3)). On receiving the advice that the Attorney General has been so notified, the Court must order that the proceedings be adjourned until the Attorney-General gives a copy of a certificate to the Court under sub-s 26(4) or gives advice to the Court under sub-s 26(7) (which applies if a decision is made not to give a certificate).

In a similar fashion, the prosecutor or defendant must advise the Court if he or she knows or believes that a witness may give an answer to a question in a federal court criminal proceeding that will disclose information relating to national security or may affect national security. In those circumstances the Court must adjourn the proceeding and hold a closed court hearing in which the witness provides a written answer to the question. This answer must be shown to the prosecutor. The obligation then falls on the prosecutor, in stipulated circumstances, to advise the Court that he has formed a knowledge or belief that the question relates to or may affect national security. In those circumstances the prosecutor must give the Attorney-General notice in writing of that knowledge or belief. Again, the obligation on the court is to adjourn the proceedings until a certificate is given or not as the case may be. (s 25).

Upon notification, the Attorney-General considers the information and determines whether disclosure of the information is likely to prejudice national security (s 26(1)).

If the information would be disclosed in a document (the source document), the Attorney-General may give each potential discloser of the information in the proceeding any of the following: -

- (i) A copy of the document with the information deleted;

(ii) A copy of the document with the information deleted and a summary attached;

(iii) A copy of the document with the information deleted and a statement of facts that the information would or would be likely to prove attached.

The material is to be accompanied by a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) but may disclose the copy or the copy and the statement or summary. (s 26(2)(a))

The certificate however may describe the information and state that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) (s 26(2)(b)).

If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:

(a) Either:

(i) a written summary of the information; or

(ii) a written statement of facts that the information would or would be likely to prove;

Together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) but may disclose the summary or statement;

Alternatively, the Attorney-General may give a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise). The Attorney-General must give the Court a copy of the certificate and the documents mentioned in this sub-section. (s 26(3) and (4)).

Where the Attorney-General has given a potential discloser a certificate under s 26, the Court must in any case where the certificate is given to the Court before the trial begins, hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3a)).

Where the certificate has been given to the Court after the trial begins, the Court must continue the adjournment formerly granted to hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3)).

Where the Attorney-General forms the opinion after notification that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence and the Attorney-General considers that the disclosure is likely to prejudice national security, the Attorney-General may give a certificate to the prosecutor or defendant that states that the prosecutor or defendant must not call the person as a witness in the federal criminal proceeding (s 28(2)). The Attorney-General must give a copy of the certificate to the Court (s 28(3)). Again the giving of this certificate to the Court triggers the need for the Court to hold a hearing to decide whether to make an order under s 31 in relation to calling of the witness (s 28(5)). If the Attorney-General decides not to give such a certificate, the Attorney-General must, in writing, advise the prosecutor or defendant, as the case requires, and the court of his or her decision (s 28(10)).

Any certificates that have been issued must be considered at a closed hearing of the trial or pre-trial court (ss 27(5) and 28(7)). The Attorney-General may intervene in the proceedings to take part in the closed hearing. If the Attorney-General does intervene in the hearing, he or she is treated as if he or she is a party to the hearing (s 30 sub-ss (1) and (2)).

While the Court has a discretion to exclude the defendant, non security cleared legal representatives of the defendant or non security cleared court officials from the closed hearing, the defendant and his or her legal representative must be given the opportunity to make submissions to the court on arguments relating to the disclosure of information or the calling of witnesses (s 29(2) (3) and (4)). The discretion to

exclude only arise where the Court considers that the information would be disclosed to the defendant, the legal representative or the court officials and determines that the disclosure would be likely to prejudice national security.

After holding a hearing required under sub-s 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of sub-ss (2), (4) and (5) of s 31. In general the court may -

- (a) Agree with the Attorney-General that the information not be disclosed at all or be disclosed other than in the particular form; or
- (b) Disagree with the Attorney-General and order the disclosure of the information either generally or in a particular form. (s 31(1), (2), (4) and (5)).

The information or document is only admissible in evidence in the proceeding if, apart from the order made under s 31, it is in fact admissible (s 31(3) and (5)).

After holding a hearing required under s 28(5) the Court must order that:

- (a) The prosecutor or defendant must not call the person as a witness in the federal criminal proceeding; or
- (b) The prosecutor or defendant may call the person as a witness in the federal criminal proceeding. (s 31(6)).

In deciding what order to make under s 31, the Court must consider the following matters (s 31(7) and (8)):

- “7(a) Whether, having regard to the Attorney-General’s certificate there would be a risk of prejudice to national security if:
- (i) Where the certificate was given under sub-s 26(2) or (3) – the information were disclosed in contravention of the certificate; or

(ii) Where the certificate was given under sub-s 28(2) – the witness were called.

(b) Whether any such order would have a substantial adverse affect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) Any other matter the Court considers relevant.”

In making its decision, the Court must give greatest weight to the matter mentioned in s 31(7)(a) (s31 (8)).

The Court must make and keep a record of the hearing under s 31 of the Act. It must make the record available to the Court that hears an appeal from its decision or reviews its decision; it must make the record available to the prosecutor and, if the Attorney-General has intervened, the Attorney-General and its legal representative. The Court must also allow access to the record to any legal representative of the defendant who has been given a security clearance at the appropriate level. Otherwise the Court must not make the record available or allow it to be accessed by anyone else (s 29(5)). There is also provision to give a copy of the proposed record to the prosecutor and to the Attorney-General to enable those persons to consider whether making the final record available to the prosecutor, the Attorney-General and the appeal court, and allowing access to it to the defence, will disclose information and that the disclosure is likely to prejudice national security. In such a situation the record recipient may request that the Court vary the proposed record so that the national security information will not be disclosed (s 29(5), (6) and (7)). There is also a provision made for the record recipient to request the Court from delaying making the record to allow time for the record recipient to decide whether to appeal against the Court’s decision in relation to the form of the record and, if the recipient decides to do so, make the appeal. The Court must grant the request (s 29A).

Where an order or orders has been made under s 31, the Court is required to give reasons. It must give a written statement of its reasons for making an order to the prosecutor, the defendant, any legal representative of the defendant and the Attorney-General where intervention has occurred (s 32(1)). Indeed, the Court must

give a copy of the proposed statement of reasons to the prosecutor and the Attorney-General to enable those persons to consider whether the statement of reasons may involve the disclosure of national security information and whether the disclosure might be likely to prejudice national security. The statement recipient may request the Court to vary the proposed statement so that national security information will not be disclosed.

The Court must make a decision in relation to such a request and where this is done, the statement recipient may request the Court to delay giving its statement of reasons to allow time to decide whether to appeal against the Court's decision and to make the appeal (s 32(2), (3) and (4); s 33(1) and (2)).

An order made by the Court under s 31 does not come into force until the order ceases to be subject to appeal; and remains in force until it is revoked by the Court (s 34).

Where the Court has made an order under s 31, the prosecutor may apply to the Court for an adjournment of the federal criminal proceeding to allow time for the prosecutor to decide whether to appeal against the Court order or to withdraw the proceeding. If the prosecutor decides to do either of these things, the adjournment is to allow time for the prosecutor to make the appeal or withdrawal. (s 36(1)).

Similarly where an order has been made under s 31, the defendant may apply to the Court for an adjournment of the federal criminal proceeding to allow time for the defendant to decide whether to appeal against the Court order; and if he or she decides to do so – to make the appeal. The Court must in either case grant the adjournment (s 36(1), (2) and (3)).

The Attorney-General also has a right of an appeal as an intervener in relation to orders under s 31. These appeal are to the Court of Criminal Appeal (ss 36A, 37 and 38).

Section 19 deals with the general powers of a court in a federal criminal proceeding. It provides: -

“19(1) The power of a court to control the conduct of a federal criminal proceeding, in particular in respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(2) An order under s 31 does not prevent the Court from later ordering the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under s 31 would have a substantial adverse affect on a defendant’s right to receive a fair hearing.”

General Comments

It is, I think, fair to make the following general observations: -

1. This legislation poses a very significant challenge to the efficient running of a criminal trial. At the same time, it has, as I shall explain later, the capacity, in an indirect sense, to create a situation where the defendant’s right to a fair trial may be significantly impaired.
2. The Act imposes highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning National Security.
3. There is also an obligation on the Court’s staff and Court reporters to obtain National Security clearances. The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individuals be scrutinised but so also their spouses and partners and their financial and personal lives.
4. If, before or during a hearing, either the prosecutor or the defendant knows or believes that information which relates to or may affect national security will be disclosed, each is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment up to two years.

5. Delay and disturbance to the trial process is perhaps the most significant potential problem created by the legislation. As I have explained above, there is the possibility of a disruption to the trial itself while the Attorney-General contemplates whether to issue a Certificate. Where a Certificate is issued, there is a need to hold a Closed Court hearing in the absence of the jury. This will presumably take place days, or perhaps weeks, after the initial adjournment. If the Court decides to make orders after the Closed Court hearing, there are three possible appeals. The first is an appeal relating to the records to be kept. The second is an appeal relating to the reasons for the decision. The third is an appeal against the merits of the decision. In each of these cases there is the capacity for delay and the trial cannot proceed until the appellate court has resolved the issues arising under the various appeals.

It may be appropriate if I mention at this stage that during the Lodhi trial there were a number of strategies selected which, I trust, prevented these delays from intruding unfairly on the trial process. First, it was generally agreed that all aspects of national security disclosure (including the imposition of protective orders) would be dealt with entirely during pre-trial hearings. This had the effect of elongating the pre-trial stage of the proceedings. It had the advantage, however, of ensuring that there was very little delay, if any, in the hearing of the trial itself. In those circumstances, the jury were not inconvenienced by appellate delays.

Secondly, there was a considerable degree of co-operation between experienced counsel for the prosecution and the defence. It was plainly the desire of all parties to ensure that the trial proceeded as normally as possible. There was, it must be said, a degree of co-operation from those representing the Attorney-General although their concerns focused, as might be expected, more on the protection of national security and were less concerned with the trial process. Thirdly, a clear dichotomy was maintained between the issue of disclosure of sensitive information on the one hand; and the issue as to whether protective orders should be made or the manner in which evidence was to be given during the trial. There was, during the pre-trial procedures, an appeal to the Court of Criminal Appeal brought on behalf of the

defendant in relation to protective orders. There was some delay in relation to this but it was relatively limited. For example, the orders I made (relating to Closed Court hearings and the like) were made on 15 March 2006. The Court of Criminal Appeal heard the appeal on 24 March and dismissed the appeal on 4 April 2006. The important point to note, however, is that the appeal process occurred during the pre-trial proceedings and not during the trial itself. In that way, the jury did not experience the frustration and disruption of an interrupted hearing.

On the issue of delay, I gave a decision on 7 February 2006. This decision upheld the constitutional validity of the legislation and, in so doing, it addressed the issue of delay. If I may be permitted to refer to my own remarks, I said during the course of my reasons: -

“But even if the worst possible scenario were to develop and there were appeals under these sections as well as a merit appeal under s 37, there is no reason to suppose that these matters could not be dealt with expeditiously. In a worst case scenario, again, the Court would retain the right to bring the trial to an end either by discharge or, in the case of vexation or abuse of process by way of a stay.

Delays are not uncommon during a criminal trial. Experienced judges are generally able to explain the situation; to explain the reasons for the delay and to ask for the jury’s indulgence if delay occurs. It is also the function of the judge in such a situation to make it clear to the jury, if it is appropriate, that the delays are not the fault of the accused nor of the prosecution. The experience of the Court is that juries are understanding of such delays and do not allow properly explained interruptions to the trial process to divert them from their important task.

The critical point, however, is that the Court, even in the worst case situation I have outlined, would still retain control over the trial so as to be able to ensure that the accused was not tried unfairly (Dietrich (1992) 177 CLR 299). I am unable to accept the suggested dichotomy inherent in the submission for the media interests that the so called right to bring a trial to an orderly conclusion

is frustrated and not met, for example, where a stay order is made. In this regard, the presence of s 19 in the legislation is very important both in its general application and in particular its application to orders made during a s 31 hearing. The core function of a court in criminal trials is to establish guilt or innocence but the public interest may be met in an extreme case by a stay order.

In my view, adopting the test stated by Gummow J in **Nicholas v The Queen** at (145) the system of mandatory adjournments contemplated by the Act does not amount to such an interference with the governance of the trial, nor a distortion of its predominant characteristics, so as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth. There is plainly a potential for a degree of disruption. The discretion of the Court has been displaced to the extent that adjournments must be granted in the stipulated circumstances, should they arise, but overall, in my opinion, the level of disruption is not so great as to render the legislation unconstitutional.”

Finally, notwithstanding that I thought that the legislation was valid, there is plainly a highly respectable school of thought that thinks otherwise. For example, in a recent paper, the Honourable Michael McHugh QC thought that there was a forceful argument to suggest that the **National Security Act** was unconstitutional, although as he kindly remarked, it appeared that the more powerful arguments in favour of invalidity had not been presented before me. Mr McHugh thought that a number of features of the legislation combined to make a strong case that it might properly be seen as an attempt by Parliament to usurp the judicial power of the Commonwealth. I am sure we have not heard the last of this contention.

Areas of potential unfairness for an accused in a terrorism trial

The barriers to disclosure in the **National Security Act** will not necessarily pose an unfairness problem for an accused person if those issues can be clarified and resolved during pre-trial session. There is another problem, however, arising from the way in which the legislation requires the Court’s discretion to be weighted. This

emerges from s 31(7) and (8) which I have set out earlier in this paper. On its face, the question as to whether there is a risk of prejudice to national security can plainly trump the defendant's right to receive a fair hearing, including, in particular, on the conduct of his or her defence. This is because the statute requires that "greatest weight" be given to the question as to whether there would be a risk of prejudice to national security if the information were disclosed in contravention of the Certificate, or the witness were to be called. For my part, however, I do not think that the statutory weighting of the discretion in this way necessarily works to the disadvantage of the accused. There are two reasons for this. First, the object of the Act, (s 3(1)), is to prevent the disclosure of information where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. It is not difficult to prove in a particular case that, where a refusal to make a disclosure would have a substantial adverse effect on the defendant's right to receive a fair hearing, this may be sufficient to "seriously interfere with the administration of justice". Secondly, where disclosure is not made, the Court maintains the capacity, in an appropriate case, to stay the proceedings (s 19).

Special Counsel

Before leaving the issue of disclosure under the **National Security Act**, I should refer to one other matter: there is a capacity under the legislation for part of the argument addressed in a Closed Court hearing to be taken in the absence of the defendant or his or her non-security cleared legal representative (s 29). There is also the capacity, as occurs in ordinary public interest immunity claims, for affidavit material to be received from the Director of Security on a confidential basis. In either situation, the Court and the defendant may well be assisted by the appointment of special counsel.

In **Lodhi** [2006] NSWSC 586, I addressed the possibility of the appointment of special counsel to represent the interests of the defendant and to assist the Court in the area of national security claims. I traced the development of the practice of the appointment of special counsel in the United Kingdom (see paras 13-16). In particular, I was satisfied that the provisions of the legislation did not prohibit the

appointment of special counsel during, or for the purposes of, a hearing under sub-ss 25(3), s 27(3) or 28(3). I was satisfied that the language of s 29(2) was sufficiently wide to allow a person appointed as special counsel to take part in a s 31 hearing.

The appointment of special counsel in Australia is a novel concept. So far as I am aware, special counsel has not been appointed in Australia, either within or outside the confines of the **National Security Act**. Although the utility of the appointment of special counsel has been doubted (see Sir Anthony Mason in a paper given in Brisbane to the ISRCL “**Justice for All**” 2 July 2006), I consider that it could be a useful weapon in the armoury of a trial judge in a situation where there is a clash between a national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case. The problem is that defence counsel may not be entitled to look at the document, which is the subject of the national security claim. Special counsel, on the other hand, will be entitled to do so. One reason will be because he or she has a security clearance. In addition, special counsel will understand the nature of the defence case but will not have had any direct contact with the accused himself. This means that submissions, helpful to the defendant and of assistance to the trial judge, will be forthcoming to counter the arguments advanced on behalf of the Commonwealth.

For a broad discussion relating to the issue of the appointment of special counsel in the United Kingdom, see **R v H; R v C** (2004) 2 AC 134 at 150-151 per Lord Bingham and the remarks of Lord Woolf CJ in **M v Secretary of State** (2004) 2 All ER 863 at 868. It is, however, worthwhile recalling the cautionary words of Lord Bingham in **R v H; R v C** at para 22: -

“None of these problems should deter the Court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant”.

Protective Orders

I leave now the issue of disclosure and turn to the important issue of the making of protective orders. This issue raises the indirect effect of “disclosure” under the **National Security Act**. If disclosure is to be made or a witness called, there may arise a need to impose protective orders. For practical purposes, I will consider the following types of order – pseudonym orders; closed court and suppression of publication orders; and screening orders. There are others, of course, but time will defeat me if I try to cover the entire field.

(a) **Pseudonym**

In New South Wales, there has been recognition and acceptance for a considerable time of the making of orders in an appropriate case for the use of pseudonyms or ciphers (**Regina v C A L** (unreported decision of NSWCCA 18 February 1993). In addition, there is a need, on occasions, to consider making an ancillary order relating to the non-publication of details of the appearance of a witness (**Witness v Marsden** [2000] 49 NSWLR 429 at 464). In that case, an order was made in the following terms; -

“Any matter which is likely to lead to the identification of the witness is not to be reported by those in court”.

An example of the situation where the use of a pseudonym might be necessary is the taking of evidence from an ASIO witness or a police informant.

(b) **Court Closure and Non-publication of evidence orders**

The prospect of an order of this kind raises particular problems. May I give a hypothetical example: let it be assumed that the Australian Intelligence Agency has interviewed a witness and obtained information in circumstances where some degree of confidentiality has been promised. The prosecution proposes to call the witness to give the evidence that was communicated to the intelligence officer. Should the Court be closed while the witness gives his or her evidence? Should

there be a non-publication order relating to the evidence taken during the closed court session? Consider another example: one where the ASIO agent must himself or herself give evidence. An unwitting question might inadvertently disclose extremely sensitive material. There is also a need to protect the identity of the witness.

There are two statutory sources of power available. The first is s 85B of the **Crimes Act 1914 (Cth)**. The second source of power is s 93.2 of the **Criminal Code Act 1995**. The first section enables the Court to make protective orders if satisfied “that such a course is expedient in the interests of the defence of the Commonwealth”. The second operates if the Court is satisfied that “it is in the interests of the security or defence of the Commonwealth”.

Neither section mentions the principles of open justice. The content and scope of those principles are, and remain, one of the most fundamental aspects of the system of justice in Australia. The content and scope of open justice principles at Common Law have been the subject of determination by the New South Wales Court of Appeal in a number of decisions over the last 20 years. One of the most recent is the decision of the Court in **John Fairfax Publications Pty Limited & Anor v District Court of New South Wales & Ors** [2004] 61 NSWLR 344. The principles to be derived from the decision will be found in the judgment of Spigelman CJ with whom Handley JA and M. W. Campbell AJA agreed. (See also the extra judicial commentary by Spigelman CJ “**The Principle of Open Justice**” an address to the **Media Law Resource Centre Conference London, 20 September 2005**) (www.lawlink.nsw.gov.au/sc). Those principles may be summarised as follows:

1. Open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public is an essential quality of an Australian court of justice.
2. Where a Court has an inherent or statutory jurisdiction to make a non-publication order, a test of necessity is ordinarily applied to the exercise of the power to make such an order. A court can only depart from the fundamental rule that the administration of justice must take place in open court where

observance of the rule would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. An order of the court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in the proceedings before it.

3. An order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice or the protection of the relevant public interest.

4. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication (see **John Fairfax & Sons Pty Limited v Police Tribunal of New South Wales** (1986) 5 NSWLR 465; **Attorney-General (NSW) v Mayas Pty Limited** (1988) 14 NSWLR 342).

5. It is well established that the exceptions to the principle of open justice are few and strictly defined (see for example, **McPherson v McPherson** (1936) AC 177 at 200; **R v Tate** (1979) 46 FLR 386 at 402). It is now accepted that the courts will not add to the list of exceptions but, parliament may do so, subject to any Constitutional constraints.

In **Lodhi** [2006] NSWSC 596 I determined that orders of the kind under discussion here should be made. That decision was confirmed by the Court of Criminal Appeal (see **Lodhi v Regina** [2006] NSWCCA 101 per McLellan CJ at CL with whom Spigelman CJ and Sully J agreed).

In **Lodhi**, there were, however, two important qualifying considerations, it seemed to me, arising out of the protective orders to be made. First, there was the need to respect the principles of open justice so as to respect the right of the media to report matters occurring in a closed court and the public's right, as a consequence, to receive reasonably prompt notification of the evidence taken during the closed court hearing. The second qualifying consideration related to the obvious potential for

prejudice to the accused because of the closure of the court in the jury's presence and because of the making of a non-publication order in the same situation.

As to the first, I directed that, once a transcript had been scrutinised, it should, subject to any necessary editing arising from considerations of national security matters, be published. In that way, the media interests and the public would know precisely what it is that has happened in Court, subject only to the deletion of clearly sensitive material. And they will know these things very promptly after the evidence has been given. As to the second matter, I took the view – others may disagree – that the jury, properly instructed and directed, would approach their important task precisely in accordance with the oath or affirmation they had taken. In my experience, juries usually understand and respect the directions they are given. This extends to general directions to avoid particular areas of bias and to approach the evidence in the trial in a manner that is free from prejudice. In the same way, I considered that careful and appropriate directions could be crafted in relation to the imposition of protective orders and that they would be respected and taken into account by the jury. I attach as Appendix “B” to this paper an example of two directions that were ultimately given.

Before leaving this topic, I should say that I recognise and respect that other trial judges may legitimately take a robustly different view than the one I did in relation to closure of court orders and non-publication orders. It is, I think, fair to recognise that, in trials of this nature, it is by no means easy for an accused person to receive a fair trial. This is particularly so in light of the attention paid by the media and politicians to divisions within the community regarding people of the Muslim faith. It seemed to me, however, that the scope of the statutory power to make the relevant orders, considered in the light of the application of the principles of open justice required, in the particular circumstances, the making of the protective orders, subject only to the qualifications I have here mentioned.

Screening Orders

This is an area that requires particularly sensitive and careful attention. The screening orders sought related to certain individual ASIO witnesses identified

confidentially. The proposal was that protection be made for the evidence they would give both pre-trial and at trial. The Attorney-General sought an order that those particular witnesses give evidence in such a way that their appearances be screened from persons other than: -

- (i) The Judge and Judge's Associate
- (ii) The jury (during trial)
- (iii) Legal representatives of the defendant; and
- (iv) Prosecution legal representatives
- (v) Court Reporters and Court Officers

These orders were sought on the basis of the Court's inherent jurisdiction. No statutory power was called in aid. The basis of the application, publicly identified, was that the witnesses were ASIO personnel who were then presently involved in operational duties or who might be so in the future. There was confidential evidence to justify the proposition that screening orders should be made and that such orders were necessary for the purposes of national security. It was openly asserted that, unless a screening order were made, the accused would be able to identify ASIO witnesses presently involved in operational duties or likely to be so involved at a future time.

It is very clear that a trial judge, who is confronted with an application for orders of this kind, has a difficult decision to make. Arguably, the orders involve an area of special prejudice to the accused. It would, for example, be apparent to the jury that the only person in the courtroom who was being screened from the witness was the accused himself. No matter the nature of the directions given, this perception might lead inevitably to the conclusion, in the minds of the jury, that the accused was a dangerous person and therefore likely to be guilty as charged.

In Lodhi, screening orders were made for the purposes of pre-trial proceedings. Having observed the screening process in practice, it became quite apparent to me that it would be entirely inappropriate to make such an order in the trial itself. I was content to admit I had been wrong in the initial conclusion I reached. Consequently, a stratagem was devised, with the consent of the parties, that overcame the

problem. Emboldened by the decision of the Court of Criminal Appeal in **R v Ngo** [2003] 57 NSWLR 555, I decided to use a different methodology altogether.

In **Ngo's** case, the accused, a successful Vietnamese businessman and local identity, had been charged with the murder of a politician, John Newman. During the course of the trial, the trial judge authorised the giving of evidence of two witnesses by way of an audio-visual link. Each witness had expressed fear at giving evidence in front of the accused. While the jury, presiding Judge, counsel and court officers could hear and see the witnesses on the video screen, the accused was not permitted to see the witnesses. In order to overcome any prejudicial inference that might be drawn against the accused, a non-operating monitor was placed in front of him. This gave the jury the impression that the accused was looking at the same material as they were. The trial judge (Dunford J) concluded that it was in the interests of the administration of justice to make the order. His Honour specifically took into account a particular objection raised by the accused, namely that he would not have the opportunity to properly contest the evidence of the witness because he would not have the opportunity of personally seeing them and identifying them. This, however, did not outweigh the Judge's view that the video link application should be granted as well as the screening application.

In the **Lodhi** trial, the accused had a television monitor placed in front of the dock. There were also television monitors placed at the front of the jury box. In addition, there was a larger wall screen situated behind the dock area which the jury, and other people in the court, could observe as well. Counsel and the trial judge also had individual television monitors. The relevant witnesses gave evidence from a remote location. Their visual appearances were displayed on the monitor screens, with the exception of the screen placed in front of the accused.

As I have said, this proposal was one that was implemented by consent. It did away with the physical screen which had been placed in front of the accused during pre-trial. It became very apparent to me that the process of physically screening an accused from the presence of a witness had a high capacity to implant prejudice in the minds of the jurors. The fact that orders of this kind were sought at all highlights the tremendous clash existing between the need to protect national security matters

and the rights of an accused to a fair trial. The resolution of the conflict between these notions presents challenges of the highest order for a trial judge.

Miscellaneous Matters

There are two final matters I would like to mention. The first relates to applications for evidence to be taken by way of audio-visual link (“AVL”). The second relates to the structure of a prison sentence if an accused person is convicted of a serious terrorism offence.

Application for AVL

There is now a specific section of the **Crimes Act 1914 (Cth)** dealing with applications for video-link evidence in proceedings for terrorism and related offences. It is s 15YV. The section is in the following terms: -

“15YV (1) *Application by prosecutor*

In a proceeding, the court must:

- (a) direct; or
- (b) by order, allow;

a witness to give evidence by video link if:

- (c) both:
 - (i) the prosecutor applies for the direction or order; and
 - (ii) the court is satisfied that the prosecutor gave the court reasonable notice of his or her intention to make the application; and
- (d) the witness is not a defendant in the proceeding; and

- (e) the witness is available, or will reasonably be available, to give evidence by video link; and
- (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that giving the direction or making the order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

Application by defendant

(2) In a proceeding, the court must:

- (a) direct; or
- (b) by order, allow;

a witness to give evidence by video link if:

- (c) both:
 - (i) a defendant in the proceeding applies for the direction or order; and
 - (ii) the court is satisfied that the defendant gave the court reasonable notice of his or her intention to make the application; and
- (d) the witness is not a defendant in the proceeding; and
- (e) the witness is available, or will reasonably be available, to give evidence by video link; and
- (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link.

Definition

(3) In this section:

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.”

This new part of the **Crimes Act 1914** came into force in November 2005. It applies to any proceeding for an offence against Part 5.3 of the **Criminal Code** (s 15YU). The legislation gives the Court power in making a direction or order under the section to require, when the witness is giving evidence by video-link, that there be physically present at the place where evidence is given a person specified in the direction or order who may act as an observer. Such an observer may, if directed, give the Court a report concerning the person's observations in relation to the giving of evidence by the witness. The Court may make use of the report in determining whether evidence by the witness should or should not be admitted as evidence in the proceedings (s 15YW).

Section 15YY provides that a witness can give evidence under a s 15YV direction or order only if the courtroom or other place where the court is sitting (the courtroom point) and the place where the evidence is to be given (the witness point) are equipped with video facilities. These must be such as to enable appropriate persons of the courtroom point to see and hear the witness giving the evidence; and enable appropriate persons at the witness point to see and hear appropriate persons at the courtroom point. The court determines who are, in each case, appropriate persons.

Section 15YZA provides that a person who gives evidence under a s 15YV direction or order is taken to give it at the courtroom or other place where the Court is sitting. This sub-section has effect for the purposes of laws relating to evidence, procedure, contempt of court and perjury. Section 15YZB enables an oath or affirmation to be sworn or made by a witness who is to give evidence under a s 15YV direction or order. This may be administered either by means of the video link in as nearly as practicable the same way as if the witness were to give evidence at the courtroom or other place where the court is sitting. Alternatively, an oath or affirmation may be administered on behalf of the court and as directed by it at the place where the witness is to give the evidence. This will be done by a person authorised by the Court.

Section 15YZD gives a right of appeal where the Court gives a direction or makes an order or where it refuses to do so. Section 15YX requires that there be an

adjournment after a s 15YB direction or order or after the refusal to give a direction or make an order.

The prevailing view, at least in New South Wales, is that the taking of evidence by way of video-link facilities in an appropriate case is a satisfactory method of adducing evidence. This is so, not only in civil proceedings but in criminal proceedings as well (**R v Wilkie & Ors** [2005] NSWSC 794 per Howie J; **Shayan Badraie** NSWSC per Johnson J 6 December 2005; see also the views of Austin J in **ASIC v Rich & Ors** [2204] 49 ASCR 578 at [17-18]). These were cases brought under the New South Wales legislation enabling the taking of evidence by way of AVL. There is no reason to suppose that, in the case of the Commonwealth legislation, any different view would be taken.

In **Lodhi**, over defence opposition, I ordered that the evidence of three American witnesses be given by way of AVL. (**R v Lodhi** [2006] NSWSC 587. In so doing I considered, in an extensive decision, a number of Australian and United Kingdom authorities dealing with the concept of “a fair trial”. These authorities demonstrated that a court, in determining whether a particular procedure would put at risk a fair trial, is required, having regard to the particular circumstances, to consider and balance competing interests. It is only when this has been done that the court may properly determine the relevant application before it.

It was my view that there was a clear legislative intention in the relevant sections of the **Crimes Act 1914** that orders of directions should be made to allow the taking of evidence by video-link, if it were otherwise an appropriate discretionary exercise to do so, quite apart from considerations of convenience, cost and the like. Such matters might be relevant but they would not generally be determinative of issues posed by the legislation. I also concluded that the physical absence of the witnesses from the courtroom would not, in the circumstances, lead to unfairness. Once again, I accept that there might legitimately be a different approach on this issue. It seemed to me, however, that the demeanour of a witness could be assessed satisfactorily by the use of AVL facilities. For example, in New South Wales, juries are required to assess the evidence of complainants in child sexual assault cases where evidence has been given by way of AVL (see also the observations of Howie

J in **Wilkie & Ors** at para 31. His Honour mentioned the range of improvements in receiving visual and audio transmissions brought about by modern technology).

Sentencing discretion – statutory non-parole period

This is a matter that only arises after conviction. I thought I should draw it to your attention because, in the **Lodhi** trial, the Crown itself was not aware of the statutory provisions, necessitating the unexpected adjournment of the sentencing hearing.

Section 19AB of the **Crimes Act 1914 (Cth)** enables the Court, in the case of several offences, to fix a single non-parole period. The purpose of the non-parole period is to provide a mitigation of the punishment of the offender in favour of rehabilitation through conditional freedom. The non-parole period, however, must incorporate all the relevant sentencing principles including denunciation and deterrence. Prior to the enactment of s 19AG of the **Crimes Act 1914 (Cth)** – see Item 1B of Schedule 1 of the **Anti-Terrorism Act 2004** – the normal range for a non-parole period was between 60-66 per cent of the total sentence (**R v Bernier** (1998) 102 A Crim R 44), although a higher non-parole period, up to 75 per cent in the most serious situations, might be justified. The new legislation specifically applies to terrorism offences. It makes it obligatory now for the Court to fix the non-parole period at a percentage of “at least 3/4 of the sentence”. Where two or more sentences have been imposed on a person, the relevant percentage must relate to the aggregate of those sentences.

It will be seen that the section does not rob the Court entirely of discretion. But the discretion now moves upwards between $\frac{3}{4}$ of the sentence and 100%. This represents a very significant alteration of the previous situation against a person who has been convicted of a terrorism offence. One puts into the balance the fact that bail may be granted to a person accused of a terrorism offence only in exceptional circumstances; and the fact, at least in New South Wales, that a new prison classification has been created for persons both accused of, and convicted of, terrorism offences. The classification carries with it conditions that are not much better than to those we see depicted on the screen in images of Guantanamo Bay.

As trial judges, we have to respect the legislation that comes into existence from time to time relating to terrorism offences, even if we find it personally distasteful. But the very nature of the legislation to which I have referred may tend to reinforce the potential in the public mind for prejudice animosity and bias.

Conclusion

The National Affairs Editor of the Australian, in an article published on 26 October 2006, pointed out that, including the September 11 attacks, Americans who have lost their lives to terrorism since the late 1960's, total about the same as Americans killed by lightning, accident-causing deer or allergic reaction to peanuts. The writer wryly observed that, with about forty thousand fatal car accidents a year in the U.S., research in 2003 suggested that airlines crashes on the scale of September 11 would have to occur once a month to make flying as dangerous as driving a car. The author, however, concluded that none of this alleviated the deep and abiding fear in the U.S.A. relating to the threat of terrorist attacks.

In our country, we must take the potential for terrorist attacks seriously as well. As a Nation, we have suffered in recent times the horrors of the Port Arthur massacre. And not so many years ago, there was the spectre of terrorism involved in the Hilton bombing in Sydney. There is no doubt that we will see increasing emphasis on the investigation and prosecution of terrorism related trials.

It is interesting to note that the number of ASIO staff has now increased to well over 1100 in the three year period to 2006. The budget of the agency has gone from \$75 million to about \$233 million. The figures I have quickly researched would seem to indicate that only one Australian was killed in the London bombing, four in the second Bali bombing and one in Iraq. At the same time, Federal Parliament has passed 37 laws dealing with terrorism during the past five years. There is no doubt that the legislature passed these laws in the hope that they will help protect the community and frustrate the reality of a terrorist attack in this country.

As I have endeavoured to show in this paper, there will be a mounting pressure on trial judges (and the appellate courts for that matter) to maintain the reality of a fair trial for persons accused of terrorism offences. To my mind prejudice, delay and secrecy are the principal problems confronting a trial judge in these matters. I have endeavoured to argue in this paper that appropriate directions to jurors should mitigate and diminish the problem of bias and prejudice. Secondly, that sensible co-operation between counsel, and the use of appropriate pre-trial procedures, should reduce the problem of delay significantly. In the third area, that of secrecy, I can offer no magic solution. There is likely to be an increasing presence of ASIO agents in relation to the collection of evidence to be used in criminal trials involving terrorism. Yet our intelligence agency, for all its skill in intelligence gathering, is perhaps not well equipped to gather evidence for a criminal trial; and its individual agents are not well tutored in the intricacies of the criminal law relating to procedure and evidence. Moreover, the increasing presence of our intelligence agency in the investigating and trial processes brings with it an ever increasing appearance of secrecy which, if not suitably contained, may substantially entrench upon the principles of open justice and significantly dislocate the appearance and the reality of a fair trial.

APPENDIX "A"

The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials

Justice Whealy - Supreme and Federal Court Conference 2007

HIS HONOUR: Members of the jury panel, the process of selection of the jury will commence shortly. Before that happens, however, it is my task to direct the prosecutor to inform you of certain matters relating to the trial. These include the nature of the charge, the identity of the accused, the identity of the principal witnesses who will be called on behalf of the prosecution.

When that is done, my further task is to call on you, as the panel members for the jury, and to ask whether any of you wish to be excused, on the basis that you may consider that you are not able to give impartial consideration to the case.

As you would expect, it is a matter of fairness, commonsense and justice that the 12 members of the panel who are ultimately selected to be the jury in a criminal trial, and in particular this criminal trial, must be persons who consider that they are capable of giving completely impartial consideration to the trial and to the issues that will arise in it. That is the reason I will be directing the prosecutor to inform you of the nature of the case and to identify the names of witnesses who are to be called.

For example, it might turn out that you know one of the witnesses well. It might turn out that you have worked with one of the witnesses. Or that a member of your family knows one of the witnesses, or has worked with one of the witnesses.

Whatever be the situation, it will be necessary for you to let me know if you feel that your acquaintance with a witness, for example, might prevent you from giving impartial consideration to the issues in the trial. If that were so, you would be entitled

to ask to be excused from the jury panel on that basis, and I would have to make a decision whether I should excuse you or not.

This is a very important part of the process that takes place before the selection of a jury commences. Sometimes it happens, and this has been my experience in a number of trials, that a jury of 12 is selected and, on the following day, or a few days after the trial has been running, one of the jurors comes forward to say: I did not realise that X was going to be a witness in the case, and I am now embarrassed about that situation.

The unfortunate consequence, if that were to happen, members of the jury panel, is that the jury might have to be discharged and the whole process of selection would have to be gone through again. So, for that reason, it is very important that you each give very careful consideration as to whether you are able to give impartial consideration to the trial and to the issues that will arise in the trial.

You have heard the charges brought against the accused that have been read out to you. They were contained in a document which is known, in the law, as the indictment. There are four charges. They were quite lengthy. I will not repeat them in detail again here. However, in shorthand fashion, the accused is charged with the following offences.

First, he is charged that, on 3 October 2003, he collected documents, namely two maps of the Australian electricity supply system, which were connected with the preparation for a terrorist act, namely causing serious damage to the electricity supply system, or part thereof, by the detonation of an explosive or incendiary device or devices, knowing the said connection.

Secondly, he is charged that, on or about 10 October 2003, he did an act in preparation for a terrorist act. The allegation is that he did an act, namely seeking information concerning the availability of materials capable of being used for the manufacture of explosive or incendiary devices in preparation for a terrorist act, and that he did so intentionally.

Thirdly, the accused is charged that, on or about 24 October 2003, he made documents, namely a set of aerial photographs of certain Australian defence establishments, which were connected with preparation for a terrorist act, namely the causing of serious damage to one or other of the establishments by detonation of an explosive or incendiary device or devices, knowing the said connection.

Finally, the fourth charge. On or about 26 October 2003, the accused is charged that he possessed a document containing information concerning the ingredients for and the method of manufacture of poisons, explosives, detonators and incendiary devices, and concerning intelligence connected with preparation for a terrorist act, namely an action or threat of action involving the detonation of an explosive or incendiary device or devices or the use of a poison or poisons, knowing the said connection.

It is important, members of the jury panel, for me to remind you that the accused has pleaded not guilty to all these charges. This means that he has, in his favour, the presumption of innocence, and it will be necessary, in those circumstances, for the Crown to prove that he is guilty of these offences, and to prove that beyond reasonable doubt.

The accused here is entitled to expect that the jury to be selected in this trial will approach the issues relating to these charges bearing in mind the presumption of innocence he has in his favour and the onus that is placed on the Crown to prove each of the charges beyond reasonable doubt. For that reason, the accused is entitled to expect the jury that is to try him will so do with a collective mind that is impartial and free from prejudgment, bias or prejudice.

For that reason, members of the jury, I would ask you to consider very carefully whether, if you were selected, you would be able to approach the particular issues that arise in this trial impartially and without prejudice of any kind.

You are to be, if selected, the judges of fact in this trial, and judges throughout the world, and in this country particularly, are required to act impartially and without prejudice of any kind.

I would ask you, therefore, each of you, to examine your own conscience in determining whether or not you are able to act impartially. If, when you have done so, you consider that, for any reason at all, you may not be able to approach the issues in this trial impartially, it will be your duty to come forward, on an individual basis, and ask to be excused.

May I say this to you: Please do not be embarrassed or feel awkward or shy or reluctant about making an application to be excused, if you feel that you should do so. It is far better that we sort out any problems in that regard at this stage, rather than after the selection of the jury and the commencement of the trial.

I will do my best to deal with any applications to be excused sympathetically, and I will do so on a confidential basis, if necessary. In a practical sense, all you have to do is put up your hand. You will be asked to come forward and speak to me from the witness box. As I say, that can be done confidentially, if you wish, but you should not, in any way, feel awkward or hesitant about coming forward and making such an application.

I will now call on the Crown to tell you something of the nature of the case and of the principal witnesses to be called.

APPENDIX "B"

Example 1

HIS HONOUR: Thanks, members of the jury. Sorry to keep you waiting. We were just have a few technical problems.

The first two witnesses that are to be called are witnesses who are ASIO officers. That is, they work with the Australian Security Intelligence Organisation.

By the nature of the work they do, and the statutory requirements under which they are employed, their identification is not to be disclosed in any way. With that in mind, I have made an order that their evidence be given in Closed Court, although, in due course, in an edited form, the transcript will be available to the media. The unedited transcript will be available to you, or if you need to have any of it read to you.

That is why I have done ordered the court to be closed; simply because of the operation of the law. I want to make it clear that it has nothing to do with the accused at all. It is not about the accused at all. It is simply to do with compliance with the legislation under which ASIO officers are employed.

For further protection of those witnesses, I have also ordered that they give their evidence by way of video link, so that you will be able to see them on the screen. One of the reasons for that is a practical reason. You will probably notice that there are a great number of media people outside the courtroom with cameras, so it makes a bit of a mockery about having their evidence in Closed Court if they are photographed going in and out of the courtroom. For that reason, and that reason alone, I have made an order that their evidence be given by video system. That is why you have been delayed; because we have been having something of a technical problem with the equipment.

Example 2

HIS HONOUR: Members of the jury, before Mr Crown continues with his questions, I should indicate to you that the Court is being closed for reasons similar to those that I mentioned to you yesterday.

The evidence you will now hear relates, in part, to ASIO's dealings with an overseas security organisation, and also ASIO's dealings with the witness to be called.

Again, the need to keep secure the dealings of our national security organisation arises from the legislation and the nature of the organisation itself.

In those circumstances, it seemed to me that the Court should make a Closed Court order whilst the material is being revealed to you, the jury.

Once again, this order has nothing to do with the accused. You should not draw any inference against the accused in any way whatsoever because the evidence is being given in Closed Court.

Once again, may I make the same point that I made to you yesterday. This evidence is being given by video link but, again, while you are listening to the witness' evidence, you should not give the evidence any greater or lesser weight because it is being given by audio visual link than if it had been given in the normal way.

Instructing a jury in complex commercial trials – The position in England and its significance in an Australian context

Justice Whealy

The Fraud Trials Committee

The use of juries in complex fraud trials has been an issue that has attracted quite a lot of attention in England since at least 1986. In that year, the Fraud Trials Committee (chaired by Lord Roskill) handed down a Report which recommended the abandonment of jury trials in complex fraud cases. The Committee proposed a specialist tribunal (the “Fraud Trials Tribunal” or FTT) which would consist of a judge and two expert members who would be required to have substantial knowledge of commercial matters. The judge would decide all questions of law, and, along with the two lay members, would have a vote in relation to questions of fact. In respect of factual issues, the judge could be outvoted. Cases would be referred to the FTT by a High Court judge if, on the application of either of the parties, the judge was satisfied that the case was a “complex fraud case” as defined by a flexible set of Guidelines.

The Committee did not make this recommendation lightly. In the Report the Committee analysed in detail both the general and specific arguments in favour of retention of jury trial in complex cases. Four arguments in particular were identified:

“The first is that jury trial has the unique advantage of delivering verdicts in which the public at large has confidence, because members of the public, as distinct from persons in authority, are involved in delivering them. The second is that the public regards the jury as the citizen’s ultimate protection against unjust or oppressive laws. The third argument is that to provide an alternative to jury trial for complex fraud cases would create an undesirable precedent for such other crimes as murder, robbery or rape – the ‘thin edge of the wedge’ argument. The fourth was that, in fraud cases, the main question is that of

honesty and that a random jury do not have difficulty in reaching a verdict on this issue.”¹

Recognising these cogent propositions, and cognisant of the historical importance of juries in English law, the Committee nevertheless felt that the disadvantages of jury trial outweighed the advantages in this type of case. The Committee cited many problems with the existing system. Amongst other things, it was noted that:

- jury trial was a deterrent to prosecutors, who, despairing of a jury’s capacity to understand complex transactions, might elect to proceed with less serious charges than were warranted, or might even decide not to prosecute at all;²
- the existence of a plethora of specialist tribunals, and the fact that the bulk of criminal matters were dealt with by magistrates sitting alone, indicated that jury trial was not sacrosanct and that in other contexts society had accepted that verdicts are best delivered by persons with appropriate training, knowledge, experience, integrity or “a combination of these four qualifications;”³
- the nature of modern transactions and financial markets meant that in some cases even a trained business mind would have difficulty coming to an informed conclusion as to an accused’s guilt;⁴
- there is a real danger that a jury’s verdict would be dictated by the opinion of the minority of jurors who comprehend the evidence (or who think that they do), or that the verdict would be based on vague impressions rather than on the actual evidence (i.e. on a feeling that where there’s smoke, there’s fire);⁵
- the necessity to explain complex matters to a jury contributes to the inordinate length of complex trials.⁶

¹ Fraud Trials Committee, *Report*, Her Majesty’s Stationery Office, London, 1986, p. 135

² *Ibid*, p. 136.

³ *Ibid*, p. 139.

⁴ *Ibid*, p. 140.

⁵ *Ibid*, pp. 141-142.

⁶ *Ibid*, p. 141.

The Committee was not unanimous in its recommendations. Although he concurred with the majority on most issues, in a Note of Dissent Mr Merricks argued that jury trial should be retained. Mr Merricks said that:

“Amongst the judges and lawyers who gave evidence, none suggested that they had regularly come across cases in which the verdicts returned by juries in fraud cases indicated that they had not understood the evidence. On the contrary many spoke of the dedication and application jurors brought to their unfamiliar task, and how their verdicts often reflected an apparently sophisticated evaluation of the charges and the evidence combined in a common sense result.”⁷

The gist of Mr Merricks’ dissent was that the jury was fundamental to a trial for any serious offence and that as such fraud trials should be distinguished from summary trials and the sorts of matters that were tried before specialist tribunals.⁸ Jury trial required the prosecution to put its case in terms that were publicly comprehensible, which was consistent with the principles of open justice.⁹ Mr Merricks further argued that the system of trial by jury should not be abandoned but on the strongest of proofs, including unambiguous empirical evidence. It must be “demonstrated not only that jury trial has broken down in serious fraud cases, but also that all possible procedural improvements have been considered and found inadequate.”¹⁰

The English Experience

Today the debate still revolves around the same issues that were identified in the Report, which is the starting point for most academic discussion in this area of the law. Ultimately the English government did not abandon jury trial in complex cases, preferring instead to take the approach suggested by Mr Merricks. The majority of the procedural recommendations contained in the report were enacted in modified

⁷ Ibid, p. 193.

⁸ Ibid, p. 194.

⁹ Ibid, pp. 195-196.

¹⁰ Ibid, p. 193.

form in the *Criminal Justice Act 1987* and the *Criminal Justice Act 1988*.¹¹ Writing in 1992, Mark Weinberg QC, a former Commonwealth Director of Public Prosecutions, described the legislation's three most salient features as follows:

“(a) it permits the prosecution to by-pass committal hearings and to transfer a prosecution directly to the trial court;

(b) it provides for a new mechanism, known as a preparatory hearing, to be utilised, and introduces into the criminal process something akin to a system of pleadings;

(c) it simplifies proof of documentary hearsay, avoiding the need to call witnesses to prove formal matters not seriously in dispute.”¹²

In addition, the legislation provided for the establishment of the Serious Fraud Office to both investigate and prosecute serious frauds, and s 31 of the 1988 Act allowed provision to be made in the Crown Court Rules for the furnishing of glossaries of technical terms.

Notwithstanding these changes to the law, the abolition of trial by jury in complex cases has remained a live issue. To a large extent, this is because the Roskill reforms did not prove as effective it was hoped they would be.¹³ Indeed, “some would say that, if anything, the new procedure...produced even longer and more complex trials.”¹⁴ This assertion should not be accepted uncritically, but some of the earliest cases that came on under the 1987 and 1988 legislation provide some support for it. The *Guinness* trials are often cited as an example of the failure of the reforms to live up to their promise. Rozenes writes that:

¹¹ G. Scanlan, “The Trial of Serious and Complex Frauds: Further Reforms” (2002) 23 (11) *Company Lawyer* 328 at 329.

¹² Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 155.

¹³ G. Scanlan, “The Trial of Serious and Complex Frauds: Further Reforms” (2002) 23 (11) *Company Lawyer* 328 at 332.

¹⁴ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 159.

“Despite the optimism with which the Criminal Justice Act was received in the UK, it would seem the new procedures have not led to shorter or less expensive trials overall. While that part of the trial after the jury has been empanelled may be a little shorter and less prone to interruption, UK experience would suggest that any savings gained may be lost by a protracted preparatory hearing. In the Guinness case, for example, the preparatory hearing for the first trial occupied 52 sitting days spread over some 13 months.”¹⁵

At the time, the first *Guinness* trial was the longest criminal trial in English history.¹⁶ The second *Guinness* trial was even more of a disaster. The jury was discharged after 68 days, by which stage only 10 of an expected 80 witnesses had given evidence.¹⁷ Beside the leviathan of the *Blue Arrow* trial, however, the *Guinness* trials pale in comparison. It has been said that:

“It is a mark of just how far *Blue Arrow* [had] blown out that the [first] *Guinness* trial, which had previously held the record in England, ran for only 107 sitting days. One is tempted to say that, by comparison with *Blue Arrow*, *Guinness* was only small beer.”¹⁸

The *Blue Arrow* trial, which was conducted over 15 years ago, cost £35 million and lasted over a year. Mr Justice McKinnon, who presided at the trial, said that “all involved in this case have been called upon to endure more than anyone should be required to cope with: defendants and their families, jurors and me.”¹⁹ Although four of the five defendants were convicted, the decision was overturned on appeal due to the trial judge’s failure to sever excess counts from the indictment until far too late in the trial, which contributed to the result that “the jury retired with 956 pages of

¹⁵ M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993

¹⁶ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 157.

¹⁷ G. F. K. Santow, “The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context” (1993) 67 *ALJ* 265 at 269.

¹⁸ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 157.

¹⁹ Quoted in: G. F. K. Santow, “The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context” (1993) 67 *ALJ* 265 at 268-269.

exhibits and such recollections they may have had of the 94 prosecution witnesses given between seven and 11 months earlier.”²⁰ It was held that the lengthy trial process rendered the jury’s verdicts unsafe. As Mann LJ observed on the appeal,

“The awesome time-scale of the trial, the multiplicity of issues, the distance between evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days) could be regarded as combining to destroy a basic assumption. This assumption is that a jury determines guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberation.”²¹

David Kirk, a former prosecutor, describes the difficulties the *Blue Arrow* jurors would have faced, which of course would have posed considerable problems when the trial judge instructed them:

“The Indictment contains one count alleging conspiracy to defraud, listing 19 particulars each against two or more of the 10 conspirators. In order to decide the guilt or innocence of each defendant, the jury has to find that the prosecution has proved its case on at least one particular...The jury will have to examine the case from the perspective of each defendant in relation to each particular, and it has been calculated that this requires them to make 150 individual decisions.

The decisions will be based:

- (a) on evidence, much of which they heard at least six months earlier;
- (b) on evidence which has been examined, then cross-examined by between one and nine defendants;

²⁰ *R v Cohen* (unreported, CA, 28 July 1992) per Mann LJ, quoted in *ibid*, at 271, footnote 16.

²¹ *R v Cohen* (unreported, CA, 28 July 1992) per Mann LJ, quoted in M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993

- (c) on directions of considerable complexity about an area of activity about which none of the jury has any experience;
- (d) on listening to evidence for more than six months without taking a note of any sophistication;
- (e) on a prosecution closing speech which they may have heard two-three months before retiring to reach their verdicts;
- (f) on nine day closing speeches;
- (g) on a very long summing-up.”²²

As Mark Aronson notes, trials like those described above have shaken proponents’ faith “in the ability of a pre-trial directions scheme to persuade or cajole an accused into defining the real issues in dispute before the Crown opens its case. Gone is the faith once placed in the efficacy of a judge’s power to comment in disparaging terms to the jury on an accused’s tactics, as a mechanism for expediting the trial.”²³ Nevertheless, some positive practices have emerged since Lord Roskill’s reforms. In *Blue Arrow* itself, both the jury and the judge were carefully selected to ensure – as far as possible – that they could all see out the trial.²⁴ A similar process was undertaken in the 1995 *Maxwell* trial:

“Jury selection...reduced 700 potential jurors to 70 by using lengthy questionnaires and oral questioning. Potential jurors were asked questions regarding their jobs, what papers they read, what they had read about the Maxwells, whether they had heard about the accusations against the Maxwells, and whether they would be able to be dispassionate. The initial questionnaires excluded 550 potential jurors for a variety of reasons, such as poor health or previously booked holidays. The replies of the remaining 150 potential jurors was [sic] screened by the judge as well as the lawyers for both parties and a quarter of them were excluded “on grounds of literacy and ‘in the interests of justice.’” Nearly three-quarters of the potential jurors had given answers that were incomplete, ambiguous, or otherwise inconsistent, and

²² David Kirk, quoted in G. F. K. Santow, “The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context” (1993) 67 *ALJ* 265 at 272.

²³ Mark Aronson, quoted in: M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993

²⁴ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 156.

were further questioned by the judge in the presence of both sets of lawyers in order to create a final 'short list' from which twelve jurors could be chosen at random."²⁵

Justice Phillips, who presided in *Maxwell*, was very creative in his use of the Court's existing powers. His Honour

"began by reducing the number of charges from ten to two, considering this to be more manageable for jurors in a single trial. He also reduced the length of the Court day to 9:30am-1:30pm and reserved the afternoons for legal argument. This not only meant that jurors had to concentrate for a shorter day, but also that counsel discussed legal points in the jury's absence without the need for the jury to keep leaving and returning to the courtroom. The judge also made extensive use of the court computer system. Prosecuting counsel produced a 'road map' of documents that would be called and highlighted specific passages to be examined. Several monitors in the courtroom then displayed all the highlighted passages. Finally, before the jury retired to consider its verdict, the judge provided the jurors with a written summary of his three-and-a-half-day summing up, although his refusal to allow jurors to have daily transcripts was controversial."²⁶

The *Barlow Clowes* trial is another instance where Lord Roskill's reforms seem to have been effective. In that case the "trial finished ahead of time after 100 days with a preparatory hearing producing an agreed booklet of facts and a conviction by the jury who were thereby able to concentrate on the points at issue."²⁷

Australian Parallels

Australia had its own problems with lengthy and complex criminal trials at the time of the Fraud Trials Committee's Report (and it still does). A fraud trial in the District

²⁵ S. Lloyd-Bostock and C Thomas, "Decline of the 'Little Parliament:' Juries and Jury Reform in England and Wales" (1999) 62 *Law and Contemporary Problems* 7 at 18; quoted in: New Zealand Law Commission, *Juries in Criminal Trials*, Report 69, 2001, at para 104.

²⁶ *Ibid*, at para 103.

²⁷ G. F. K. Santow, "The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context" (1993) 67 *ALJ* 265 at 268.

Court of Queensland which had run for 20 months was aborted when, after 13 days of deliberation, a juror fell ill.²⁸ Some of the jurors who had convicted Edward Splatt in a South Australian fraud trial publicly admitted after his release that they did not understand some of the crucial evidence in the case.²⁹ The jury in the Victorian fraud case of *R v Wilson & Grimwade*³⁰ was discharged after 33 weeks in the first trial. The second trial commenced in January 1991 and a verdict was reached on 17 December 1992. The verdict was overturned on appeal because the trial had been severely fragmented.³¹ In NSW, a jury was discharged in a fraud trial before Justice James after they had deliberated for 15 days. The trial had lasted 111 sitting days. Some indication that the jury might be unable to agree was apparent on the 84th day of the trial when his Honour “received a letter from the foreman indicating that one of the jurors had stuck cotton-wool in her ears during some days of the Crown’s closing address, had done the same thing in the jury room, put her head on a cushion and refused to take part in jury discussions about the case.”³² A 1992 drug trafficking trial lasted nine months and cost \$5.5 million, using most of Legal Aid’s annual budget and forcing the postponement of 132 cases in the NSW District Court.³³ Following Lord Roskill’s recommendations, Victoria was the first Australian jurisdiction to enact legislation based on the English model, namely the *Crimes (Criminal Trials) Act 1993*.

The Debate Continues

In the years since the Fraud Trials Committee’s Report, the recommendation to abandon jury trials in complex fraud cases has not been forgotten. The issue was considered in a 1998 Home Office Consultation Paper titled *Juries in Serious Fraud Trials*. Although the Paper came to no firm conclusion, it invited submissions about whether jury trial should be abandoned, and if so what the alternative(s) might be. The Fraud Advisory Panel responded to the Consultation Paper, noting that

²⁸ NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12, 1985 at para 10.1.

²⁹ *Ibid*, at para 10.3.

³⁰ See (1995) 1 VR 163 for the appeal.

³¹ D. Bugg QC, “Prosecuting Fraud,” Paper presented at the Fraud Prevention and Control Conference, Surfers Paradise, August 2000.

³² “Editorial,” (1992) 16 *Crim LJ* 367 at 367.

³³ M. R. Liverani, “Has Trial Complexity Gone Too Far?” 31 (10) *LSJ* 36 at 38.

dispensing with the jury might not result in a substantial saving of court time. It pointed out that “some of the complex issues that would have formed the subject matter of the second Maxwell trial were fully ventilated in a civil case that lasted nine months in 1993 before an experienced High Court judge.”³⁴ Like Mr Merricks in his dissent in the 1986 Report, the Panel concluded that before considering whether or not to remove the right to jury trial in complex cases certain extensive procedural reforms should be undertaken.³⁵ Amongst the suggested reforms were the following:

- “During the course of the preparatory hearing the parties should be required to draft a list of issues for the jury to determine. The prosecution and the defence should then be required to prepare statements which address these issues.”³⁶ These statements should be given to the jury at the start of the trial.
- The parties should be required to draft a statement of agreed facts which should be given to the jury.³⁷
- It should be standard practice to establish the literacy and numeracy of jurors through the use of questionnaires (as was done in the Maxwell trial).³⁸
- Information technology should be employed to ensure that evidence is presented in an accessible and efficient manner.³⁹
- Realistic time limits should be imposed on counsel’s speeches,⁴⁰ and skeletons of all speeches should be given to the jury.⁴¹
- The jury should be provided with written directions by the judge.⁴²
- Judges should be exposed to the types of accounting techniques and financial practices encountered in fraud cases through continued professional training.⁴³

³⁴ P. Binning, “Are Juries Essential?” *The Times*, 24th September 1996, quoted in: Fraud Advisory Panel, “Proposals for Procedural Reform in Cases of Serious Fraud,” 1998, available from: http://www.fraudadvisorypanel.org/newsite/Publications/Publications_other.htm (accessed 23/5/06), at para 16.2.

³⁵ Fraud Advisory Panel, “Proposals for Procedural Reform in Cases of Serious Fraud,” 1998, available from: http://www.fraudadvisorypanel.org/newsite/Publications/Publications_other.htm (accessed 23/5/06), at para 16.4.

³⁶ *Ibid*, at para 6.1.

³⁷ *Ibid*, at para 7.1.

³⁸ *Ibid*, at para 10.1.

³⁹ *Ibid*, at paras 11.1-11.2.

⁴⁰ *Ibid*, at para 12.1.

⁴¹ *Ibid*, at para 12.2.

⁴² *Ibid*, at para 13.1.

⁴³ *Ibid*, at para 15.2.

In September 2001 Lord Justice Auld released his report on the English criminal courts.⁴⁴ His Lordship recommended that in all indictable cases the accused (subject to the discretion of the trial judge) should be allowed to elect to be tried by judge alone. Moreover, in fraud and other complex cases a judge should be entitled to unilaterally direct – “in the interests of justice” - that the case will not be heard by a jury. In such cases, the trial may proceed before a judge alone or before a judge and two lay members, according to the accused’s choice (but subject to the trial judge’s discretion). Following Lord Justice Auld’s report the UK Government issued a 2002 White Paper titled *Justice for All*.⁴⁵ In that document the Government substantially adopted his Lordship’s proposals insofar as they related to judge alone trials in serious fraud cases. Due to the practical difficulties of identifying and recruiting expert lay members, that part of his Lordship’s recommendations were not taken up.⁴⁶

The ***Criminal Justice Act 2003 (UK)*** provides:

“43 Applications by prosecution for certain fraud cases to be conducted without a jury

(1) This section applies where—

(a) one or more defendants are to be tried on indictment for one or more offences, and

(b) notice has been given under section 51B of the Crime and Disorder Act 1998 (c 37) (notices in serious or complex fraud cases) in respect of that offence or those offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

⁴⁴ Auld, *A Review of the Criminal Courts of England and Wales*, September 2001, available from: <http://www.criminal-courts-review.org.uk/> (accessed 23/5/06).

⁴⁵ Available from: <http://www.dca.gov.uk/pubs/white.htm> (accessed 23/5/06).

⁴⁶ *Justice for All*, at para 4.30.

(3) If an application under subsection (2) is made and the judge is satisfied that the condition in subsection (5) is fulfilled, he may make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The judge may not make such an order without the approval of the Lord Chief Justice or a judge nominated by him.

(5) The condition is that the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.

(6) In deciding whether or not he is satisfied that that condition is fulfilled, the judge must have regard to any steps which might reasonably be taken to reduce the complexity or length of the trial.

(7) But a step is not to be regarded as reasonable if it would significantly disadvantage the prosecution.”

Section 43 was the subject of controversy, and as part of a last minute deal to secure the passage of the legislation the commencement of s 43 was delayed so that it will only come into force following an affirmative resolution by both Houses of Parliament.⁴⁷ This has not yet occurred, with a motion having been withdrawn in late 2005 because the Government did not have the numbers in the House of Lords.⁴⁸ At the time Lord Goldsmith, the Attorney-General, indicated that he would not “shelve” the proposal, but that he would consider alternatives such as trial before a panel of three judges, a judge sitting with two magistrates, or a judge with two expert lay members.⁴⁹

⁴⁷ C. Dyer, “Goldsmith fights to save plans for no-jury fraud trials” *The Guardian*, 26 November 2005.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

A further development is the *Fraud Bill*, which was laid before the House of Lords in May 2005. If passed, the Bill aims to simplify the law of fraud by altering the substantive offences themselves rather than by tinkering with the procedure of fraud trials. In the Consultation Paper that preceded the Bill, it was said that:

“Repealing the current statutory and common law offences, and replacing them with a general offence of fraud will benefit juries by making fraud easier to understand. This could prove particularly beneficial in complex and serious fraud cases.”⁵⁰

The reform proposals were somewhat watered down by the decision not to abolish the common law offence of conspiracy to defraud, but the *Fraud Bill* nevertheless represents a common sense approach to the problem of complex fraud cases. If the real issue in such cases is juror competence – i.e. their ability to understand the issues and the evidence – then it makes sense to simplify the substantive law as well as the procedural rules that obtain in such trials. Hopefully this will make the task of instructing a jury easier, and even if jury trial is abolished in complex fraud trials a judge sitting alone will also benefit from a rationalisation of the substantive law.

Empirical Research

The parameters of the debate surrounding trial by jury in commercial matters have not shifted very much in the years since Lord Roskill made his recommendations. The main arguments both for and against the retention of juries continue to be largely based on principle or on anecdotal evidence rather than on empirical research. What little research there is tends to support the view that jurors understand, or can be made to understand, the issues encountered in a complex commercial trial. The following propositions emerge from four studies commissioned

⁵⁰ Home Office, *Fraud Law Reform – Consultation on proposals for legislation*, May 2004, available from: <http://www.homeoffice.gov.uk/about-us/haveyoursay/closed-consultations/2004-cons-closed/?view=Standard> (accessed 23/5/06), at p. 7.

by the Fraud Trials Committee during the preparation of its Report,⁵¹ as well as a 1998 study that sought to simulate the experience of jurors in the Maxwell trial:⁵²

- “Jurors’ comprehension of fraud trials can be improved by providing them with information about the technical, legal and financial terms they will encounter during the trial. A glossary giving detailed explanations in everyday language of the key technical terms that may be used during the trial is particularly helpful. A glossary should be given to jurors before the trial begins and a minimum of 15 minutes study time given for every 10 words in the glossary. Giving the glossary at the time that the information is heard, without a chance for prior study, is not helpful.”⁵³ By contrast, a spoken introduction to the case was not shown to be helpful, but the researchers urged caution in interpreting this result.⁵⁴
- “Presentation of numerical information can be improved by:
 - using graphs to present time series information;
 - ensuring all graphs are well designed...;
 - providing explicit cues to the internal structure of balance sheets, showing the relations between subtotals and other figures;
 - using simpler terminology where possible.”⁵⁵
- “In an experiment to compare the effectiveness of summing-up by *either* presenting all points made by the first speaker then all those made by the second, *or* reorganising their material around issues and presenting all points made by both speakers on that issue, the former was found to be more effective. This is consistent with other research on memory which shows that maintaining chronological sequence makes it easier to recall information.”⁵⁶

⁵¹ MRC Applied Psychology Unit, Cambridge, *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies*, Her Majesty’s Stationery Office, London, 1986.

⁵² T. M. Honess, “Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial” (1998) November, *Criminal Law Review* 763.

⁵³ Summary of Roskill’s research contained in: New Zealand Law Commission, *Juries in Criminal Trials*, Report 69, 2001, at para 100.

⁵⁴ MRC Applied Psychology Unit, Cambridge, *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies*, Her Majesty’s Stationery Office, London, 1986, p. 6.

⁵⁵ Summary of Roskill’s research contained in: New Zealand Law Commission, *Juries in Criminal Trials*, Report 69, 2001, at para 100.

⁵⁶ Summary of Roskill’s research contained in: *Ibid*

- “[A]s the trial goes on, the ability of jurors to assimilate and place arguments in context will increase”⁵⁷ and “repetition of complex material enables individuals to assimilate it in a more systematic fashion and increases comprehension.”⁵⁸
- “[T]he majority of participants in [the 1998] studies – around four out of five – may be regarded as sufficiently competent to serve on a major fraud trial.”⁵⁹ Although in reality the figures might be worse than this because competent jurors may be vetted out due to work and other commitments.⁶⁰

Participants in the 1998 research stated that their comprehension would be aided by the use of simpler language, the frequent provision of summaries of key points, the greater use of visual aids and the linking of evidence in some sort of narrative or “story-like” structure.⁶¹ Honess concludes that “the results suggest that with some screening and more focussed help for the jury, non-specialist jurors are sufficiently competent to understand and evaluate the evidence in complex trials.”⁶² That is, “whatever merits it may or may not have on other grounds (such as cost savings), it is far from clear...that the complete abolition of the jury system for complex fraud trials is warranted on the grounds of ‘cognitive unfitnes.’”⁶³ Research in New Zealand indicates that while some jurors (such as people who cannot speak English or who are of limited intelligence) are inherently incompetent, “the reason for a substantial number of jurors having difficulty understanding evidence is the confusing and unsatisfactory way in which it is presented to them.”⁶⁴

A Summary of the Arguments

What the debate ultimately comes down to is this: can complex cases be presented to jurors in a way that they can understand without unduly lengthening what are already long and arduous trials? That is, are complex trials inherently so hard to

⁵⁷ T. M. Honess, “Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial” (1998) November, *Criminal Law Review* 763 at 765.

⁵⁸ *Ibid.*, at 769.

⁵⁹ *Ibid.*, at 771.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, at 763.

⁶³ *Ibid.*, at 772.

⁶⁴ New Zealand Law Commission, *Juries in Criminal Trials*, Report 69, 2001, at paras 86-87.

comprehend that, without wasting valuable time and effort, they are beyond the grasp of an ordinary member of the public? Can juror competence and/or case presentation be improved so that jurors are better equipped to deal with complex cases? Do they need to be improved? If they need to be improved but cannot be improved, should trial by jury be abolished in such cases, or is jury trial – however imperfect – better than the alternatives?

Juror Competence

The research outlined above indicates that in most cases, jurors are *capable* of understanding complex commercial trials. Whether or not they will *actually* understand the trial will depend to a large extent upon how evidence is presented. The chance that a juror will understand complex evidence is substantially increased when they have some familiarity with the subject matter at hand – indeed, this is why Lord Roskill recommended the creation of a Fraud Trials Tribunal which included two lay expert members. The unrepresentative nature of modern juries (“those who want to get out will, and those who are most competent will be those who have the most reason to escape to avoid clashes”⁶⁵) played a large part in Lord Justice Auld’s decision to recommend the abolition of jury trial in complex cases.⁶⁶ Arguably, then, it may be more satisfactory to seek to increase the chances that skilled, working people will be included on juries, rather than to abolish jury trial outright.⁶⁷ It has been suggested that if procedures were adopted to stop skilled and educated people from avoiding jury service, many of the objections to juror competence in complex cases would be defused. Procedures such as those used in the Maxwell trial (see above), would also go a long way to ensuring juror competence and in preventing juror attrition.

Case Presentation

This is an area where a trial judge can take a leading role. Indeed, many commentators who favour the retention of trial by jury in complex cases argue that if

⁶⁵ Ibid, para 98.

⁶⁶ G. Scanlan, “The Trial of Serious and Complex Frauds: Further Reforms” (2002) 23 (11) *Company Lawyer* 328 at 330.

⁶⁷ Ibid, at 333.

the system is to work at all, it *must* be presided over by strong and active judges.⁶⁸ Any suggestion that this might be inappropriate can be countered with the trite reminder that, if there was no jury, the judge would have to be more active anyway. Weinberg makes the point that “the right trial judge can do a great deal to ensure that the real issues are identified early on, and that the case is continually directed towards the resolution of those issues.”⁶⁹ This is particularly so when counsel for the defence might see obfuscation as a legitimate tactic. In an article titled “Strategies for defending complex commercial crimes,” the author states that “if the central allegations are lost in a morass of ancillary and incidental charges [caused by lack of defence co-operation], a jury is more likely to acquit out of frustration with the prosecution.”⁷⁰ It has been observed that

“some defence counsel have stretched their ethical obligations to the limit in ‘aiding and abetting’ a defendant who perceives it as in his or her best interest to delay and obfuscate, and generally to play the system for all it is worth. Regrettably, such tactics are not always unsuccessful. By the time the matter comes on for trial, memories may have faded or important evidence may no longer be available. During the trial it is relatively easy under our existing procedures for the defence to promote confusion, which it can then exploit to its advantage. Even if such tactics are unsuccessful to the extent the defendant does not avoid conviction, a plea in mitigation that the offence occurred a long time ago, and that the defendant has had the matter hanging over his head for a long time, does not always fall on deaf ears.”⁷¹

It is in precisely these sorts of situations where a trial judge can make a real difference to the course of the trial, either by seeking to prevent delay and confusion when it is apparent that it is being deliberately cultivated, or at least to prevent an

⁶⁸ M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993; D. Bugg QC, “Prosecuting Fraud,” Paper presented at the Fraud Prevention and Control Conference, Surfers Paradise, August 2000, p. 5; Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 162-163. Note that all of these authors are or were public prosecutors.

⁶⁹ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 163.

⁷⁰ M. Pickering, “Strategies for defending complex commercial crimes,” (1990) 64 (9) *Law Institute Journal* 862 at 864.

⁷¹ M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993.

unco-operative accused from gaining any advantage from such delay or confusion once it occurs. Arguably this style of judging may increase the chances of a judge falling into appealable error, but even as early as 1995 the Victorian Court of Criminal Appeal – which should not be seen as markedly different from other Courts of Criminal Appeal in this context - was foreshadowing a higher tolerance for judges who took a more active role. The Court said in *R v Wilson & Grimwade* (1995) 1 VR 163 (see above) that:

“This case is in our experience unique. We hope and expect that no other will approach it in its normal characteristics...[A] firm and resolute management of the trial, and a strong cooperative effort by Judge and counsel were imperative if it was to continue as a proper trial...[C]ounsel in future, faced with a long and complex trial, criminal or civil, will cooperate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this Court appropriate regimentation by the Judge, perhaps of a kind not hitherto experienced, designed to avoid the unhappy result that befell this trial.”

The NSWLRC, in a Report published in 1985, considered the specific things a trial judge could do to present the case more clearly to a jury:

“Where the complexity of a trial is due to a large number of accused and/or multiple charges, consideration should be given to instructing the jury separately in respect of each. The jury could then be asked to consider its verdict in relation to each accused, or each charge, independently of the others. This approach, in appropriate cases, could simplify the jury’s task of properly digesting the various parts of the summing-up and giving it due consideration in reaching a verdict in the case. The Queensland Court of Criminal Appeal affirmed in *Fong* [[1981] Qd R 90] that ‘the procedure whereby the summing up was split and the verdicts taken was lawful’...Another procedure for dealing with the complexity of multiple charges or even of alternative verdicts to a single charge is to provide the jury with a written statement setting out the various counts in the indictment and the alternative verdicts available...Such a statement could give some order to the

jury's deliberations and would go some way towards ensuring that a complete consideration of the issues is made and that a formally correct verdict is rendered."⁷²

Admittedly, there is only so much that a trial judge can do to aid the comprehensible presentation of a case. Much will necessarily depend on the approach taken by the parties. While some commercial cases are exceedingly complex, Roger Gyles QC – the first Special Prosecutor appointed in Australia to prosecute fraud - has said that:

“In my view, if the fraud is such as to make it appropriate to bring criminal proceedings, there should be no difficulty in a skilled and experienced prosecutor explaining the nature of the fraud to a jury, and then presenting evidence to establish it. Even if the evidence takes weeks or months in a complex case, criminal fraud at its heart is always explicable by those who properly understand it.”⁷³

Indeed, if this were not the case then there is an argument that fraud should not be prosecuted at all. As Mr Merricks noted in his dissent to the Fraud Trials Committee Report:

“I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.”⁷⁴

In this sense jury trial can be seen as imposing “a discipline on the prosecution to reduce counts and simplify presentation.”⁷⁵

⁷² NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12, 1985 at para 10.18.

⁷³ R Gyles, quoted in: P. Evans, “Prosecuting Complex Commercial Fraud” AIC Conference Proceedings, No 10, available from: <http://www.aic.gov.au/publications/proceedings/10/evans.html> (accessed 23/5/06).

⁷⁴ Fraud Trials Committee, *Report*, Her Majesty's Stationery Office, London, 1986, p. 196.

⁷⁵ G. F. K. Santow, “The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context” (1993) 67 *ALJ* 265 at 270.

Throughout this paper there have been many suggestions as to how a case can be more effectively presented to a jury. These include the provision of glossaries of technical terms at the beginning of a trial, the provision of statements of agreed facts and skeletons of speeches, the use of visual aids and information technology as well as the provision of summaries and other simplified forms of evidence. Again, much of this is in the hands of trial counsel, but a judge who is aware of how such things can assist a jury might be able to guide counsel towards presenting their case in a more efficient and comprehensible manner.

Abolition of Trial by Jury

Of course, all of the difficulty involved in instructing a jury in a complex commercial trial would be removed if jury trial was abolished in such cases. Section 80 of the Constitution presents a real obstacle to this in Australia that does not exist in England. Nevertheless, this should not prevent us from asking the hypothetical question whether, if it was open to us, the right to trial by jury in complex cases should be removed.

The New Zealand Court of Appeal would probably say yes, jury trial should be done away with in difficult cases. In *R v Gunthorp* (unreported, NZCA, 9 June 1993) the court said:

“The trial was long and complex with a multiplicity of counts. It was dealt with competently by a judge sitting alone, demonstrating the superiority of such a mode of trial over a jury. There would have been virtually no prospect of [a jury] being able to comprehend the almost incredibly complicated financial arrangements made by these appellants, or to follow the cash flows in and out of the transactions which formed the subject of the charges.”

Trial by an experienced judge sitting alone is certainly the cheapest alternative to jury trial,⁷⁶ and the accused is protected by the safeguard of a fully reasoned judgment against which he or she may appeal.⁷⁷

⁷⁶ Fraud Trials Committee, *Report*, Her Majesty's Stationery Office, London, 1986, p. 145.

However, the counter-argument (aside from the traditional arguments in favour of jury trial) is that there is no evidence that juries are in practice getting it wrong in anything but a tiny minority of cases. It is also arguable that cases will get even more complex and technical if the moderating presence of the jury is removed.⁷⁸ Scanlan suggests that it “could well *increase* the length of such trials”⁷⁹ (emphasis added). Some of the main reasons why commercial cases can be exceedingly lengthy have nothing at all to do with the presence or absence of a jury. These include the following:

“1) the alleged criminal conduct is often discovered several years after the commission of the offence. This raises problems of evidence collection and witness recollection etc.;

2) while a criminal scheme may be essentially simple, the means used to perpetrate the scheme are inevitably complex, with long documentary and money trails;

3) usually the matter raises complex matters of law, especially if innovative methods and/or new legislation are being considered...; and

4) cases often involve several accused persons, which again complicates matters of fact and law; see *Ahern v R* [[1988] 62 ALJR 440].”⁸⁰

Indeed, “there is little evidence to suggest that juries in themselves add to the length of a trial.”⁸¹ Certainly, experience in civil trials indicates that the absence of a jury is not necessarily conducive to speedy and efficient decision-making in complex cases.

Some commentators have suggested that the real problem is not the jury, but the criminal system. Commercial trials are arguably of a different nature to other trials.

⁷⁷ D. Corker, “Trying Fraud Cases Without Juries” [2002] *Criminal Law Review* 285 at 293.

⁷⁸ G. Scanlan, “The Trial of Serious and Complex Frauds: Further Reforms” (2002) 23 (11) *Company Lawyer* 328 at 331.

⁷⁹ *Ibid.*, at 332.

⁸⁰ S. P. Devlin, “White Collar Crime” (1990) 64 (9) *Law Institute Journal* 859 at 860.

⁸¹ *Ibid.*

“In the typical complex commercial criminal trial, there are no eye-witnesses; no stunning video tapes of an extended, greedy palm; no telephone intercepts; no bags bulging with heroin or cocaine; no masked, armed robbers; and no inflated, outrageous falsehoods about instant wealth or tenfold profits. Instead, the Crown must use financial documents to show a chain of inferences from which the jury will have to deduce criminal intent.”⁸²

It has also been said that:

“It must be acknowledged that there is very little resemblance between an ordinary prosecution for traditional crimes such as burglary, assault, or even murder, and the kinds of serious or complex frauds we are likely to soon confront. Rules of procedure and evidence devised centuries ago can no longer be regarded as sacrosanct. No ordinary criminal trial of which I am aware involves unravelling hundreds, if not thousands, of complex transactions, explaining to jurors, in terms which they can understand, the workings of the securities markets, following movements of funds through corporate entities in this country and overseas, and reducing all of that into one or two basic issues suitable for determination by lay jurors. Traditional methods of trial will not allow that process to be undertaken unless trials run for inordinately long periods of time.”⁸³

On this basis, Mr Justice Henry, who presided over both of the *Guinness* trials, has written that:

“The complexities (real and simulated) of serious fraud make that a testing specification for a criminal justice system which evolved into an oral tradition, memory-based, with short trials and no documents, and in which protections designed for the vulnerable, the weak and the suggestible (into which categories those accused of serious fraud tend not to fall) were extended to

⁸² M. Pickering, “Strategies for defending complex commercial crimes,” (1990) 64 (9) *Law Institute Journal* 862 at 862.

⁸³ Mark Weinberg, “Complex Fraud Trials – Reducing Their Length and Cost” (1992) 1 *Journal of Judicial Administration* 151 at 155.

all accused. So it is not surprising that serious fraud is today near the limit of criminal jurisprudence, where there is the risk that a system designed for very different trials may be tested to destruction.”⁸⁴

These sorts of observations have led some people to suggest that serious fraud should perhaps be dealt with as a civil rather than a criminal matter, at least where no dishonesty or theft is involved.⁸⁵ In Australia, this could be a way to sidestep the Constitutional guarantee of trial by jury in serious criminal cases. Of course, the imposition of civil penalties and the lower standard of proof in civil trials makes this option somewhat unsavoury from a civil liberties point of view, but this could be seen as a quid pro quo for removing the criminal stigma from what are, in effect, actions that are no less blameworthy than robbing a person or an institution in a conventional sense. If such a course is followed, there is a danger that there will be a perceived double standard for white collar and blue collar crimes. Another alternative would be to legislate for parallel civil remedies which would apply in addition to criminal sanctions.⁸⁶ So long as criminal prosecutions could be brought after a civil remedy has been pursued, this would give prosecuting authorities a chance to see whether or not their case can be presented in a way that a jury would understand. If the civil trial proved so complex that a jury would not understand it, then prosecution can be foregone. It is suggested that some form of sanction – albeit a civil penalty – is better than a mere acquittal in cases where guilty people might escape criminal responsibility due to the complexity of their case. Another solution might be to allow a judge at an early stage in proceedings to direct that a criminal case be tried as a civil case, if he or she is of the view that the trial will be too long or complex for a jury to cope with.⁸⁷ It goes without saying that trying a complex case in a civil rather than a criminal court will not make the case any easier to understand – indeed, the case could become even *more* complex. Some judges, such as Lord Justice Auld, are of the opinion that civil frauds are much more intellectually demanding for the decision-maker than criminal frauds because the criminal standard of proof is easier to apply

⁸⁴ Mr Justice Henry, quoted in: M. Rozenes, “The new procedures for the prosecution of complex fraud – will they work?” Speech delivered at the 28th Australian Legal Convention, September 1993.

⁸⁵ G. F. K. Santow, “The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context” (1993) 67 *ALJ* 265 at 270-271.

⁸⁶ *Ibid*, p. 270.

⁸⁷ *Ibid*, p. 273.

than the civil standard.⁸⁸ The issue then is really whether or not jury trial is in itself worthwhile, and that is a matter upon which minds may legitimately differ.

Conclusion

Section 80 of the Constitution limits the options available in Australia in relation to juries in complex commercial trials. Short of legislation at a state level (which has its own problems), or the wholesale transplantation of Commonwealth commercial offences from a criminal into a civil context, it seems that no matter what other options are pursued the jury is here to stay in trials for complex commercial crimes. This places a heavy onus on judges, who must do their best to ensure the jury can understand the case being presented to them. Not only is this necessary from an efficiency point of view, it is also necessary in the interests of fairness to an accused. All judges would benefit from familiarity with the sorts of commercial practices and transactions that are encountered in complex trials, as this will make the task of instructing juries in such cases far easier. Judges must not be afraid to be active and creative in their approach to complex trials – indeed, it is a lack of judicial intervention, rather than the jury itself, which often lies at the root of many of the criticisms levelled at the jury's role in long and complex trials. We live in a complex and multifaceted society. It is somewhat patriarchal and condescending to assume that 12 people who live their lives in such a society are not capable of understanding a difficult commercial case. In this rapidly changing age, people are confronted with new and unfamiliar things on a daily basis, and they are required to navigate and assimilate increasingly complex systems and processes. Ordinary people have the ability to comprehend things that are outside of their everyday experience – what is needed, what we *all* need from time to time, is for someone to take the time to explain, in a straightforward manner, the terms and concepts that are being used. Not many of us could get very far in a foreign, unfamiliar city where we don't speak the language and we don't have a map; the same thing applies to jurors in complex cases. A trial judge, through his or her instructions to a jury, can to some extent alleviate the difficulties in comprehension they might face.

⁸⁸ D. Corker, "Trying Fraud Cases Without Juries" [2002] *Criminal Law Review* 285 at 285.

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Appendix A: Written Directions in *R v Ronen*: Conspiracy to Defraud

To establish the offence against each accused in relation to each count, the Crown must prove the four following matters and prove them beyond reasonable doubt.

1. First that there was in existence during the relevant period an agreement which had as its outcome or incidental to its outcome, the depriving of the Commissioner of Taxation of income tax on the income of On Fovo Pty Limited and the income of Ida Ronen trading as Ronen Young Fashion; or the risk of that deprivation;
2. That each of the accused were parties to that agreement and remained so during the relevant period.
3. That the agreement between each of the accused contemplated and intended that the dishonest means to be used to deprive the Commissioner of income tax or to make the collection of tax more difficult was the concealment of the income of On Fovo Pty Ltd and Ida Ronen trading as Ronen Young Fashions.
4. That in entering into the agreement each accused intended to prevent the Commissioner from collecting income tax that was or might be payable on those moneys; or alternatively each accused intended to make it more difficult for the Commissioner to determine the taxable income of On Fovo Pty Ltd and Mrs Ida Ronen.

If you are satisfied beyond reasonable doubt of each and every of these matters in relation to each accused you will return a verdict of guilty on both counts. If you are not satisfied beyond reasonable doubt in relation to any one of these matters then you will acquit each accused on both counts.

Appendix B: Written Directions in *R v Rivkin*: Insider Trading (*Corporations Act 2001* (Cth), s 100G)

Elements of the offence charged in the indictment:

1. On 24 April 2001 the accused procured Rivkin Investments Pty Limited to purchase Qantas shares.
2. At the time of procuring the Qantas shares the accused was possessed of the following information:
 - (i) Mr Gerard McGowan said that there was a deal for the merging of Impulse's business with Qantas;
 - (ii) Mr McGowan said that he had to wait until he had ACCC approval of the deal before making the purchase of the property at 5 Rose Bay Avenue, Bellevue Hill; and
 - (iii) Mr McGowan said that he believed that ACCC approval would be forthcoming.
3. At the time the accused procured the purchase of the 50,000 Qantas shares the information set out above was not generally available.
4. If at the time the accused procured the purchase of the Qantas shares the information set out above had been generally available, a reasonable person would have expected it to have had a material effect on the price or value of the securities of a body corporate, namely, ordinary shares in Qantas Airways Limited ('Qantas shares').
5. At the time the accused procured the purchase of the Qantas shares, the accused knew, or ought reasonably to have known, that the information set out above was not generally available and that, if it were generally available, it might have a material effect on the price or value of Qantas shares.

Appendix C: Written Directions in *R v Cooper*: Corrupt Commissions or Rewards (*Crimes Act 1900* (NSW), s 249B) and Obtaining Money etc By False or Misleading Statements (*Crimes Act 1900* (NSW), s 178BB).

Count 1 – Elements

The onus is on the Crown to prove beyond reasonable doubt:

1. On or about 3 December 2000 at Sydney the accused offered to give William Herbert Howard (“Mr Howard”) a benefit, namely cash and employment at Home Security International Inc.
2. Mr Howard was an agent of H.I.H. Casualty and General Insurance Limited (“H.I.H. C & G”).
3. The expectation of the benefit would tend to influence Mr Howard to show favour to companies associated with the accused in relation to the affairs of H.I.H. C & G, namely in the processing of claims and demands of those companies.
4. The accused made the offer corruptly, that is with the intention to influence Mr Howard to show favour to companies associated with the accused in relation to the affairs of H.I.H. C & G, namely in the processing of claims and demands of those companies.

Counts 2 - 6

Elements of each count **stated generally**

The onus is on the Crown to prove beyond reasonable doubt:

1. The accused gave to Mr Howard a benefit.
2. Mr Howard was an agent of H.I.H. C & G.
3. The receipt of the benefit would tend to influence Mr Howard to show favour to companies associated with the accused in relation to the affairs of H.I.H. C & G, namely in the processing of claims and demands of those companies.
4. The accused gave the benefit corruptly, that is with the intent to influence Mr Howard to show favour to companies associated with the accused in relation to the affairs of H.I.H. C & G, namely the processing of claims and demands of those companies.

On each of counts 2 – 6 it will also be necessary for the Crown to prove beyond reasonable doubt, as part of element 1, that the accused gave Mr Howard the benefit

alleged in the particular count, on or about the date or between the dates alleged in the particular count.

Counts 7 – 13

Elements of each count **stated generally**

The onus is on the Crown to prove beyond reasonable doubt:

1. The accused published a statement to H.I.H. C & G.
2. The statement was false in a material particular.
3. The accused knew that the statement was false in that material particular.
4. The accused published the statement which he knew to be false in a material particular, with the intent to obtain for another person a financial advantage.

On each count it will also be necessary for the Crown to prove beyond reasonable doubt:

As to element 1, that the accused published the particular statement alleged in the particular count.

As to element 2, that the statement was false in the material particular alleged in the particular count.

As to element 3, that the accused knew that the statement was false in the material particular alleged in the particular count.

As to element 4, that the accused published the statement with the intent to obtain a financial advantage for the company specified in the particular count.

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Contempt: Some Contemporary Thoughts

CONTEMPT SOME CONTEMPORARY THOUGHTS

The Hon Justice Whealy

The law of contempt has at least three fundamental objects – providing a fair trial, ensuring compliance with the court's orders and generally protecting the administration of justice. It is replete with great stories and marked by the idiosyncratic reactions of particular judges. In some areas it is evolving. The contemporary advances in communication and the accessibility of information will require careful consideration of the defining principles and their application to particular controversies. The Rule of Law requires the court process to be fair and that the community accepts the court's decisions and obeys their orders. Whether it requires that courts be given protection from misinformed and strident criticisms may be questioned.

Contempts of court are recorded from early times, beginning at least in 13th century. They include a disturbance or hostile reaction of persons in or near the court affecting its business; violent or insulting reaction to the service of the court's process; drawing of a sword to strike a judge; and assaulting in open court the Attorney-General, one of the King's clerks, a juror, a witness or an opposing party. [1] From early times the conduct which the courts identified as contemptuous was that which obstructed the business of the court, whether or not the conduct actually occurred in the presence of the court. [2]

From the 14th century, insulting a judge, abusing a jury or party, speaking insultingly of the King's writ that was yet to be executed or publishing out of court a matter scandalising the court could constitute a contempt. [3] A contempt of court was regarded as a breach of the King's peace (*contra pacem regis*).

Centuries later in *Attorney General v BBC* [4] Lord Salmon said that the object of contempt of court was not to protect the dignity of the courts but rather to protect the administration of justice. [5]

This paper examines three aspects of contempt. Contempt in the Face of the Court; Sub Judice Contempt and Scandalising the Court.

CONTEMPT IN THE FACE OF THE COURT

The fear many Judges share – certainly at first instance – is the prospect of litigants openly ignoring their directions or rudely rejecting their decisions. This happened in *Wilson v The Prothonotary*. [6] The plaintiff had filed a Statement of Claim in the Supreme Court. The defendants asked the late Acting Justice Brian Murray to strike out the Statement of Claim. On 5 September 1997, his Honour acceded to the defendants' request and ordered that the proceedings be dismissed with costs. The Judge was in the process of publishing his reasons when Mr Wilson threw two bags of paint, one of which struck his Honour and splashed yellow paint over him. The second bag landed between the Judge's Associate and the Court Reporter, splashing paint on them as well.

Wood CJ at CL made a declaration that the plaintiff was guilty of contempt. He was sentenced to a fixed term of imprisonment of two years. [7] In the Court of Appeal, [8] Meagher JA indicated that he would dismiss the appeal with costs. The majority (Sheller and Heydon JJA) extended leniency to Mr Wilson and allowed the appeal against sentence. The original sentences were quashed and Mr Wilson, was in effect, released from custody on the day when the judgment of the Court of Appeal was delivered. He had served three months and twenty days.

On 29 January 2007, a procession of Judges made its usual way to St James Church for the Annual Opening of Term Church Service. This solemn passage was interrupted by placard-bearing protestors calling out abusive and offensive remarks. Among them was Mr Wilson. Would it have made a difference had the Court of Appeal upheld and endorsed the decision of Justice Wood? Would Mr Wilson have emerged from two years in prison a chastened and respectful litigant?

There are many cases which record contemptuous acts by litigants. Contemptuous acts have, of course, been committed by advocates. Advocates in some jurisdictions in America have a robust attitude to the court (*Morrissey v The New South Wales Bar Association*). [9] Joseph Morrissey, formerly a legal practitioner in the State of Virginia USA, sought admission as a legal practitioner in New South Wales but there were doubts about his character.

Some of those doubts arose from contempts he had committed. On one occasion he was opposed to an advocate who was a professional rival for the elected position of Attorney for the Commonwealth of Virginia. During the proceedings, there ensued an exchange of provocative taunts and jibes, culminating in a fist fight in which several blows were passed. The presiding judge convicted both lawyers of contempt. He sentenced Mr Morrissey to ten days imprisonment but suspended five days.

In October 1997 Mr Morrissey was convicted of contempt following an angry outburst to a judge who had just passed a net sentence of 15 years on his client for a drug-related offence. The words used in his outburst were:

“That’s outrageous, that is absolutely outrageous ... I have never seen a more jaded, more bitter, more angry jurist in my life...”

He was sentenced to 30 days imprisonment.

Problems are not unknown in New South Wales. Robert Toner, now a judge, was representing the GIO in a trial before Lloyd Jones DCJ in the District Court. There was a problem about the tender of a medical report. An exchange took place between Mr Toner and the judge: [10]

HIS HONOUR: Noted that this addendum to the report of 9 July 1990 was admitted without objection; no foreshadowing of any application for an adjournment on the basis of that was made prior to that being admitted.

HIS HONOUR: I accept the fact - and I will have it noted - that you allowed it to be admitted without objection.

MR TONER: I did not – I said I object – I am arguing with your Honour for the simple reason I recall what I said and what I said is I object.

HIS HONOUR: Those last remarks of counsel were shouted of the top of his voice at myself, as a judge of the District Court; shouted at the top of his voice and I will give you an opportunity to have yourself heard as to whether or not you should be treated as being in contempt of this court.

MR TONER: Thank you your Honour.

HIS HONOUR: And where that leaves you as to where you stand for the remainder of this matter is another matter. You will have to concede you shouted at me.

MR TONER: I do and I apologise for that and I apologise for the offence I have given to your Honour and to this court.

HIS HONOUR: I hold you in contempt of this court and in the circumstances, because you obviously lost control in an arrogant and truculent manner, I will simply take no action other than to reprimand you in the strongest of possible terms and have that referred to the Bar Council.

MR TONER: Would your Honour also note that I in fact objected to the tender of the document?

HIS HONOUR: No, I do not accept that you objected to the tender. The way in which you put it and that was noted by the shorthand writer and myself as being without objection and I am satisfied that was the situation.

.....

HIS HONOUR: I might say I propose to refer the transcript of what occurred to the Bar Council, not by way of complaint, but for whatever comment they may choose to make to you in relation to it.

MR TONER: In light of that your Honour ...

HIS HONOUR: Show some more discretion and self-control in future in your behaviour, you have to remember as a member of the Bar you are in the eyes of the public as well as of the profession.....

Contempt of court is not occasioned by mere discourtesy. Mr Toner had conceded that, in shouting at the judge, he had acted discourteously and incorrectly. For that he had apologised. But he disputed that his conduct amounted to contempt. He appealed.

The Court of Appeal overturned the conviction for contempt. The Court emphasised that it is the duty of counsel and judicial officers to conduct themselves in a temperate manner to ensure the orderly, proper and expeditious disposition of the proceedings. Where it is a legal representative who is alleged to be guilty of contempt, it is important to keep in mind their duty of courage and vigour, in the pursuit of the interests of their clients. But courage and courtesy should go hand in hand. Mere "acts of rudeness", discourtesy or even extreme discourtesy on the part of legal representatives will not constitute contempt. Discourtesy can be dealt with, in a practical way, by a judicial officer, rebuking the practitioner without the formal process of a conviction for contempt. The exceptional nature of the summary process demands that it be applied only in clear cases of contempt. Courts will not tolerate the conduct of legal representatives who cross the line and go beyond the vigorous assertion of their clients' causes to personal insult and disrespect of the judicial officer who constitutes the court. It would run the risk of substituting for calm and orderly procedures the ranting and intimidating harassment that is sometimes seen in television portrayals of the courtrooms of other countries.

The Court of Appeal concluded that Mr Toner had not done anything calculated to lower the authority of the judge or the court. [11] At most, the conduct in shouting at the judge was rude and did not warrant the exercise of the summary power to deal with contempt.

The Court also emphasised the care with which the summary power to deal with contempt in the face and hearing of the court should be exercised. The Court found that the procedural requirements under the *District Court Act 1973* (NSW) were not met: [12]

- The charge of contempt was not stated with precision;
- Mr Toner was not given an adequate opportunity to answer the charge; and
- The court did not hear Mr Toner in the deliberately formal way which the Act envisages before convicting him of the charge.

A recent example of a successful prosecution for contempt against a barrister is *Attorney-General (Qld) v Colin Lovitt QC*, [13] where Chesterman J found that the barrister committed contempt in referring to a magistrate in court as a "complete cretin." His offence was not ameliorated by his later *sotto voce* remark "I withdraw that. He is not a complete cretin."

Although there have been many prosecutions for acts of contempt in the face of the court the geographical limits which define the court's face remain unclear. [14] The competing views are discussed by Moffitt P (with whom Street CJ and Hope JA agreed) in *Registrar, Court of Appeal v Collins* [15] and in the joint judgment of Kirby P and McHugh JA in *Fraser v The Queen*. [16]

On the *Collins* view, contempt in the face of the court encompasses not only conduct within the senses of the judge, but also conduct which takes place outside the court room but with some geographic proximity. On the *Fraser* view, contempt in the face of the Court is confined to conduct, which the judge could see or hear or could have seen or heard. In *European Asia Bank A-G v Wentworth*, Priestley JA said: [17]

"It is obviously desirable that the point be settled one way or the other as soon as may be. Until the question is settled I find it difficult to see that any judge confronted with the question at first instance could be criticised for adopting either view".

On 16 September 1968, Mr David Bennett now the Solicitor General for the Commonwealth, appeared as counsel for the liquidator of a company, against which Mrs Goldman, the contemnor's wife, had made an application to commence proceedings. The application was heard before Street J in Mena House. Mr Bennett had successfully sought an adjournment.

When the hearing was complete he left the court and entered the lift with Mr Goldman and his son. Having used them frequently I can vouch for the fact that the lift is a significantly confined space. It would seem that Mr Goldman had become somewhat frustrated by Mr Bennett's advocacy. He said to Mr Bennett: [18]

"You are a bastard aren't you. You are a bloody gutless bastard, saying you don't understand it. You know as much about the case as I do. I ought to knock your block off. It is alright for you, but I have been waiting years for my money."

Mr Bennett replied, "I refuse to discuss the matter with you". Mr Goldman responded, "You know what's going to happen to you, you bastard". Mr Goldman's son joined in saying, "You bloody bastard". The lift then reached the ground floor. Mr Bennett reported the incident to Street J who convicted Mr Goldman of contempt. He was ordered to pay a fine of \$100. [19]

Disturbing the court

Adams J has recently considered the principles relevant to contempt in the face of the court in the Matter of Bauskis. [20]

John Wilson and another person who goes by the name of Eric Jury sued a number of defendants, who were instrumentalities of the State of NSW. They claimed a right to a trial by jury. Mr Wilson has previously come to attention as the paint thrower. The defendants filed notices of motion seeking to strike out the statement of claim. When the matter was called over by the Registrar, a large number of persons (somewhere between twenty and thirty) were present in court, all wearing T-shirts with the words "Trial by jury is democracy". The matter was then referred to Adams J, who was the duty judge at the time.

His Honour described the events: [21]

"When the Court convened the matters were called. Mr Wilson at the bar table, wearing the T-shirt to which I have referred, demanded a jury. I said, "I'm afraid you cannot have one". He said, "You are breaking the law". At this point there was an outcry from the persons gathered in the Court, as I say numbered about twenty to thirty, most of whom were wearing T-shirts identical to that worn by Mr Wilson. They abused me. They shouted offensive statements about corruption. I have no doubt that the reason for this abuse was an attempt to intimidate me in relation to the matter which, I am sure, they were well aware was being agitated by Mr Wilson and Mr Jury. This of itself was a serious contempt of Court.

I asked Mr Wilson whether he had any other applications. He asserted, "You are breaking the law and I will arrest you" and he moved forward towards the Bench. I said, "Very well. Remove him please" to a Sheriff's officer in the vicinity. Mr Wilson ignored this and said, "I will arrest you" and then said to the Sheriff's officer, "This fellow is breaking the law and you are aiding and abetting that offence". I said, "Mr Wilson, go. When you have a proper application I will hear what you have to say". Mr Wilson said, "You won't hear anything. I will issue a warrant for your arrest Mr Adams". I said, "There are rules (of conduct) in Court". He said, "You are a fraud and a liar". I mentioned that there were real matters to be determined. He said "A traitor and a fraud" and I directed his removal at which time Mr Wilson said, "I will issue a warrant for your arrest. Expect it."

During the whole of this time the Court was in uproar. The persons who had attended to support Mr Wilson and Mr Jury were yelling abuse at me and at the Sheriff's officer. There were references also to their right to trial by jury, Magna Carta, the United Nations and so on. I have no doubt that for some who were lawfully in the Court it was a frightening experience. It was disgraceful conduct.

His Honour said: [22]

“Their conduct was calculated to undermine the administration of justice by intimidation and the instilling of fear in order to bring about orders to which they thought their associates were entitled. This is the very antithesis of the doing of justice and it is disgraceful that people in this community should undertake such conduct.

Sheriff officers set about enforcing the orders his Honour made and removing the members of the public, who refused to remove their T-shirts. One of them, Mr Bauskis, refused to leave and emphatically refused to take off his T-shirt. He was placed in custody.

Later the same day, he was given the opportunity to apologise and acknowledge his wrongdoing, but refused to do so. His defiance continued when he refused to give any information to his Honour for the purpose of granting bail. Mr Bauskis was taken into and remained in custody until he was brought back the following day.

The next day Mr Bauskis maintained his defiance, insisting that he was justified in what he did and that the presiding judge was wrong.

Mr Bauskis was sentenced to 14 days' imprisonment.

Refusal to take an oath or affirmation

In *R v Razzak*, [23] a Crown witness, Mr Razzak, refused to take the oath or make an affirmation before Bell J for the purpose of giving evidence in the criminal trial of Adam Darwiche. Darwiche had been charged with one count of shooting with intent to murder and another charge of maliciously discharging a loaded firearm with intent to cause grievous bodily harm. Mr Razzak was the victim. The trial judge gave him an opportunity to take legal advice, which he declined. The consequences of prosecution for contempt were explained to him but he persisted with his decision to refuse to take the oath or make an affirmation. He was orally charged with contempt and the matter stood over until the conclusion of the trial.

He pleaded guilty to contempt and was sentenced by Johnson J. The dilemma for Mr Razzak was no doubt real. The likely sequel to him giving evidence was obvious. This was a serious inter family feud where people were shot at and killed.

In passing sentence, Johnson J referred with approval, to Kirby P in *Registrar of the Court of Appeal v Raad* (NSWCA, unreported, 9 June 1992):[24]

“The refusal to answer questions which are relevant and admissible strikes at the very way in which justice is done in the courts of this country. It undermines the rule of law observed in our society. As this Court said in *Gilby*, the refusal to be sworn, or once sworn to give evidence, is a failure to discharge the obligation which the person owes as a member of the community or because he or she is within it. It is a concomitant of a society ruled by law and not by brute force that a person competent to do so should, where required, be sworn or affirmed to give truthful evidence and that he or she should give evidence when called upon to do so in the courts in answer to questions lawfully addressed.”

His Honour accepted that there was some measure of subjective fear on Mr Razzak's part, but nevertheless concluded that this was an objectively serious case of contempt. His Honour observed that there was no evidence that Mr Razzak had taken steps to seek protective custody or assistance otherwise, to enable him to discharge his duty as a witness to be called in a serious criminal trial.

Mr Razzak was sentenced to a fixed term of imprisonment for a period of 15 months.

SUB JUDICE CONTEMPT

A publication, broadcast or other conduct having a real and practical tendency to interfere with the administration of justice in a current or pending [25] trial is a contempt. There is a constant tension between the courts and the media. The interest of the community in being able to discuss issues of public interest cannot always be reconciled with essential requirements of a fair trial.

Sub judge contempt takes various forms including: publications in a newspaper and broadcasts on radio and television. Although they have not been prosecuted there is obviously potential for it to occur on the internet. Although publication of contemptuous material in conventional newspapers and journals or on radio and television may be readily identified the internet provides the opportunity for limitless numbers of people to communicate directly with each other. It will not be long before the courts have to confront the problem.

The public have an interest in serious crime. Media proprietors have a commercial interest in talking about it. The discussion is not always balanced. The law will intervene, if it is a jury trial, in order to protect the trial process from media comment which may affect the jury's impartial consideration of the evidence at the trial. The rules with respect to publication in the conventional media are well developed. Whether they are adequate for the age of the internet may be another question.[26]

The Bread Manufacturers Case

In 1937 the "iconic" journal of the day "Truth" published a series of articles critical of Bread Manufacturers Ltd, which was an association of employers in the bread-making trade. The articles related to the way in which Bread Manufacturers Ltd controlled the bread trade, especially by keeping bread prices at a high level and putting pressure upon non-members in various ways, including threats to cut off flour supply. The articles referred to Bread Manufacturers Ltd and its conduct as an "avaricious food ring", a "scandalous move to bump price on record wheat market", "bread brigands on the war path", "one of the most rapacious combines in existence today".

At the time of the Truth publication Bread Manufacturers was being sued in a libel action. It was argued that the offending articles were intended or likely to interfere with the administration of justice by causing prejudice in the minds of potential jurors. The Court determined that the articles related to a matter "which may fairly be regarded as one of public interest" and were not intended to influence the litigation in question and that any tendency to influence was "purely fortuitous".[27]

What has since been recognised as the classic statement of the test for liability for sub judge contempt was provided by Jordan CJ in *Bread Manufacturers Ltd*. [28] His Honour recognised that a balance must be maintained between the right of a person to contribute to the discussion of matters of public interest and their impact upon a pending trial. It is a point often not appreciated by those who seek to take advantage from silence once litigation has been commenced. His Honour said:[29]

"It is convenient in the first instance to consider the general principles which are applicable in such a case as the present. It is a well established general rule that any publication which has a tendency to interfere with the administration of justice by preventing the fair trial of any proceeding in a Court of justice is a contempt of court, and that if it is shown beyond reasonable doubt that such interference was either intended or likely, this Court will exercise its jurisdiction to punish summarily the criminal offence which is constituted by the contempt: *Bell v Stewart* 28 CLR 419 at p430-p432; *Austn Digest* 277. When intention is established to interfere with the proper administration of justice by means of a publication which had a tendency to produce that result, a clear case of contempt is made out, calling for sharp punishment. Where the particular form of contempt complained of is the publication of matter which in fact has a tendency to prevent a fair trial by prejudicing the parties to litigation in a Court of justice in conducting that litigation, if intention to cause such prejudice is established a serious case of contempt is at once made out, whether the publication refers to the subject matter of the litigation, or takes the form of mere general denigration of the party in question: *Higgins v Richards* 28 TLR 202; *Ex parte Myerson: Re Packer and Smith's Weekly Publishing Co* 39 WN 260; 4 *Austn Digest* 280. But if no such intention is established, the rule that the publication of matter tending, or even likely, to prejudice a party in conducting litigation constitutes a contempt of Court is not invariable.

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of

prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter."

Various cases illustrate the problems and the approach which the courts have taken to those problems. I have included some of them.

The Laws Case

In 1996 Michael Connolly was accused of the murder of a baby aged 18 months, Ari Jason Brett. On 20 February 1996 the trial came on for hearing before Simpson J and a jury. An indictment for murder was presented before the jury panel. Mr Connolly pleaded not guilty to murder but guilty to manslaughter. The Crown declined to accept the plea to manslaughter and the trial for murder proceeded. On 22 February 1996, the third day of the trial, John Laws the host of a radio "talk back" show said: [30]

"This fella's got to go in the bag. I don't want to talk too much about this fella (Hedia). You may have heard about him, his name is Michael Anthony Connolly and he is scum, absolute scum, pig, Michael Anthony Connolly. He admitted killing a little baby boy 18 months old, admitted that. He pleaded guilty but he pleaded guilty to manslaughter not guilty to murder so what are they doing here? A bit of plea bargaining. Violent crime and they let this fella plea bargain. Anyway don't ask me how he thinks he didn't murder the little fella. The child was found severely bashed: cuts, bite marks on his face. His name was Ari Jason Butt: beaten so badly that he died. How is that not murder? Could somebody tell me how that is not murder? The story emerging in court will make your blood run cold. Michael Anthony Connolly he was the boyfriend. He is the itinerant strayer of the mother of the child. Her name is Lavinia Butt. Now you've got to worry about her a little bit. The story is this, in 1994 she went to a BBQ with Connolly and a couple of her kids an 11 year old boy and 18 months old Ari and she happened to be pregnant at the time. The court heard at the BBQ she told Connolly that he might not be the father of the child she was carrying. His brother was probably the father. He drank two bottles of Southern Comfort. Two bottles! What is it 86%, 84%, 76% proof and he drank two bottles of the stuff. I don't drink it I can't stand it it's too sweet for me. And he then took the kids home. She let him, after two bottles, she let him take the kids home. The little boy Ari was later found dead in his cot. There's a picture of Lavinia Butt in the paper, she's pregnant again and fairly well pregnant by the look of it. I wonder who's the father of this one? Seems that with Lavinia it's like a lucky dip. What about Michael Anthony Connolly? He's pleaded guilty so all that remains is for him to be sentenced. But I'll certainly let you know the outcome of this but I would like to know why Michael Anthony Connolly was able to plead guilty of manslaughter and not of murder. Well I do know: plea bargaining, you see, the State saves money. That's what it is all about, but this fella deserves to be in the scumbag - open it up - in you go Michael Anthony Connolly you're scum."

As a consequence of those comments, Simpson J decided to stop the trial and discharge the jury. In the Court of Appeal, Priestley JA said that "the contempt of court and the risk of prejudice to the fairness of the trial were both starkly clear". [31] Mr Laws and radio station 2UE were found guilty of contempt and ordered to pay substantial fines and the costs of the Attorney General in those proceedings. [32] There was no question of applying the approach in *Bread Manufacturers Ltd*.

It will be obvious that Mr Laws spoke in strident tones. Any listener who respected Laws would be likely to think less of Connolly. He apparently had not been told that the Crown had rejected the plea. Laws is a morning broadcaster. Would the jury have been likely to hear the broadcast? Would it have caused them to diminish the significance of the judge's direction to confine their deliberations to the evidence? What if the same comments had been made by someone else in a "blog"? And what of the issue of the Crown accepting pleas? That must be a legitimate matter for public discussion.

Willesee case

On 11 August 1979, Peter Schneidas, who was a prisoner, was charged with the murder of John Mewburn, who was a prison officer. A strike of prison officers ensued. The prison went into lockdown with prisoners confined to their cells and supervised by police. Neighbouring residents raised complaints about the riots and disruption. Spurred on by these events, the Willesee current affairs programme arranged to conduct an interview with one of the prisoners. The interviewee made a statement about the alleged murderer's guilt. Before being put to air, this part of the interview was excised. However, in the course of the interview, the interviewee referred to the alleged murderer's criminal history. Willesee was charged with contempt.

In the Court of Appeal Moffitt P emphasised that it is one of the most "deeply rooted and jealously guarded principles of (the) criminal law" that evidence of prior convictions or crimes shall not be admissible on the trial of a person's guilt. [33] The court found that the nature of the broadcast in this case was relevant. [34] The fact that it was a television interview was said to make it more memorable.

Willesee sought to defend his actions by relying on the approach taken in *Bread Manufacturers Ltd*. Moffitt P rejected the argument saying:

- "The priorities in respect of the rights of litigants in a civil trial must be quite different from those where there is involved the right of a person to a fair trial upon a criminal charge. The right to a fair trial upon a criminal charge is so fundamental to our system of law that in any priorities it must be regarded as entitled to a primary place." [35]
- "To publish matter which has a real and definite tendency to prejudice or embarrass pending criminal proceedings is contempt. It is not to the point that the publisher is then dealing with another subject, and that the prejudicial matter published is merely incidental to the other matter and that its addition and any prejudice is fortuitous." [36]

Mr Willesee, Amalgamated Television Services Pty Ltd and Trans Media Productions Pty Ltd were fined \$2000, \$2000 and \$1000 respectively for the contempt proved. The *Bread Manufacturers* principle was successfully called in aid by Mr Willesee in a later contempt prosecution: *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650.

BLF case

In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* ('BLF case'), [37] involved a publication when a judge was sitting without a jury.

A Royal Commissioner had been appointed to investigate various matters concerning the Australian Building Construction Employees' and Builders Labourers' Federation (BLF) especially whether the organization or its officials had engaged in illegal activities. Norm Gallagher, the National Secretary of the BLF was suspected of misusing funds and abusing his position. On 19 October 1981 the Royal Commissioner began hearing evidence in public.

On 25 September 1981, the Commonwealth and the States of Victoria and Western Australia commenced proceedings in the Federal Court for the cancellation of the BLF's registration. The BLF challenged the validity of the letters patent establishing the Royal Commission and claimed that the conduct of the Commission would be a contempt of court, as it would interfere with the course of justice in respect of the Federal Court proceedings. The High Court rejected the claim.

The Court emphasised that there was a significant public interest in freedom of discussion of the issues

related to the BLF. The test for liability for contempt in a civil context is founded upon "the need to establish a substantial risk of serious injustice as an essential qualification of obtaining relief". [38]

Wran Case

Neville Wran was prosecuted for contempt following remarks which he made outside the Town Hall. He spoke with two radio journalists and in the presence of a third journalist from the Daily Telegraph about the likely outcome of a retrial for Justice Murphy. The relevant transcript was:

Q. So you're convinced he'll be found innocent after this re-trial?
A. I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing.

...

Q. So you'd expect a different verdict from a new trial?
A. Oh yes."

The Court of Appeal convicted Mr Wran. The court said that publications directed at guilt or innocence of an accused, being the central issue of any criminal trial, would rarely if ever be justified by the subordination of the public interest in the administration of justice to the public interest in the ventilation of public concerns. The court found that the stature of Mr Wran's position as Premier and President of the Australian Labor Party and his standing in the community would have made the comments more newsworthy than usual and the influence on members of the public, as potential jurors, more pronounced. The Court of Appeal found that Mr Wran was reckless as to the effect of his comments upon the administration of justice. No doubt many people express views about whether a person who has been charged with an offence is guilty. They will face difficulties if their views are reported to a wider audience.

Mr Wran and Nationwide News Pty Ltd were fined \$25,000 and \$200,000 respectively and both were ordered to pay for the DPP's costs.

Hinch case

In *Hinch v Attorney-General (Vic)*, [39] Michael Glennon, who had been ordained as a Catholic priest, was charged on 12 November 1985 with twelve counts of sexual offences committed upon young males, whilst he was governing director of the Peaceful Hand Youth Foundation Pty Ltd, an organization which conducted children's camps and other activities for children. On 13 November 1985 Derryn Hinch made a radio broadcast on Radio Station 3AW, Melbourne traversing Fr Glennon's criminal history, including an acquittal on two counts of rape involving a twelve-year-old boy. On 15 November Mr Hinch made another broadcast about Fr Glennon, raising the question of how he could continue to hold his senior office in the Foundation "after being gaoled on an indecent assault charge".

On 7 March 1986 Fr Glennon was charged with two further counts of indecent assault and rape of a female. On 11 March 1986 Mr Hinch made a third broadcast in which he again referred to Fr Glennon's prior convictions and to the charge on two counts of rape involving a twelve-year-old boy on which he had been acquitted. The thrust of the third broadcast, like that of the earlier ones, was that Fr Glennon's continued position as governing director of the Foundation was a danger to children and that this state of affairs defied any rational explanation.

Mr Hinch was charged with three counts of contempt. At first instance, Mr Hinch and Macquarie Broadcasting Holdings Ltd were fined \$25,000 each for the first 2 counts; for the third count Mr Hinch was sentenced to 42 days imprisonment and Macquarie was fined \$30,000. The Victorian Court of Appeal dismissed Mr Hinch's appeal but the sentence was reduced to 28 days and the fine for the first 2 counts to \$15,000 for each contemnor. The High Court dismissed Mr Hinch's appeal.

In his reasons, Mason CJ posed this fundamental question: [40]

"How does the law of contempt approach the discussion of a topic of public concern or interest when in the course of that discussion the speaker or the author makes explicit reference to proceedings in which an individual has been charged with a criminal offence

and that reference bears on the guilt or innocence of the accused or is capable of prejudicing him in his trial for that offence?

His Honour concluded that the law would intervene to protect the administration of justice from "any substantial risk of serious interference... as a matter of practical reality".[41]

Wilson J expressed the test in similar terms being whether, as a matter of practical reality, the impugned material had a "real and definite tendency to prejudice or embarrass pending proceedings". [42] His Honour added:[43]

"But it is important to emphasize that in undertaking a balancing exercise the court does not start with the scales evenly balanced. The law has already tilted the scales. In the interest of the due administration of justice it will curb freedom of speech, but only to the extent that is necessary to prevent a real and substantial prejudice to the administration of justice."

Prosecutions for sub judge contempt have been rare in New South Wales in recent years. There have been occasional prosecutions in other States, such as *Attorney-General for State of Queensland v WIN Television Qld Pty Ltd & Anor* [44] where fines were imposed for a television broadcast which followed the discharge of a jury which could not agree on the verdict. The broadcast suggested that the accused was guilty.

Interfering with the court's process

In *Attorney-General v Butterworth* Lord Denning MR described the rationale for prohibiting conduct, which involved interference with the court's process. He said: [45]

"There can be no greater contempt than to intimidate a witness before he gives his evidence or to victimise him afterwards for having given it. How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given? Let us accept that he has honestly given his evidence. Is he to be liable to be dismissed from his employment, or to be expelled from his trade union, or to be deprived of his office, or to be sent to Coventry, simply because of that evidence which he has given? I decline to believe that the law of England permits him to be so treated. If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences ... I have no hesitation in declaring that the victimisation of a witness is a contempt of court, whether done whilst the proceedings are still pending or after they have finished."

Harkianakis v Skalkos

The leading case in NSW is *Harkianakis v Skalkos*. [46] Defamation proceedings were on foot between Archbishop Harkianakis, the plaintiff and the head of the archdiocese of the Greek Orthodox Church in Australia, and Mr Skalkos, the defendant. During this time, Mr Skalkos published two articles on 20 and 22 July 1996 respectively. The issue was whether these articles were designed to impose pressure to force the archbishop to relinquish the defamation proceedings. The first article and much of what was in the second article, although offensive and insulting, were matters of public interest involving public criticism of the archbishop's fitness for office. However, there were passages in the second article which took it over the line as having "a tendency to deter the claimant in his prosecution of the main proceedings and to deter a person in the situation of the claimant from continuing to prosecute similar proceedings; and they do so by public vilification of the claimant because he is a litigant in the principal proceedings." [47]

The core principles were articulated in the judgment of Mason P (with whom Beazley JA agreed):[48]

- “The gravamen of the contempt is the tendency to deter both the individual litigant and litigants similarly placed who would wish to seek curial vindication of their rights.”
- “The gravamen of this particular type of contempt is the potential interference in the litigant’s freedom to conduct litigation as he or she chooses. ‘The right to bring an action in relation to a civil matter is really a bundle of rights that includes the freedom to originate, not to originate, to negotiate rather than litigate the settlement of the dispute, and/or to withdraw an action or a defence after setting it in motion. The latter options may be exercised up until the time the court delivers judgment.’”

Farahbakht v Midas Australia Pty Ltd

In *Farahbakht v Midas Australia Pty Ltd*, [49] Mr Farahbakht acted with the intention of inducing, Mr Norman, a potential material witness, to give false evidence or withhold evidence or not attend as a witness in the principal proceedings. The principal proceedings related to the proposed termination by Midas Australia of a franchise agreement with Mr Farahbakht to operate a Midas shop. The grounds for the termination included alleged fraudulent operation of the franchise, under-declaring sales and failure to produce Midas computer-generated invoices to customers of the franchise.

Mr Farahbakht knew that Mr Norman’s evidence had the potential to be highly injurious to him. On 3 October 2006 at about 4pm, while working at Midas Pymble, Mr Norman received a telephone call. The conversation proceeded in the following manner:[50]

F: Tom, this is Farid from Midas West Ryde

N: Yes

F: Are you going to court to testify against me?

N: I don’t know. How do you know I’m going to court anyway?

F: Glen told me. What did you mean? Either you are going to court or you are not going to court.

N: I don’t know. I’m waiting for a phone call. Why does it matter to you anyway?

F: I wanted to know who my friends and enemies are.

N: I don’t know yet if I am going to court. I am expecting a call today.

F: Are you going to go in there and say that you don’t know nothing or are you going to tell them what happened?

N: You should not be calling me. I have to go.

F: If you do say something it is going to hurt me and my family.

N: Look, I have to go.

Mr Norman gave evidence that during the conversation Mr Farahbakht’s tone was “menacing” and that he felt intimidated.

Brereton J found that the contempt charge involved an allegation of interference with the administration of justice. To intimidate witnesses in a manner calculated to deter them from giving evidence or to influence them in the evidence that they are to give prejudices the course of justice. [51] His Honour held that although the contemnor may not have intended to interfere with the course of justice, the action complained of was inherently likely to interfere with the administration of justice. [52] It was sufficient to constitute a contempt that the acts of the alleged contemnor were intentional. [53]

Brereton J said: [54]

“It is not a contempt to ring or approach or speak to a potential witness to ascertain what the witness is going to say, if called. There is no contempt involved in asking, “Are you going to court to testify against me?” Nor in my view is there necessarily any contempt involved in asking, “Are you going to go in there and say that you don’t know nothing or are you going to tell them what happened?”, at least unless accompanied by a suggestion, express or implicit, that the witness should do the former; such an inquiry simply seeks to elucidate what the witness is going to say and, in particular, whether the witness is going to tell what the enquirer, in the circumstances, fears will be disclosed if the truth is told, but might not be disclosed if nothing is said.

But it is when he goes on to say, “If you do say something, it is going to hurt me and my family” that in my view the line was definitely crossed. The statement, “If you do say something, it is going to hurt me and my family” can only have had as its purpose the raising of some, albeit perhaps slight, pressure, influence or encouragement not to tell the whole truth. At the very least, it was calculated to have that effect.”

His Honour emphasised that:

- “It is fundamental to the administration of justice that the willingness of witnesses to tell courts the truth be absolutely uninfluenced.”[55]

- “The administration of justice is no less prejudiced by the deterring or influencing of a witness from frankly telling the truth for reasons of affection, loyalty or concern about the impact of the evidence on a party, than by threats or bribery.” [56]

Although Mr Farahbakht’s telephone conversation was initially a legitimate one without threat, violence, “a menacing tone” or any intention to persuade Mr Norman to refrain from giving or altering his evidence, he stepped over the line in the course of it. [57] It became contemptuous “more or less spontaneously”. [58]

Brereton J decided that a term of imprisonment was not warranted. His Honour determined that the case was at the bottom of the scale. [59] Mr Farahbakht apologised and Brereton J ordered that he pay Midas Australia’s costs of the contempt proceedings on an indemnity basis.[60]

Novotny v Cropley

Novotny v Cropley [61] concerned an allegation that improper pressure had been applied to a litigant by her opponent. A firm of solicitors acting for Ms Cropley, the opponent, sent a letter to Dr Novotny, the claimant. It was alleged that the letter sought to put improper pressure on the claimant by "inviting" him to withdraw his appeal, and asserting that his case and the grounds relied upon were "hopeless". [62]

The question for the Court of Appeal was whether the contents of the letter had, as a matter of practical reality, a real and definite tendency to interfere with the course of justice. The Court made reference to the following principles:[63]

- To dissuade a litigant from prosecuting or defending proceedings by threats of unlawful action, by abuse, by misrepresentation of the nature of the proceedings or the circumstances out of which they arose and such like, is no doubt a contempt of court.

- The litigant’s freedom to conduct litigation as he or she chooses is not an absolute one. Pressure can be proper or improper. It may be actual or threatened, conditional or unconditional. What is done or threatened may be lawful or unlawful conduct. The mere fact that something that is lawful is threatened does not mean that the pressure is necessarily proper.

- An objective test, based on the hypothetical litigant of ordinary reasonable fortitude, to determine the tendency to interfere with the course of justice is more appropriate for contempts by publication, where balancing the public interest in freedom of speech against the public interest in the administration of justice is critical. In cases involving improper pressure arising from private communications between

parties to proceedings, rather than choosing between an objective and a subjective test, subjective factors such as the particular vulnerability of a party, in terms for example of age and means, are material to whether the pressure was improper.

Dr Novotny did not accede to the suggestion in the letter but continued with the appeal. The events in September and October of 2004 were found to be nothing more than an attempt to resolve the proceedings. The court found that both the letter and those events did not have the necessary real and definite tendency to interfere with the course of justice, such that a charge of contempt could possibly be made out.[64]

Implied undertakings to the Court

In *Street v Luna Park Sydney Pty Ltd*, [65] the plaintiffs charged Peter Hearne and David Tierney with contempt arising from their publication of documents produced to Luna Park Sydney by the plaintiffs. The plaintiffs were suing Luna Park Sydney for nuisance. Mr Hearne asked the Minister for Tourism and Sport and Recreation to legislate to amend the *Luna Park Site Act 1990* to ensure that in the future operations of Luna Park would be protected from proceedings. Mr Hearne sent an email to Minister Nori with a copy to Mr Tierney. The email contained a number of attachments, including a copy of a section of the affidavit of one of the plaintiffs together with their acoustic report.

Gzell J found that the implied undertaking that the documents would be used only for the litigation had been given by Luna Park and its solicitors but not the defendants. He dismissed the contempt proceedings.

Gzell J's decision has been challenged in the Court of Appeal. Before that appeal can be resolved it will be necessary for the court to determine whether it has jurisdiction. Apart from the circumstance where the Attorney-General appeals in respect of a question of law an appeal by a moving party is confined to a civil contempt (s 101 *Supreme Court Act 1970*). Although the difference between civil and criminal contempt has been described as "illusory"[66] and it has been suggested that all contempts are criminal in nature, the Court of Appeal will have to decide into which category the proceedings fall.

Gzell J's decision raised a number of significant issues. Were Messrs Hearne and Tierney bound by an implied undertaking to the Court? Mr Hearne was the managing director of the company which was one of the parties to the main proceedings. Mr Tierney was an advisor to the holding company of another of the main parties. Gzell J did not consider himself bound by a decision of the Full Bench in Western Australia in *Hammersley Iron Pty Ltd v Lowell* (1998) 19 WAR 316 and declined to follow it. That decision in which Ipp J (as he then was) joined would support a finding that a company director or anyone into whose hands the discovered documents come is bound by the undertaking if he or she knows they were obtained by way of discovery. Ipp JA as he now is sat upon the appeal from Gzell J. We await the outcome with interest.

Improper influence on jurors

The justification for this species of contempt is obvious. However, the boundaries of improper influence may not always be easily defined.

Regina v Bollen [67] illustrates some of the problems. In this case the friends and relatives of the victim came to court during a jury trial wearing T-shirts bearing a photograph of the victim. There was a conviction for contempt and the matter was reconsidered by the Court of Criminal Appeal (Hunt CJ at CL, Hulme J and Graham AJ).

Hunt CJ at CL said:

"There is a contempt of court if anything is said or done which has a tendency, as a matter of practical reality, to interfere with a criminal trial by influencing the minds of jurors upon the issues which they have to decide. There is a contempt whether the conduct suggests that the accused is guilty or innocent. And this is so, whether or not there was an intention to influence the jurors. I refer to the law relating to contempt not in order to accuse the friends and relatives of contempt, but only to illustrate just how seriously the law insists upon criminal trials proceeding without any conduct which is likely to influence jurors. What is in issue is not really the rights of the accused against the rights of victims

(or their families). What is in issue is the integrity of the process itself by which criminal justice is administered. If that integrity suffers, so does the whole criminal system.[68]

Photographs and identity of an accused

The publication of a photograph of an accused, accompanying written reports or commentary on pending proceedings, is likely to constitute contempt, especially where the identity of the accused is a live issue.

Attorney-General (NSW) v Time Inc Magazine Company Ltd, [69] concerned Ivan Milat who was indicted on seven charges of murder and a number of other charges. In May 1994, Milat was arrested. He was charged, amongst other things, with attempting to rob and to kill an English backpacker. The identity of the perpetrator of the crime was the central issue in the case.

On 6 June 1994 "Who" magazine published a story about the backpacker serial killings. On the front page, there was a large photograph of the accused. The photograph was accompanied by words which indicated that the magazine contained an article on the private life of the accused, as told by his brother. The photograph clearly depicted the facial features and the upper body of Mr Milat. The magazine was found to be in contempt.

Gleeson CJ explained the "notorious difficulty" of identification:[70]

"Such is the concern of courts about the risks involved in identification evidence that trial judges are bound by authority to give appropriate warnings and directions drawing the attention of juries to these risks. One of the particular problems about identification evidence is that the most honest of witnesses, completely confident in their own beliefs, can be mistaken. Another problem is that of suggestibility. People can honestly believe they recognise somebody because of ideas that have been suggested to them, and human nature is such that it is difficult, and sometimes impossible, for people to distinguish between what they know, and what they believe, or between the various sources from which their beliefs have come to be made up."

Finding the publication by Time Magazine contemptuous, the Court concluded that there was a real and definite possibility that the evidence of people who might come forward as witnesses for the Crown, or the defence, would be contaminated by their having seen the photograph of Mr Milat before performing an act of identification. [70]

What is not sub judice contempt?

Apart from the exception where there is an overriding public interest in freedom of speech (*Bread Manufacturers*), in *Packer v Peacock* [71] the High Court determined that the "bare facts" of a pending trial may be published without endangering a fair trial or interfering with the administration of justice: [72]

"In our opinion the public are entitled to entertain a legitimate curiosity as to such matters as the violent or sudden death or disappearance of a citizen, the breaking into a house, the theft of property, or any other crime, and it is, in our opinion, lawful for any person to publish information as to the bare facts relating to such a matter. By "bare facts" we mean (but not as an exclusive definition) extrinsic ascertained facts to which any eyewitness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person accused, and so on. But as to alleged facts depending upon the testimony of some particular person which may or may not be true, and may or may not be admissible in a Court of Justice, other considerations arise. The lawfulness of the publication in such cases is conditional, and depends, for present purposes, upon whether the publication is likely to interfere with a fair trial of the charge against the accused person. (*emphases added*)

Similarly, a fair and accurate report of proceedings in open court will not offend the sub judice rule. [73] However, in a jury trial, if any part of the proceedings has been conducted in the absence of the jury and decided by the judge alone, typically on a *voir dire*, a report of that part should not be made. [74] Likewise, a report of matters, such as the criminal history of an accused, not brought to the attention of the jury in open court through mechanisms of the trial process will contravene the sub judice rule. [76] The publication of material, which was not intended for the jury, would subvert the administration of justice and could not be a "fair, accurate and contemporaneous" [77] report of proceedings. A "fair" report will be one made bona fide and not for some ulterior purpose. [78] The bona fides of a report will be questionable if it is made long after the committal proceedings but shortly before the commencement of the trial "for its news value and in a complete and serious disregard of its consequences". [79] A report of court proceedings is not privileged from liability for contempt merely because the information was obtained from a police officer. [80]

Changes proposed by the NSW Law Reform Commission

The Law Reform Commission published a Report [81] on sub judice contempt in 2003. It made a number of recommendations. I shall mention three of them.

Reformulating the 'tendency' test

The Commission recommended the following reformulation of the test for liability for sub judice contempt: [82]

The publication of matter should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publishing the matter, that:

- (a) members, or potential members, of a jury, or a witness or witnesses, or potential witness or witnesses, in legal proceedings will:
 - (i) become aware of the matter; and
 - (ii) recall the content of the matter at the relevant time; and
- (b) by virtue of those facts, the fairness of the proceedings will be prejudiced.

This modification was said to have a number of advantages: [83]

- A test based on "substantive risk" is preferable to one based on "tendency" because it is more precise, clearer, and raises the threshold for liability to a level that justifies curtailment of freedom of discussion to protect prejudice to legal proceedings.
- The scope of liability extends to not only criminal proceedings but also defamation proceedings involving a civil jury.
- The test involves "awareness" of the contemptuous material. This encompasses both direct and indirect encounters with the offending material, be it by reading, watching or listening.
- The reformulation refers to "will recall", "will become aware of" and "will be prejudiced". This refinement creates a higher threshold of liability for the prosecution to meet and therefore a high degree of probability is required in order to justify curtailment of freedom of discussion.

Additional defences

Sub judice contempt is an offence of absolute liability. The contempt will be made out even if a publisher or author did not know or could not reasonably have known that an offence was being committed or had made reasonable efforts to check that no proceedings were pending which might be affected by a publication. [84] The Commission was concerned that this was unnecessary and expressed the view that fault should be incorporated into a statutory definition of contempt.

The Commission proposed a defence of innocent publication that should be available to (1) those persons who are in a position to exercise editorial control in relation to the contemptuous publication;

and (2) those who have no such control, for example, distributors, vendors and broadcasters who broadcast live interviews. The common underlying principle was the need to exercise reasonable care. [85]

‘Law & order’ emphasis on public interest test

The Commission restated the process by which the competing interests in the freedom to discuss public affairs and the administration of justice are balanced by defining more precisely the matters that need to be weighed: [86]

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:

- (a) the material relates to a matter of public interest; and
- (b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses and/or litigants created by the publication.

However, the Commission goes on to suggest further refinement by creating a “public safety” exception in respect of a publication that is found to have breached the sub judice rule. Although it may be said that notions of “public safety” are too broad and may overshadow the imperative of a fair trial, the proposal is worded so that the countervailing interest in “public safety” is required to be demonstrated “only after a careful and independent examination of the relevant circumstances and not based on reliance on who gave the information nor on the representations made by the latter”, such as a law enforcement officer. [87] The recommendation states: [88]

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if the publication the subject of the charge was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence.

SCANDALISING THE COURT

Early English cases

In 1765, Sir Fletcher Norton [89] having moved for a writ of attachment, Mr Almon [90] was brought before Wilmot J in the Court of King’s Bench to answer a charge of contempt for publishing a pamphlet accusing Lord Mansfield, the Lord Chief Justice, of having acted “officiously, arbitrarily and illegally”. [91] Wilmot J foreshadowed the formulation by modern courts of the rationale for the punishment of this form of contempt in these terms: [92]

“[I]t excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are channels by which the King’s justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary.”

In *R v Gray*, [93] Mr Gray, the editor of the Birmingham Daily Argus, on the day following the trial and conviction of a Mr Wells on a charge of obscene publications, in which the trial judge – Mr Justice Darling – had warned the local press at the start of the trial against the publication of any of the obscene publications in evidence, published an article stating the following: [94]

“The terrors of Mr Justice Darling will not trouble the Birmingham reporters very much. No

newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty-headedness, who admonished the Press yesterday."

The remarks were found to be a scurrilous abuse of a judge. [95] Mr Gray was fined £100 and ordered to pay £25 in costs. He also apologised.

Re New Statesman (Editor); Ex parte Director of Public Prosecutions [96] concerned a libel action brought by the editor of the Morning Post against Dr Marie Stopes, who was an advocate of birth-control. [97] After the verdict against Dr Stopes, the New Statesman published an article suggesting that Mr Justice Avory had allowed his religious convictions as a Roman Catholic to affect his summing up to the jury. It said: [98]

"The serious point in this case, however, is that an individual owning such views as those of Dr Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr Justice Avory – and there are so many Avorys."

This publication was found to be in contempt for lowering the authority of the court by imputing a lack of impartiality and fairness on the part of the trial judge in discharging his judicial duties. [99]

Bell v Stewart [100]

An early example of scandalising the Court in Australia occurred before the Commonwealth Court of Conciliation and Arbitration. Although the High Court on appeal set the contempt charges aside the formulations of the test for this form of contempt are useful.

On 15 April 1920, the President of the Commonwealth Court of Conciliation and Arbitration, Higgins J, was hearing a matter relating to the reduction of the weekly hours of work and there arose discussion of employees "slowing down". On the following day, the Argus, a newspaper then in circulation in Melbourne, published the following: [101]

"Mr Justice Higgins is not satisfied that 'slowing down' is practised in industry. ... The lack of judicial knowledge of facts well known to the parties is not unknown in cases outside industrial matters, and, although the Court can take no cognizance of notorious facts, there is nothing in law to forbid the public from feeling amused at this display of innocence from the Bench. ... The detachment of the Arbitration Court from the facts of industrial life explains, in some measure, why industrial life is rapidly detaching itself from the Court."

The publisher of the newspaper, George Bell, was charged and punished for contempt in the Court of Petty Sessions. The article was said to be calculated to bring the Court of Conciliation and Arbitration into disrepute.

The High Court agreed with the argument that for the words published, to constitute contempt, they must:

"in the mind of any reasonable man, bring the Court into disrepute, or, to use synonyms, disesteem, discredit, disgrace or dishonour". [102]

The comments about the President's refusal to assume, without due proof, the fact of "slowing down", although notoriously practised in industry, were satirical. A majority of the High Court decided that it was

"difficult indeed to believe that any such comment would sap or undermine the authority of any Court in the mind of any reasonable person. Indeed, amongst reasoning men, we believe that the practice of the Court would rather be supported and seem to be well

calculated to ensure a proper and just administration of the law free from the prejudices or want of knowledge of any particular officer." [103]

Isaacs J and Rich J said: [104]

"Words calculated to bring a Court into disrepute are words imputing to it, not erroneous judgments or a mistaken view of the subject it deals with, but, as in the case of individuals, conduct or character that, if true, would forfeit the respect of the community."

Wik

The High Court came under vehement attack from politicians and pastoral lobby groups for its decision in *The Wik Peoples v State of Queensland; The Thayorre People v State of Queensland*. [105] Tim Fischer, the Deputy Prime Minister at the time, was one of many vocal critics. The attacks were directed at the competence of the High Court and the diligence with which it carried out its functions. The first shot was fired on 27 November 1996: "I am frustrated and angered by the delay in handing down of the decision by the High Court of Australia with regard to the *Wik* decision." [106] During January and February 1997, his criticisms escalated to include:

- accusing the four majority judges in the *Wik* decision of unacceptable judicial activism and described Justice Kirby's separate judgement as "awful"; [107]
- all four majority judges in the *Wik* case were guilty of "the maximalist approach to judicial intervention in legislative creation"; [108]
- "I'm attracted to the thought that it would be a capital C Conservative lawyer/judge... That doesn't necessarily mean, by the way, someone who's had any direct contact with the Liberal or National Party," he said. "There are capital C law persons... who may well have connections to both sides of politics. In other words someone who's somewhat conservative on the matter of judicial activism." [109]
- "However, I am absolute that it's a legitimate thing to debate the judgments of the High Court if it is dominated by the majority who believe in judicial activism." [110]

The wave of criticism of the Court in the months following the *Wik* judgment caused the Chief Justice at the time, Sir Gerard Brennan, to take the extraordinary step of writing a letter to Mr Fischer, in which his Honour said: [111]

"You will appreciate that public confidence in the constitutional institutions of government is critical to the stability of our society.

.....

Neither the cooperation that is required among the branches of government nor the dignity of this Court would be advanced by my making a public statement to repel the attacks which you have made. Indeed, Courts are not capable of responding – nor would they wish to respond – to media attacks. I ask you to bear this in mind and to consider whether the making of attacks on the performance by the Court of its constitutional functions is conducive to good Government, even if an attack can gain some temporary political advantage."

The National Party's Senate leader, Senator Ron Boswell, added to the chorus of complaints about the High Court. He told Parliament that the High Court had usurped the politicians' role and helped "plunge Australia into the abyss". [112]

The Premier of Queensland at the time, Rob Borbidge, entered the fray. On 28 February 1997 he said:

"The defence that he has given in respect of the High Court's performance is pathetic and lamentable... What we've got are self-appointed kings and queens... The current High Court, across large parts of Australia, is increasingly being held in absolute and utter

contempt." [113]

The following day in a speech to a National Party conference in Sydney, attended by Mr Fischer and broadcast on ABC television that night, Mr Borbidge dismissed "the High Court, collectively" as "a pack of historical dills". [114] He also said that the Wik ruling was a "lunacy" and the "ranting and ravings" of Justice Kirby constituted an assault on the democratic process. [115]

This wave of criticism post-Wik drew the following response by the late Sir Maurice Byers: [116]

"The constitutional impropriety of the Deputy Prime Minister's attack upon members of the High Court is obvious enough and it should have been obvious to Mr Fischer. For a leading member of the Federal Government intemperately to criticise the institution charged by the Constitution with the duty of determining the validity of Commonwealth legislation does not strike the onlooker as the height of political wisdom. When the decision is one any first-year law student could have told Mr Fischer and his National Party colleague, Mr Borbidge, was not only in accordance with long-established legal principle, but arrived at after meticulously written elaboration of the terms of the pastoral leases and the legislation in question, Mr Fischer's foray could be considered unfair and even misleading. Mr Borbidge's crude outburst was perhaps prompted by the rancour of a bad loser, for the pastoral leases in the Wik Case were granted by the Queensland Government and the legislation had been passed by the Queensland Parliament and Queensland fought and lost the litigation."

In a speech given on 5 January 1998 to the Litigation Section of the American Bar Association, Justice Kirby collated a litany of epithets, which had been used to attack the High Court and its justices since the Wik decision: [117]

"Recent High Court decisions, the Court and the justices were labelled "bogus", "evasive", guilty of "plunging Australia into the abyss", a "pathetic ... self-appointed [group of] Kings and Queens", a group of "basket-weavers", "gripped ... in a mania for progressivism", purveyors of "intellectual dishonesty", unaware of "its place", "adventurous", needing a "good behaviour bond", needing, on the contrary, a sentence to "life on the streets", an "unfaithful servant of the Constitution", "undermining democracy", a body "packed with feral judges", "a professional labor cartel". There were many more epithets of a like character, many stronger."

Of present relevance is the fact that no proceedings were brought for contempt. Nothing so marks the contemporary division in social attitudes in this country as the *Wik* and *Mabo* decisions. Were contempts committed? Probably yes. Would there have been any purpose in their prosecution? Probably not. If the answer to the second question is correct the next question must, of course, be "why not." Perhaps we have reached the point in our society where the authority of the courts is so firmly established that most criticism, however strident, is not likely to adversely affect the administration of justice. Or is that view naive?

Dunbabin case

The lack of any action following the *Wik* decision may be contrasted with *R v Dunbabin; Ex parte Williams*. [118] In that case, the editor of the Sun Newspaper, Thomas Dunbabin, and Sun Newspapers Ltd, the owner of the newspaper, were punished for contempt by publishing an article on 13 April 1935.

Rich J said the article fell into that class of publications, which: [119]

"tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

The article took issue with the approach the High Court took in both a matter under the *Immigration Restriction Act 1901* relating to the illegal arrival of Mr Kisch, a Czechoslovakian author, and another a case concerning the applicability of sales tax provisions to second-hand dealers. There is a deliberate choice of derisive and insulting terms. The tone is not of rational criticism, rather sarcastic jibing. Inter alia, the article stated the following: [120]

- "...the High Court knocked holes in the Federal laws. Those laws have certainly been perforated by the keen legal intelligences of the High Court bench."
- "to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia, the High Court declared that Mr Kisch must be given his freedom"
- "When the amendments [to the Immigration Restriction Act] are made we should invite [Mr Kisch] to jump ashore again to see whether the new Act pleases the High Court any better than the old, or whether the ingenuity of five bewigged heads cannot discover another flaw."
- The High Court was said to have a "keen, microscopic vision for splits in hairs which is the admiration of all laymen".
- "Well may [they] cry, like the historic British monarch, for some gallant champion to rid them of this pestilent Court."
- "If the High Court were given some real work to do the Bench would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee."
- "Some of these days a commonsense Government may tell the High Court that, as it has very little useful work to do, it will be required to examine the Acts which will be sent to it straight from the Legislature, to stamp OK upon them, or to suggest amendments which will make them thoroughly legal, as the case may be, and then return them by swift messengers for the Vice-Regal signature."

Mr Dunbabin and Sun Newspapers Ltd were fined £50 and £200 respectively.

Rich J said of the article:

"Such imputations, if permitted, could not but shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law." [121]

Gallagher v Durack

In *Gallagher v Durack* [122] the High Court dealt with an appeal from the Federal Court where Norman Gallagher was found guilty of contempt.

After Mr Gallagher's successful appeal before the Full Federal Court in another matter, journalists, television cameramen and others assembled outside the office of the Builders Labourers' Federation seeking an interview with him. He was interviewed twice. After the first interview, he distributed a resolution passed by the federal management committee of the Builders Labourers' Federation, which stated: [123]

"The decision of the Federal Court is a credit to the rank and file of the Federation whose significant stand, alongside their elected representatives, is the key to the reversal of the decision to jail Norm Gallagher."

In the second interview, which immediately followed, an exchange between Mr Gallagher and a television channel representative occurred as follows: [124]

"Q: Mr. Gallagher, what is your reaction (or response) to the Court's decision?"

A: I'm very happy to the rank and file of the union who has shown such fine support for the officials of the union and I believe that by their actions in demonstrating in walking off

jobs ... I believe that that has been the main reason for the court changing its mind." (emphases added)

Mr Gallagher was found guilty of contempt and sentenced to 3 months' imprisonment. The High Court dismissed the appeal and affirmed the conviction.

The relevant principles were comprehensively stated in the joint judgment of Gibbs CJ, Mason J, Wilson J and Brennan J: [125]

"The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority": per Dixon J. in *R v Dunbabin*; *Ex parte Williams*. The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges."

Some other decisions

In *Ambard v Attorney-General for Trinidad and Tobago* [126] Lord Atkin took a robust view of a person who criticised a court:

"[N]o wrong is committed by any member of the public [much less, it may be thought, an official called upon to comment] who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice...Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." (emphases added)

In *Attorney-General for New South Wales v Munday*, [126] the President of the Builders' Labourers' Federation ('BLF') had been charged with malicious damage to property at the Sydney Cricket Ground during a protest against the presence in Australia of the South African Rugby Union team. Many members of the public attended the trial, including a large contingent of builders' labourers. The President was found guilty, fined \$500 and released on a good behaviour bond. After the trial outside the Court of Quarter Sessions, Mr Munday, who was the Secretary of the BLF, was interviewed: [127]

Q: Mr Munday, what's your impression of this morning's decision?

A: Well, I think it's a miscarriage of justice, it is very evident that right from the start that the barrister who did an excellent job, Jim Staples, was prevented from giving very important and relative material and because of this well, you couldn't call it a real case. I think that, once again it showed that the judge himself was a racist. It shows you the extent to which racism exists within our society and it shows you what a tremendous problem we have, all Australians, to overcome this deeply ingrained racism.

.....

Q: Will the Federation be considering any further, say, strike action as a result of this morning's decision?

A. Well the Executive will meet this afternoon and we will weigh everything up. I think the main purpose, the industrial action by the workers here this morning, the spontaneous action of workers walking off jobs, stopped the racist judge from sending these two men to jail. That's the real position.

It was not the suggestion of racial bias that constituted contempt. Rather in the words of Hope JA: [128]

“the words the defendant used meant that the judge had decided to send Mr Pringle and Mr Phillips to gaol, but he changed his mind because he was overawed by the action of workers walking off their jobs and attending the trial and by the threat to call a national strike...the words which he did use were calculated to express a view that a judge, having made up his mind to take a particular course of action, was overawed into taking another course of action...Such a statement must tend to induce a lack of confidence in “the ordered and fearless administration of justice”, and was in the circumstances quite unwarrantable.”

Committal for contempt of court is a weapon to be used sparingly. [129] In this case Hope JA said: [130]

“Anyone who had the slightest acquaintance with the learned Chairman [of the Court of Quarter Sessions] involved in the present case would realize that a suggestion that he would be overawed in this way is a ludicrous one, but nonetheless it is in my opinion of the greatest importance that the public generally should be disabused at once as to the truth of such a claim.”

CONCLUSION – WHERE TO FROM HERE?

In relation to sub-justice contempt it appears based on recent experience, that Attorneys-General may have lost the stomach for taking on large media organisations even where apparently significant contempts have occurred. In part, this may be because of certain newspapers' critical attitude to Judges generally. On the other hand, there is no doubt a genuine feeling throughout the community that Judges and judicial decisions (for example, the grant of bail) are not above public scrutiny and public criticism. Judges have to accept, I think, that this is, generally speaking, a healthy sign in a democracy, even if some of the commentary is ill-informed.

On a completely different subject (the Danish Cartoonists and the vehement international protests orchestrated against them) Peter Coleman recently wrote: -

“In Australia editors did not republish the cartoons, even to help explain the riots and allow readers to judge. They said it was a matter of taste or respect. No doubt it was for some. But for others I think it was cowardice. Almost everyday newspapers publish cartoons which many find offensive or humourless. But readers know they are part of the give and take of a free society. They may criticise them but they do not call for the beheading of the cartoonists. In the event, the newspapers passed up a heaven sent opportunity to demonstrate the freedom that it has taken some centuries to establish”.

It may be a proper area for debate for Judges to consider whether they have, in the past, been too narrow in their focus concerning newspaper and media articles or commentary.

There is little to be said in relation to contempt arising from improper influence on jurors, witnesses or parties. Proceedings for contempt in relation to such matters are clearly warranted. The principal query, however, may be whether any reform of the present procedures or structures is required. So too with contempt proceedings arising out of breach of undertakings or contravention of court orders.

The more difficult arena is the situation of contempt in the face of the Court where litigants openly ridicule, abuse and threaten the Judge. Should the hubris and idiosyncratic temperament of an individual Judge be the anvil on which these issues are to be hammered out? Where is the dividing line between legitimate dissatisfaction and the undoubted right of a court to go about its business without undue disturbance of the proper administration of justice in either criminal and civil proceedings? These are difficult issues particularly in an age when the wisdom of Judges is no longer seen as a certainty and the actions of individual courts are increasingly under public scrutiny.

Two areas for consideration emerge from this paper. The first is the impact of the internet on sub judge contempt and the conduct of a trial. The Chief Justice considered some aspects of this issue in his paper “The Internet and the Right to a Fair Trial.” [131] Justice Bell has also discussed it. [132] The capacity of jurors to research legal or factual issues or seek out information about an accused have been discussed. Statutes have been provided and model directions have been developed. The assumption, about which in this area, I have significant reservations, is that jurors will obey them. The

temptation to make the extra “click” will prove irresistible for many people.

But what of the more general use of the internet in the future. The newspapers now include a “hyperlink” from the news story to your judgment. Once published it cannot realistically be retrieved. An article which condemns a convicted person will in the future remain accessible, probably for all time. When, as is inevitable, for most people our daily news comes from the internet, with infinite possibilities for cross reference or connection giving access to information at a speed and in detail never previously imagined - when a news story will give you access on the internet to other “related stories” - the assumption that jurors will not gain access to information about an accused’s antecedents will almost certainly be challenged. Publication will no longer be a unique event which readily fades from our memories. Everyone will have access to a permanent record which they can retrieve with a prompt from the report of a contemporary event. How will the law of contempt respond to these challenges?

The second issue is the contemporary approach to scandalising the courts. It is true that prosecutions are now rare. At the same time critical discussion of courts and the efficiency of their process and quality of their decisions has increased. Regrettably the language of the critic is not always elegant and descends at times to mere abuse without attention to the facts or an intellectually coherent thread. This is, of course, true of some critics who write on matters other than the law. The fact that proceedings have not been thought necessary to protect the standing of the courts, rather than a reflection of timidity by Attorneys General, may represent the contemporary reality that the ordinary person does respect the courts and, although perhaps amused by it, is capable of distinguishing between abuse, which often diminishes the writer, and reasoned criticism which, although sometimes painful when received, contributes positively to the administration of justice.

In 2002 Chief Justice Marshall from Massachusetts gave a lecture with the title “Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law.” [133] Her Honour asked the question: “should citizens be permitted to say anything they please about judges and the courts – even untrue and vicious things.” Speaking from her experience in Massachusetts courts and mindful that American jurisprudence had departed sharply from the path of the English Common Law in this area her Honour expressed the view that scrutiny and criticism of the courts sometimes highly critical statements had made the judiciary stronger and not weaker. Freedom to criticise judges “is a necessary condition of judicial independence.” Provided the courts remain resolute in their efforts to apply the law the ebb and flow of public criticism will not impinge upon the community’s confidence in the institution. That confidence could be lost if attempts were made to confine the critics.

Were Professors Enid Campbell and H P Lee correct when they said:

“The exercise, especially of a superior court’s summary jurisdiction for contempt, should be reserved for cases when the action or publication in question clearly and beyond doubt is calculated to bring the court into contempt and to lower its authority. Otherwise, the courts should leave to public opinion the reprobation of scandalous attacks or comments.”[135]

JURISDICTION

A superior court of record has inherent jurisdiction to deal summarily with any contempt affecting its own proceedings. [136] There are various provisions of the *Supreme Court Act 1970* (NSW) relevant to contempt including:

Section 48(2)(i)

There are assigned to the Court of Appeal proceedings in the Court for the punishment of contempt of the Court, but only if the contempt consists of:

- (i) contempt in the face of, or in the hearing of, the Court of Appeal, or
- (ii) disobedience of a judgment or order of the Court of Appeal, or
- (iii) breach of an undertaking given to the Court of Appeal.

Section 53(3)

Subject to the rules, there are assigned to each Division proceedings for the punishment of contempt of the Court, but only if the contempt consists of:

- (a) contempt in the face of, or in the hearing of, the Court in that Division, or
- (b) disobedience of a judgment or order of the Court in that Division, or
- (c) breach of an undertaking given to the Court in that Division.

Summary procedure: the norm

A charge of contempt is now dealt with summarily, by either motion or summons. Trial on indictment is obsolete. [137] There is no recorded case during the 20th century in New South Wales of any contempt cases prosecuted other than by summary procedure.

Immediate procedural consequences of prima facie contempt

Contempt in the face of the Court

In the event of an allegation of contempt in the face of the Court, rule 2 in Part 55 Division 2 of the Supreme Court Rules 1970 (NSW) provides:

Where it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of court, committed in the face of the Court or in the hearing of the Court, the Court may:

- (a) by oral order direct that the contemnor be brought before the Court, or
- (b) issue a warrant for the arrest of the contemnor.

A warrant for the arrest or detention of the alleged contemnor shall be addressed to the Sheriff and may be issued under the hand of the judge directing the arrest or detention. [138] The Court may, upon the arrest of the alleged contemnor and pending the disposal of the contempt charge, direct that the contemnor be: [139]

- kept in such custody as the Court may determine, or
- released, where the Court may direct the contemnor to give security in such sum as the Court directs for his appearance in person before the Court to answer the charge and submit to the judgment and order of the Court.

Section 64 *Bail Act* 1978 provides, in effect, that the *Bail Act* 1978 does not apply to contempt proceedings except where those proceedings may be commenced by information or complaint. Once the contemnor is brought before the Court, the Court shall: [140]

- (a) cause the contemnor to be informed orally of the contempt charge(s);
- (b) require the contemnor to make their defence to the charge;
- (c) after hearing the contemnor, determine the matter of the charge; and
- (d) make an order for the punishment or discharge of the contemnor.

Other types of contempt

In cases other than contempt in the face of the court, if the contempt is in connection with proceedings in the Court, the usual procedure requires an application for punishment of the contempt by notice of motion in those proceedings. [141] If the contempt is not in connection with proceedings in the Court, proceedings for punishment of the contempt must be commenced by summons. [142] The notice of

motion or summons is to be served personally on the contemnor. [143]

Where a notice of a motion for punishment of a contempt has been filed, or proceedings have been commenced by summons for punishment of a contempt, but it appears to the Court that the contemnor is likely to abscond or otherwise leave the jurisdiction of the Court, the Court may issue a warrant for the arrest and detention in custody of the contemnor until the contemnor is brought before the Court to appear in person to answer the charge. [144]

Detention of contemnor

In *ASIC v Michalik* [145] Palmer J determined that a person who has been arrested for contempt of court pursuant to a warrant granted under Pt 55 r 10 of the Supreme Court Rules is a “person in custody” within the meaning of s 249(a) and s 249(h) of the *Crimes (Administration of Sentences) Act* 1999 (NSW). Consequently, the procedures for detention contained in Pt 13 (‘Custody of persons during proceedings’) of that Act were applicable in respect of the alleged contemnor, pending a substantive hearing of the charge. [146] This is equally relevant to the interim custody of an alleged contemnor charged for contempt in the face of the court.

Who can initiate contempt proceedings?

Attorney General

Under the *Criminal Procedure Act*, the Attorney General, Solicitor General or Crown Advocate acting under a delegation from the Attorney General may institute proceedings for contempt in the Supreme Court in the name of the ‘State of New South Wales’. [147] Although the Director of Public Prosecutions (“DPP”) is generally responsible for the prosecution of most indictable offences, it is the Attorney General who is the main law officer that initiates and conducts prosecutions for contempt.

Director of Public Prosecutions

The *Director of Public Prosecutions Act* 1986 is silent on the topic of the DPP commencing contempt proceedings. In *Director of Public Prosecutions v Australian Broadcasting Corporation* however the Court of Appeal decided that in the usual course of its prosecutorial role, the Commonwealth DPP could institute contempt proceedings by exercising its rights as a litigant to ensure the integrity of the administration of justice in respect of the principal proceedings, which it is prosecuting. [148] By analogy, at common law it is conceivable that the State DPP could bring contempt proceedings where the DPP is a party to the principal proceedings. This has also been referred to by the NSWLRC [149] but the DPP is yet to exercise the power.

In practice, the New South Wales Director of Public Prosecutions may appear in criminal proceedings where the trial judge charges the contemnor (eg *R v Razzak* (2006) 166 A Crim R 132; [2006] NSWSC 1366) or where a charge alleges a breach of a statutory prohibition upon publication (eg s 11, *Children (Criminal Proceedings) Act* 1987). The Crown Solicitor will prosecute contempt where proceedings are initiated following referral by the judge to the Principal Registrar of the Supreme Court under Pt 55 SCR (eg *Principal Registrar of Supreme Court v Tran* (2006) 166 A Crim R 393; [2006] NSWSC 1183).

The NSWLRC discussed the possibility of conferring day-to-day responsibility for the prosecution of criminal contempt on the DPP regardless of whether the DPP was a party to the proceedings from which the contempt ensued. Given that the DPP is the main prosecutorial officer of the State and criminal contempt should be treated like any other criminal offence, legislation allowing the DPP to prosecute contempt would facilitate consistent prosecution policy. The independence of the DPP from political imperatives may be an advantage where the contemnor is a political figure, a powerful media proprietor or the conduct politically sensitive or highly controversial. [150]

The NSWLRC recommended that the Attorney General should continue to have primary responsibility for the prosecution of criminal contempt cases, such as sub judice contempt. [151]

Others

Although the Attorney General may instigate contempt proceedings under the *Criminal Procedure Act*,

nothing prevents contempt of court being dealt with in any other manner and, in particular, proceedings for contempt from being instituted in any other manner. [152]

The Court may, by order, direct the registrar to apply by motion for, or to commence proceedings for, punishment of the contempt, where it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of the Court. [153] Superior courts of record have an inherent power to act on their own motion in contempt cases. [154]

The rules of court afford any person, other than the registrar, the opportunity to apply by motion for, or to commence proceedings for, punishment of contempt. [155] The rules preserve the common law right of a private litigant to commence proceedings for contempt of court, where he or she has a personal stake or special interest in them. [156] Although the NSWLRC has supported the right of individuals to institute contempt proceedings, it has recommended that provision be made to allow the Attorney General and the DPP to take over the carriage of a private prosecution for contempt. [157]

Who should hear contempt cases?

In the case of contempt in the face of the court, the judge who witnesses the contemptuous conduct, may try the matter and adjudicate upon it. However, it is now accepted that the court "should not appear to be both prosecutor and judge." The power should only be exercised where the contemnor needs to be dealt with swiftly to prevent further disruption of the proceedings. It is appropriate where there is an "urgent need for the court to establish its authority and conduct a trial without interference" or an "overriding public interest in the safeguarding of the administration of justice from interference". [158] The process, "though a necessary adjunct to the powers of a judge to conduct trials in his court, is an exceptional procedure" and inappropriate for non-urgent and non-imperative cases. [159] In *R v Razzak and Principal Registrar of Supreme Court v Tran*, the trial judge before whom the witnesses refused to give evidence declined to hear the contempt charges and the matters were determined by another judge of the Court.

Kirby P emphasised the need for caution when dealing summarily with contempt: [160]

"For when a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines matters in dispute and imposes punishment. The combination, in the judge, of four such inimical functions is not only unusual. It is so exceptional that, though it may sometimes be required to deal peremptorily with an emergency situation, those occasions will be rare indeed."

To avoid this potential conflict of roles, prior to 2 May 1997, there existed the power under the *Supreme Court Act* to assign proceedings for any type of contempt of the Court to the Court of Appeal. [161] Although such cases of contempt could still be dealt with within the relevant Division of the Court, they were assigned as a matter of course to the Court of Appeal. [162]

As of 2 May 1997, however, upon the commencement of the *Courts Legislation Amendment Act 1996* No 111, amendments to the *Supreme Court Act* were made such that in the event of (a) contempt in the face of or in the hearing of the Court, (b) disobedience of a judgment or order of the Court or (c) breach of an undertaking given to the Court, proceedings for the punishment of those contempts of the Court are now assigned within the relevant Division of the Supreme Court. [163] Likewise, if any of these classes of contempt are alleged to have occurred in the Court of Appeal, proceedings are assigned within the Court of Appeal itself. [164] For other categories of contempt of the Court or any other court, proceedings are assigned to the Common Law Division. [165] These arrangements post-2-May-1997 under the *Supreme Court Act* ensure that contempt matters are: [166]

"sent elsewhere to be dealt with, as our law normally provides, by neutral decision makers, hearing evidence proved and tested and after the public officials normally concerned in upholding the criminal law have had an opportunity to consider their responsibility to vindicate the administration of justice. A conviction being found, punishment may be imposed, if at all, by judicial officers who can approach the case with that neutrality and detachment which is the properly prized feature of justice in our courts."

SENTENCING FOR CONTEMPT

Briefly retracing the history

Under the jurisdiction of the early common law courts, the contemnor was said to be in *miser cordia regis* (in the King's mercy) or *capiatur* (taken or imprisoned). [167] In the former case, the contemnor was 'amerced', whereby a money payment, which was fixed by the court and later by a local Justice of Assize and jury, had to be made to the Crown. [168] Failure to do so would result in goods being distrained but not imprisonment. [169] If the contemnor was "capiatur" or imprisoned, the contemnor could avoid it by "making fine with the Crown" by paying a fixed sum in lieu of imprisonment. [170]

Amercement typically applied to parties to the proceedings from which the contempt arose, whereas imprisonment applied to those who are not parties to the underlying proceedings. [171] A contemnor could not be both imprisoned and made liable to pay a pecuniary penalty. [172]

Where court officers committed contempt, they were both imprisoned and required to pay an amount fixed by the court; there was no pecuniary substitute for incarceration. [173] It was in this setting, that the phrase "to make fine" to avoid incarceration was replaced by the more familiar modern phrase "to be fined" to indicate a compulsory payment in default of or in addition to which imprisonment followed.

The practice of the Star Chamber, which also had jurisdiction to punish for contempt, was always to impose a pecuniary penalty and imprisonment. Before the abolition of the Star Chamber in 1641, records show the Kings Bench beginning to absorb some of the practices, including the exercise of the power to fine and imprison. [174]

Imprisonment and fines

Imprisonment and fines remain the most common penalties for contempt. For example, in cases of sub judice contempt, where the contemnor is commonly a corporate media entity, the usual penalty imposed is a fine but a term of imprisonment may be imposed in addition to or instead of the fine, albeit rarely, where the contemnor is not a corporation. The Court fixes, by way of expiation, [175] a term of custodial sentence or a fine. In *ASIC v Michalik* Palmer J said: [176]

"In punishing contempt, a court of equity acts no differently from a court of common law. The distinction between common law and equity in this context is meaningless. In punishing for contempt, a judge of the Supreme Court is vindicating the authority of the court itself, regardless of the division in which the judge happens to be sitting."

Rule 13 in Part 55 Division 4 of the Supreme Court Rules 1970 (NSW) provides:

- (1) Where the contemnor is not a corporation, the Court [177] may punish contempt by committal to a correctional centre or fine or both.
- (2) Where the contemnor is a corporation, the Court may punish contempt by sequestration or fine or both.
- (3) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security.

Although there is express reference to punishment for contempt in Part 55 Division 4 rule 13(1) of the Supreme Court Rules, the rule confirms the Court's inherent power to punish for contempt and does not exhaust it. [178]

In the exercise of summary jurisdiction, although the Court is satisfied that a technical contempt [179] has been committed the Court may determine not "convict" or "punish". As Brooking JA (with whom Phillips JA and Batt JA agreed) said in *Re Perkins*: [180]

"If on a trial on indictment the jury finds a verdict of guilty, the trial judge cannot say there was not a conviction (*Cobiac v Liddy* (1969) 119 CLR 257 at 273 per Windeyer J). But when called upon to exercise the summary jurisdiction in contempt the judge does have

what appears to be a unique discretion at common law: he may in his discretion decline to adjudge the respondent guilty of contempt, that is, decline to convict, notwithstanding that, as judge of the facts and the law, he is satisfied that a contempt has been committed. Yet again I remind myself of what Sir Wilfred Fullagar said of the reduced significance of the distinction between conviction and sentence where the summary jurisdiction is invoked." (emphases added)

The summary power to punish for contempt in the face of the court should be used sparingly and only in serious cases. [181] Instead of punishment, it may be more appropriate to make a declaration that the defendant is guilty of contempt combined with an order for costs. [182]

Principles relevant to the exercise of the power to punish for contempt

In *Registrar of the Court of Appeal v Maniam (No 2)* Kirby P said: [183]

"A conviction of contempt of Court is a conviction of an offence, criminal in nature. Punishment of the convicted Contemnor must therefore take into account the considerations normally applicable to the punishment of crime and apt to uphold the purpose of this jurisdiction, namely, the undisturbed and orderly administration of justice in the Courts according to law. Thus, in determining the punishment which is apt to the circumstances which have led to a conviction of contempt, it is appropriate to bear in mind the purposes of punishing the Contemnor, detering the Contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an appropriately emphatic way: See *Director of Public Prosecutions v J John Fairfax & Sons Limited* (1987) 8 NSWLR 732 at 741." (emphases added)

In *Wood v Staunton (No 5)* Dunford J set out a list of 10 factors relevant to the determination of the proper punishment for contempt: [184]

1. The seriousness of the contempt proved.
2. Whether the contemnor was aware of the consequences to himself of what he did.
3. The actual consequences of the contempt on the relevant trial or inquiry.
4. Whether the contempt was committed in the context of serious crime.
5. The reason for the contempt.
6. Whether the contemnor has received any benefit by indicating an intention to give evidence.
7. Whether there has been any apology or public expression of contrition.
8. The character and antecedents of the contemnor.
9. General and personal deterrence.
10. Denunciation of the contempt.

It is now common for sentencing judges to consider these factors when sentencing for contempt. [185]

The imposition of a fine, however onerous, may not be proportionate to the nature and gravity of the contempt which may warrant a custodial sentence. In *Maniam* Kirby P said: [186]

"The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt: See *Australian Consolidated Press Ltd v Morgan* (1965)112 CLR 483 at 500. This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a Court order. In cases where such a measure of wilfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both. In such a case the elements necessary to establish wilfulness, carrying as they do the potential of penal consequences, must all be proved to the criminal standard." (emphases added)

In the case of *sub judice* contempt, particularly by media organisations, the common practice is to impose pecuniary penalties. Matters, which Courts may take into account in determining the appropriate fine to be imposed upon a person or organisation, may include: [187]

- the presence or absence of an intention to interfere with the administration of justice
- the effects of the prejudicial publication
- the existence of a system to prevent prejudicial publications
- the extent of control exercised over the contemptuous material
- training, experience and academic history of individuals
- reliance or failure to rely on legal advice on whether or not to publish the offending material
- an undertaking not to repeat the offence
- the size of the business and financial circumstances of the defendant
- extent of circulation of material according to audience, size and location
- a plea of guilty
- an apology
- prior convictions for contempt.

The primary purpose of a fine is deterrence. To that end, the fine should represent an amount that is capable of universal deterrence, including corporate media publishers and proprietors. Fines imposed on individuals for *sub judice* contempt, for example, are inevitably paid by their employers, which are typically corporate media organisations. Regardless of the amount, the fine may not directly impinge upon the individual contemnor, thus undermining the deterrent effect. In such situations, a larger fine may be desirable to ensure that corporate media organisations adopt preventative measures. [188]

Applicability of the *Crimes (Sentencing Procedure) Act 1999*

The provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) apply to sentencing for contempt of Court in conjunction with those considerations of general application enumerated in *Wood v Staunton (No 5)*. [189] The sentencing principles in the Act direct that a Court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. [190] There is also the possibility of alternatives to imprisonment, such as a community service order, a good behaviour bond or suspended sentence. [191]

Regard should be had to the general sentencing principles in s 3A of the Act together with factors, both aggravating and mitigating, referred to in s 21A. For example, objective criminality, criminal history, prior good character, duress, contrition or a guilty plea may be taken into account when determining the appropriate sentence for contempt of Court.

Changes proposed by the NSW Law Reform Commission

There are currently no upper limits for penalties in cases of criminal contempt, including *sub judice* contempt. One of the recommendations of the Law Reform Commission was: [192]

“Legislation should provide an upper limit for fines that may be imposed on persons convicted of criminal contempt. The maximum amount to be set in legislation should be substantially more than \$200,000, the highest amount imposed so far in New South Wales in *sub judice* cases, to enable courts to deal with the worst class of criminal contempt cases. The legislation need not distinguish between the maximum fines that may be imposed on corporate offenders on the one hand, and individuals on the other.”

In relation to *sub judice* contempt and other forms of criminal contempt, the Commission gave the following reasons for the recommendation: [193]

The Commission, based on the support arising from its consultations, implements its recommendation that the law should specify a maximum fine for criminal contempts.

The maximum amount to be set in legislation should be substantially more than \$200,000, the highest amount imposed so far in New South Wales in sub judge cases. This is to allow for courts to deal with more extreme cases than those that have occurred and come before the courts. It should also be taken into account that the recommendation would apply to other forms of criminal contempts, for which the amount of \$200,000 could, in the worst cases, not be sufficient.

The legislation need not make a distinction between the maximum fine that can be imposed on bodies corporate as opposed to that which may be ordered against individual offenders, such as journalists, radio announcers, editors or individuals interviewed by the media. This would allow courts to deal with situations when the financial resources of an individual offender are so substantial that a fine comparable to those imposed on corporate offenders may be justifiable. Moreover, it would give the courts the discretion to set a large fine on individuals, in circumstances where it is the employer organisation who might in the end pay it, to force the latter to take measures to prevent the commission of the offence by its employees. On the other hand, the courts could still, when appropriate, take due account of the fact that individual offenders will normally have less financial resources than corporate offenders.

The Commission made the following recommendation in relation to imprisonment: [194]

“Legislation should provide that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be 5 years.”

The Commission also recommended that legislation be introduced to make available sentencing options other than traditional penalties of imprisonment and/or fines. There are some decisions of this Court endorsing the application of the *Crimes (Sentencing Procedure) Act 1999* (NSW). [195] However, there are other cases where the application of the now repealed *Sentencing Act 1989* and *Community Service Orders Act 1979* to criminal contempt was rejected. [196] To avoid any uncertainty, the power of the Court to order alternative ways of serving a sentence should be expressly provided in legislation. The following recommendation was made: [197]

Legislation should expressly provide that the various methods of and alternatives to serving custodial sentence, such as community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detention orders, home detention orders and parole, are available for the sentencing courts to use in criminal contempt proceedings.

An additional aid to achieving consistency and predictability in sentencing is the suggested creation of a registry of court outcomes of criminal contempt proceedings. [198]

Award of costs on an indemnity basis

Costs orders may be made in contempt proceedings. There is no “normal rule” for the making of an order that the contemnor pay the costs on an indemnity basis. [199]

From time to time courts have made an order for costs on a solicitor and client basis being of the opinion that such an order is sufficient recognition of the court’s disapproval of the contempt established. [200] However, in cases where a penalty, altogether apart from any order for payment of costs, has been imposed, there is no authority which supports a requirement for costs on an indemnity basis. [201] Where no separate penalty has been imposed, an order for costs on an indemnity basis may act as a means of imposing something in the nature of a sanction. [202]

Where legal proceedings have been discontinued because of a contemptuous publication, especially where a trial judge has had to discharge a jury, the NSWLRC made the following recommendation in relation to the recovery of wasted costs of the aborted trial: [203]

The *Costs in Criminal Cases Act 1967* (NSW) should be amended to enable the Supreme Court to make an order for costs against a publisher of material, in contempt of any court at which a criminal trial is held before a jury, if the publication causes the discontinuance of the trial.

The proposed power to order costs would operate within the following parameters: [204]

- The application of the legislation should not be restricted to media organisations.
- An order for compensation should only be made where there has been a conviction for contempt.
- An order for compensation should be made where contemptuous publication was the principal or substantial reason for the discontinuation of the trial.
- The Court should have a discretion to order an amount which is “just and equitable in all the circumstances”.
- The “legal costs” of the parties and the provision of “legal services” to the accused should include disbursements directly related to the aborted trial. The costs exclude the cost to the State of the remuneration of judicial and other court staff.
- In ordering a sum for compensation, the Court should be able to consider the amount of any fine ordered by the sentencing court to be paid by the contemnor.

Does a person found guilty of contempt have the right to be heard by the court on other matters?

Since at least the 18th century, the general rule has been that a person in contempt cannot be heard or take active proceedings in the same suit or cause for their own benefit, until the contempt has been purged. [205] The rule is of canon law origins and its history can be traced through cases and practices in the ecclesiastical courts and courts of chancery.[206]

As far as rules go, the general rule is subject to a number of exceptions. The contemnor can still be heard in proceedings to:[207]

- appeal the contempt conviction;
- make an application to purge the contempt;
- seek an order discharging the contempt ruling where it has been purged;
- set aside the order upon which the contempt was founded; or
- defend himself or herself against any accusation or application brought against him or her.

Another important exception arises where the contempt has been committed in proceedings different in substance from those in which it is contended that the litigant should not be heard. [208] A different cause dealing with different issues, not the same cause.

In *Hadkinson v Hadkinson*, [209] following a divorce the wife was granted custody of her child but subject to an order that she not take the child out of the jurisdiction without permission of the court. Upon remarrying, she took her child to Australia, thus disobeying the order. The ex-husband obtained an order directing the return of the child to the jurisdiction. The wife sought to appeal from that order but the Court of Appeal denied her the right to do so for being in contempt of the earlier order which remained unpurged. Only following the return of the child, was the wife’s appeal heard on its merits and allowed.

In relation to the obligation to obey court orders, Romer LJ said: [210]

“Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt...”

Denning LJ, however, adopting a flexible and pragmatic approach, said: [211]

“... the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, for so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

The general rule and contempt of ‘another’ court

In *Leaway v Newcastle City Council*, [212] Leaway Pty Ltd, which operated a waste management facility in Newcastle, sought an injunction to restrain the Council from communicating with its customers. The Council had already sent a letter which Leaway said misrepresented to its customers that Leaway was no longer able to accept second-hand building materials at its waste management facility and that any attempt to deliver such materials could result in the customers being prosecuted for an offence. It was further alleged that because of that letter, customers of the plaintiff had ceased delivering second-hand building materials to the waste management facility. Leaway applied for an injunction against distribution of any other letters or written material containing the alleged misrepresentation or anything similar to it, as part of its overall action against the Council for negligence and injurious falsehood.

As it happened, Leaway had previously breached orders made by the Land and Environment Court restraining it from using its waste management facility otherwise than in accordance with the conditions of the relevant development consent. Leaway was found to be in contempt of that court and fined \$50,000. By the time the present proceedings for the injunction had commenced in June 2005, the contempt remained unpurged, the fine not being paid.

Purporting to apply the general rule, the Council argued that Leaway’s contempt of court (albeit of another court) precluded it from being heard in the Supreme Court.

Campbell J analysed the issue in accordance with the (1) ‘bright-line with specified exceptions’ approach and (2) as a matter wholly based on discretion. Via both routes, his Honour concluded that Leaway retained the right to be heard by the Court in its application for the interlocutory injunction.

In relation to the first route, his Honour said: [213]

“[The Council] submitted that there was a close connection between the subject matter of the suit in the L & E Court, and the subject of the suit in the present court, because both the proceedings in the L & E Court, and the letter about which complaint is made in the present litigation, involved attempts by the Council to enforce the planning legislation concerning the one piece of property. I do not accept that these factors are ones which justify an erosion of the exception, now well established, that the principle that a party in contempt cannot be heard is confined to contempt in the same suit as that in which the application was made.”

As to the second route, his Honour focused on what was appropriate for the administration of justice between the parties to determine whether Leaway should be deprived of access to the courts.

In particular, the automatic deprivation of access to the courts as a consequence of a contempt meant that the contemnor was in a worse situation than a person in custody for a serious indictable offence.

The question of whether Leaway should be deprived of access to the courts was best determined by reference to whether the permitting of access would be consistent with the proper administration of justice. [214]

The contempt in this case was unpurged because the fine had not been paid. Campbell J held that the administration of justice can be vindicated without denying access to the courts, since there are statutory procedures to enforce the payment of the fine. For example, there are detailed procedures set out in the *Fines Act* 1996 (NSW). [215]

'Bright-line rule' vs 'discretion'

The approach taken by Denning LJ in *Hadkinson* (extracted above) gained favour with the House of Lords in *X Limited v Morgan-Grampian (Publishers) Ltd*. Lord Bridge (with whom Lord Templeman, Lord Griffiths, Lord Oliver of Aylmerton and Lord Lowry agreed) said: [216]

"I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions. But in practice in most cases the two different approaches are likely to lead to the same conclusion, as they did in *Hadkinson* itself and would have done in *The Messiniaki Tolmi* [1981] 2 Lloyd's Rep 595." (*emphases added*)

The consequence of the general rule that a court will refuse to entertain any application until the contempt is purged is "something which ... is sufficiently close to a penalty to require the sort of caution which is appropriate in the Court exercising its remedies in criminal cases". [217] A discretion-based approach would:

- in any case take account of whether the contemnor shows defiance in not purging the contempt and therefore undermines the importance of prompt and unquestioning compliance with court orders; and
- enable the Court to properly consider issues of proportionality [218] so as to determine whether the interests of justice are best served by hearing the contemnor or not.

Sentencing in contempt cases

The New South Wales Law Reform Commission Report sets out an extensive selection of:

- sub judice cases from 1980 to 1999 in New South Wales, Victoria, Western Australia, Queensland and South Australia; [219] and
- and examples of other types of criminal contempt mainly from the New South Wales jurisdiction. [220]

The tables in Appendix E and F of the Report provide useful material. Below is a table of the punishment imposed on the contemnors referred to in this paper.

Case	Contemptuous conduct	Penalty
<i>R v Gray</i> [1900] 2 QB 36	Scandalising the court	Mr Gray was fined £100 and ordered to pay £25 in costs
<i>R v Dunbabin; Ex parte Williams</i> (1935) 53 CLR 434	Scandalising the court	Mr Dunbabin and Sun Newspapers Ltd were fined £50 and £200 respectively

<i>Gallagher v Durack</i> (1983) 152 CLR 238	Scandalising the court	3 months' imprisonment
<i>Re Goldman and Rule Nisi for Contempt of Court</i> (1968) 89 WN (Pt 1) (NSW) 175	Contempt in the face of the court; threatening counsel after hearing inside lift	\$100 fine
In the Matter of Bauskis [2006] NSWSC 907 [2006] NSWSC 908	Contempt in the face of the court; insulting judge, defying orders to leave courtroom	14 days' imprisonment
<i>R v Razzak</i> [2006] NSWSC 1366	Contempt in the face of the court; refusing to take oath or affirmation	15 months' fixed term imprisonment
AG (NSW) v Willesee [1980] 2 NSWLR 143	Sub judice	Mr Willesee, Amalgamated Television Services Pty Ltd and Trans Media Productions Pty Ltd were fined \$2000, \$2000 and \$1000 respectively
DPP v Wran (1986) 7 NSWLR 616	Sub judice	Mr Wran and Nationwide News Pty Ltd were fined \$25,000 and \$200,000 respectively and both were ordered to pay for the DPP's costs
<i>Hinch v Attorney-General (Vic)</i> (1987) 164 CLR 15	Sub judice	Mr Hinch was sentence to 28 days' imprisonment for one count and fined \$15,000 for two other counts; Macquarie Broadcasting Holdings Ltd was fined \$15,000 for two counts
<i>Farahbakht v Midas Australia Pty Ltd</i> [2006] NSWSC 1322	Improper pressure on witness	Costs on an indemnity basis

END NOTES

1. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [1-2]
2. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [1-3]; see Bowen LJ in *Re Johnson* (1887) 20 QBD 68 at 74
3. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [1-5]
4. [1981] AC 303 at 344
5. See also *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 307, 309 per Lord Diplock
6. [1999] NSWSC 1148
7. [1999] NSWSC 1114
8. [2000] NSWCA 23
9. [2006] NSWSC 323
10. *Toner v Attorney General for New South Wales* (unreported, NSWCA, 19 November 1991, Kirby P, Clarke JA, Hope AJA, p 3)
11. *Toner v Attorney General for New South Wales* (unreported, NSWCA, 19 November 1991, Kirby P, Clarke JA, Hope AJA, p 21)
12. *Toner v Attorney General for New South Wales* (unreported, NSWCA, 19 November 1991, Kirby P, Clarke JA, Hope AJA, pp 10-14)
13. [2003] QSC 279
14. *R v E Sleiman* (Judgment No 29) [1999] NSWSC 858 at [16] per Sperling J. See also a paper given by Clarke JA, "Commentary on Contempt in the Face of the Court" pp 7-10
15. [1982] 1 NSWLR 682
16. [1984] 3 NSWLR 212
17. (1986) 5 NSWLR 445 at 463
18. *Re Goldman and Rule Nisi for Contempt of Court* (1968) 89 WN (Pt 1) (NSW) 175
19. *Re Goldman* (1968) 89 WN (Pt 1) NSW 175 at 183
20. [2006] NSWSC 907, [2006] NSWSC 908
21. [2006] NSWSC 908 at [4]-[6]
22. [2006] NSWSC 908 at [11]
23. [2006] NSWSC 1366; (2006) 166 A Crim R 132
24. [2006] NSWSC 1366; (2006) 166 A Crim R 132 at [39]

25. A matter is pending when a person is arrested and charged, and the Court is in some way or other seized of the subject matter and the Supreme Court is thereby vested with authority to protect its authority: *James v Robinson* (1963) 109 CLR 593. This was said to be the necessary bright line, rather than a vague notion of imminence.
26. The Hon V Bell “*How to Preserve the Integrity of Jury Trials in a Mass Media Age*” (2005) 7 The Judicial Review 311; The Hon J J Spigelman AC “*The Internet and the Right to a Fair Trial*” (2005) 29 Crim LJ 331
27. (1937) 37 SR (NSW) 242 at 251
28. (1937) 37 SR (NSW) 242
29. (1937) 37 SR (NSW) 242 at 249-250
30. *Attorney General for New South Wales v Radio 2UE Sydney Pty Ltd* (unreported, NSWCA, 16 October 1997, Priestley, Meagher and Powell JJA)
31. *Attorney General for New South Wales v Radio 2UE Sydney Pty Ltd* (unreported, NSWCA, 11 March 1998, Priestley, Meagher and Powell JJA)
32. *Attorney General for New South Wales v Radio 2UE Sydney Pty Ltd* (unreported, NSWCA, 11 March 1998, Priestley, Meagher and Powell JJA)
33. [1980] 2 NSWLR 143 at [13] per Moffitt P
34. [1980] 2 NSWLR 143 at [15] per Moffitt P
35. [1980] 2 NSWLR 143 at [18]
36. [1980] 2 NSWLR 143 at [24]
37. (1981-1982) 152 CLR 25
38. (1981-1982) 152 CLR 25 at 99 per Mason J
39. (1987) 164 CLR 15
40. (1987) 164 CLR 15 at 22
41. (1987) 164 CLR 15 at 27-28
42. (1987) 164 CLR 15 at 34
43. (1987) 164 CLR 15 at 41-42
44. [2003] QSC 157
45. [1963] 1 QB 696 at 719
46. (1997) 42 NSWLR 22
47. (1997) 42 NSWLR 22 at 43
48. (1997) 42 NSWLR 22 at 28-29
49. [2006] NSWSC 1322
50. [2006] NSWSC 1322 at [9], [15]-[23]
51. [2006] NSWSC 1322 at [25]
52. *Attorney General v Butterworth* [1963] 1 QB 696 at 722-723 per Donovan LJ; *John Fairfax & Sons Pty Limited v McRae* (1955) 93 CLR 351 at 371; *Registrar of the Supreme Court, Equity Division v McPherson* [1980] 1 NSWLR 688 at 700 per Moffitt P and Hope JA; *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245 at 285
53. [2006] NSWSC 1322 at [38]
54. [2006] NSWSC 1322 at [40]-[41]
55. [2006] NSWSC 1322 at [42]
56. [2006] NSWSC 1322 at [42]
57. [2006] NSWSC 1322 at [51], [53]
58. [2006] NSWSC 1322 at [53]
59. [2006] NSWSC 1322 at [53]
60. [2006] NSWSC 1322 at [58]-[59]
61. [2005] NSWCA 26
62. [2005] NSWCA 26 at [2], [4], [6]
63. [2005] NSWCA 26 at [9] per Hodgson JA (Handley and Santow JJA agreeing), relying on *Bhagat v Global Custodians Ltd* [2002] NSWCA 160 at [37], [46]-[49] per Spigelman CJ (Ipp AJA and Brownie AJA agreeing)
64. See also *Street v Luna Park Sydney Pty Ltd* (2006) NSWSC 624 at [63]-[66]
65. [2006] NSWSC 624
66. *Witham v Holloway* (1995) 183 CLR 525 at 534
67. (1998) 99 A Crim R 510
68. (1998) 99 A Crim R 510 at 520
69. Unreported, NSWCA, 15 September 1994, Gleeson CJ, Sheller JA, Cole JA
70. Unreported, NSWCA, 15 September 1994, p 6 per Gleeson CJ (Sheller and Cole JJA agreeing)
71. Unreported, NSWCA, 15 September 1994, p 15 per Gleeson CJ (Sheller and Cole JJA agreeing)
72. (1912) 13 CLR 577
73. (1912) 13 CLR 577 at 588 per Griffith CJ and Barton J
74. *R v Day and Thomson* [1985] VR 261
75. *R v Day and Thomson* [1985] VR 261
76. *Attorney-General for NSW v John Fairfax & Sons Limited* (21 April 1988, Court of Appeal, BC8802019 (conviction); 24 June 1988, Court of Appeal, BC8801793 (penalty)).

77. *R v Border Television Ltd* (1978) 68 Crim App R 375
78. *R v Scott & Downland Publications Ltd* [1972] VR 663
79. *R v Scott & Downland Publications Ltd* [1972] VR 663
80. *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 at 57 per McGechan J (New Zealand High Court)
81. New South Wales Law Reform Commission, "Contempt by Publication" Report 100, June 2003 ('NSWLRC Report 100')
82. NSWLRC Report 100 Recommendation 2, pp 73-74
83. NSWLRC Report 100 [4.18]-[4.26]
84. NSWLRC Report 100 [5.5]
85. NSWLRC Report 100 [5.20]
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90. *Almon's case* (1765) Wilm. 243, 97 ER 94
91. C J Miller, *Contempt of Court*, Oxford University Press, 2000, [12.02]
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93. [1900] 2 QB 36
94. C J Miller, *Contempt of Court*, Oxford University Press, 2000, [12.08]
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96. (1928) 44 TLR 301
97. C J Miller, *Contempt of Court*, Oxford University Press, 2000, [12.13]
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100. (1920) 28 CLR 419
101. (1920) 28 CLR 419 at 423-424
102. (1920) 28 CLR 419 at 425 per Knox CJ, Gavan Duffy J, Starke J
103. (1920) 28 CLR 419 at 426 per Knox CJ, Gavan Duffy J, Starke J
104. (1920) 28 CLR 419 at 426
105. (1996) 187 CLR 1; [1996] HCA 40
106. "Fischer Lashes High Court for Delay in Wik Decision", *The Australian*, 28 November 1996
107. "Fischer Lashes High Court on Wik", *The Sydney Morning Herald*, 11 January 1997, p 1
108. "Fischer Lashes High Court on Wik", *The Sydney Morning Herald*, 11 January 1997, p 1
109. "Fischer seeks a more conservative court", *The Age*, 5 March 1997, p 1
110. "Fischer seeks a more conservative court", *The Age*, 5 March 1997, p 1
111. Campbell and Lee, "The Australian Judiciary", Cambridge University Press, 2001, pp 56-57
112. *Sunday Age*, 9 March 1997, p 11
113. "Attorney pleads for peace in court row", *The Age*, 1 March 1997, p 5; "Borbidge steps up attack on High Court", *The Sydney Morning Herald*, 1 March 1997, p 7
114. "High Court gets short shrift", *The Sydney Morning Herald*, 8 March 1997, p 43
115. "Attacks undermine role of High Court", *Sunday Age*, 9 March 1997, p 11
116. *The Sydney Morning Herald*, 20 March 1997, p 16
117. M Kirby, "Attacks On Judges - A Universal Phenomenon" delivered in Maui Hawaii on 5 January 1998 for the 'Winter Leadership Meeting' for the Section of Litigation, American Bar Association: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_maui.htm
118. (1935) 53 CLR 434.
119. (1935) 53 CLR 434 at 442 (Dixon J, Evatt J and McTiernan J agreeing). See also *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [2] per Gleeson CJ and Gummow J, McHugh J agreeing at [34], Hayne J agreeing at [108].
120. (1935) 53 CLR 434 at 435-437
121. (1935) 53 CLR 434 at 444-445 (Dixon J, Evatt J and McTiernan J agreeing)
122. (1983) 152 CLR 238
123. (1983) 152 CLR 238 at 242
124. (1983) 152 CLR 238 at 242
125. (1983) 152 CLR 238 at 243 per Gibbs CJ, Mason, Wilson and Brennan JJ. See also *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [3] per Gleeson CJ and Gummow J, McHugh J agreeing at [34], Hayne J agreeing at [108]
126. [1936] AC 322 at 335
127. [1972] 2 NSWLR 887
128. [1972] 2 NSWLR 887 at 897-898
129. [1972] 2 NSWLR 887 at 914-915 per Hope JA
130. [1972] 2 NSWLR 887 at 906 per Hope JA
131. [1972] 2 NSWLR 887 at 915 per Hope JA
132. (2005) 29 Crim LJ 331

133. "How to Preserve the Integrity of Jury Trials in a Mass Media Age." (2005) 7 *The Judicial Review* 311
134. (2002) vol 24 *Sydney Law Review* 455
135. E Campbell & H P Lee, "The Australian Judiciary", Cambridge University Press, 2001, p 182. For a discussion of the impact of the implied right to freedom of political communication on the law of contempt see E Campbell and H P Lee, *Criticism of Judges and Freedom of Expression*(2003) 8(2) *Media & Arts Law Review* 77. The ALRC declined to recommend the abolition of contempt: ALRC Report No 35 'Contempt' at [457]-[458]. See K Gould, "When the Judiciary is Defamed: Restraint Policy under Challenge" (2006) 80(9) *ALJ* 602 at 607-610 for a discussion of the viability of contempt by scandalising the court.

136. K Mason, "The Inherent Jurisdiction of the Court" (1983) 57 *ALJ* 449
137. *Witham v Holloway* (1995) 183 *CLR* 525 at 534; *Re Colina; Ex Parte Torney* (1999) 200 *CLR* 386 at 393-4; 428, 433.
138. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 4 r 12, Sch F Form 65
139. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 2 r 4, Sch F Form 65
140. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 2 r 3
141. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 6(1)
142. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 6(2)
143. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 9
144. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 10
145. (2004) 62 *NSWLR* 335
146. *ASIC v Michalik* (2004) 62 *NSWLR* 335 at [40]-[43]
147. *Criminal Procedure Act* 1986 (NSW) s 316, Sch 3 Pt 1
148. See *Director of Public Prosecutions v Australian Broadcasting Corporation* (1987) 7 *NSWLR* 588 at 596 (this related to the Commonwealth DPP prosecuting a federal offence in a State court); *United Telecasters Sydney Ltd v Hardy* (1991) 23 *NSWLR* 323 at 328
149. *NSWLRC Report* 100 [12.12]
150. *NSWLRC Report* 100 [12.14]-[12.16]
151. *NSWLRC Report* 100 [12.18]-[12.19]
152. *Criminal Procedure Act* 1986 (NSW) s 316, Sch 3 Pt 1
153. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 11(1)
154. *European Asian Bank AG v Wentworth* (1986) 5 *NSWLR* 445 at 458-460
155. *Supreme Court Rules* 1970 (NSW) Pt 55 Div 3 r 11(2), 11(4)
156. *United Telecasters Sydney Ltd v Hardy* (1991) 23 *NSWLR* 323 at 328; *European Asian Bank AG v Wentworth* (1986) 5 *NSWLR* 445 at 460
157. *NSWLRC Report* 100 [12.22]-[12.41], Recommendation 26
158. *Killen v Lane* [1983] 1 *NSWLR* 171 at 178 per Moffitt P
159. *European Asian Bank AG v Wentworth* (1986) 5 *NSWLR* 445 at 452 per Kirby P
160. *European Asian Bank AG v Wentworth* (1986) 5 *NSWLR* 445 at 452 per Kirby P
161. See subsection 48(2) (replaced) of *Supreme Court Act* 1970 (NSW) prior to 2 May 1997.
162. See subsection 48(4) (repealed) of *Supreme Court Act* 1970 (NSW) prior to 2 May 1997.
163. *Supreme Court Act* 1970 (NSW) s 53(3)
164. *Supreme Court Act* 1970 (NSW) s 48(2)(i)
165. *Supreme Court Act* 1970 (NSW) s 53(4)
166. *European Asian Bank AG v Wentworth* (1986) 5 *NSWLR* 445 at 452-453 per Kirby P
167. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [1-35]
168. *Ibid* at [1-35]
169. *Ibid* at [1-35]
170. *Ibid* at [1-35]
171. *Ibid* at [1-35]
172. *Ibid* at [1-35]
173. *Ibid* at [1-36]
174. *Ibid* at [1-37]
175. The phrase is used by Windeyer J in *Australian Consolidated Press Ltd v Morgan* (1965) 112 *CLR* 483 at 499.
176. [2004] *NSWSC* 1259 at [32]
177. 'Court' means the 'Supreme Court of New South Wales': *Supreme Court Act* 1970 (NSW) s 19(1). Thus it includes the Common Law Division, Equity Division and Court of Appeal.
178. *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 *NSWLR* 309 at 314 per Kirby P
179. In *Pelechowski v Registrar of the Court of Appeal (NSW)* (1999) 198 *CLR* 435 at [147] per Kirby J referred to "casual, accidental or unintentional" cases of contempt.
180. [1998] 4 *VR* 505 at 514
181. *Lewis v Judge Ogden* (1984) 153 *CLR* 682 at 693; *Klewer v District Court of New South Wales* (unreported, NSWCA, Handley, Sheller and Stein JJA, 31 August 1998, p 4)
182. *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] *NSWSC* 506

183. (1992) 26 NSWLR 309 at 314
184. (1996) 86 A Crim R 183 at 185
185. *Principal Registrar of Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at 532-535 [17]-[35] per Studdert J; *Commissioner for Fair Trading v Partridge* [2006] NSWSC 478 at [22] per Bell J; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393 [2006] NSWSC 1183 at [34]-[35] per Buddin J; *R v Bilal Razzak* (2006) 166 A Crim R 132 [2006] NSWSC 1366 at [43] per Johnson J
186. (1992) 26 NSWLR 309 at 315
187. NSWLRC Report 100 [13.6]
188. NSWLRC Report 100 [13.18]
189. *Principal Registrar of Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at 537-538 [42]-[45] per Studdert J. This approach has been upheld in many subsequent cases, for example, *Principal Registrar of Supreme Court of NSW v Tran* [2006] NSWSC 1183 at [32] per Buddin J and *R v Bilal Razzak* [2006] NSWSC 1366 at [42] per Johnson J.
190. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1)
191. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 8, 9, 12
192. NSWLRC Report 100, Recommendation 28, p 321
193. NSWLRC Report 100 [13.19]-[13.21]
194. NSWLRC Report 100, Recommendation 29, p 328
195. *Attorney General v Whiley* (1993) 31 NSWLR 314 at 320-321 per curiam (Clarke JA, Meagher JA and Handley JA) applying the former *Sentencing Act 1989*; *Principal Registrar of the Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at [45] per Studdert J; *NSW Crime Commission v Field* [2003] NSWSC 5 [27]-[29] per Bell J; *ASIC v Michalik* [2004] NSWSC 1259 at [26] per Palmer J; *NCR Australia v Credit Connection* [2005] NSWSC 1118 at [24] per Campbell J; *Principal Registrar of Supreme Court of NSW v Tran* [2006] NSWSC 1183 at [32] per Buddin J.
196. *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 288 per Handley JA; *Wood v Galea* (1996) 84 A Crim R 274 at 276-277 where Hunt J said that *Attorney General v Whiley* (1993) 31 NSWLR 314 at 320-321 (which applied the *Sentencing Act 1989*) should be reconsidered but was bound to follow the Court of Appeal's decision in that case; *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 319 per Kirby P saying *Community Service Orders Act 1979* did not apply.
197. NSWLRC Report 100, Recommendation 30, p 333
198. NSWLRC Report 100, Recommendation 31, p 337
199. *McIntyre v Perkes* (1988) 15 NSWLR 417
200. *Ibid* at 427 per Samuels JA
201. *Ibid* at 427 per Samuels JA
202. *Ibid* at 427 per Samuels JA
203. NSWLRC Report 100, Recommendation 34, p 363
204. NSWLRC Report 100 [14.64], [14.68]-[14.69]; Recommendation 35 at p 379
205. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [12-66]; *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [60], [72], [74] per Campbell J
206. The history of it has been traced back to the 78th ordinance of the Ordinances of Lord Chancellor Bacon of 1618, which is discussed and distinguished in a succession of English cases: *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [18]-[25] per Campbell J
207. *Hadkinson v Hadkinson* [1952] P 285 at 288-289 per Romer LJ (Somervell LJ agreeing); *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [31] per Campbell J
208. *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [62]-[71] per Campbell J
209. [1952] P 285
210. *Hadkinson v Hadkinson* [1952] P 285 at 288 (with Somervell LJ agreeing)
211. *Hadkinson v Hadkinson* [1952] P 285 at 298; *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [36] per Campbell J
212. *Leaway v Newcastle City Council (No.1)* [2005] NSWSC 696; *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826
213. *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [74] per Campbell J
214. *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [97] per Campbell J
215. *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [99]-[101] per Campbell J
216. [1991] 1 AC 1 at 46; *Leaway v Newcastle City Council (No.2)* [2005] NSWSC 826 at [51] per Campbell J
217. *Leaway v Newcastle City Council (No.1)* [2005] NSWSC 696 at [11] per Campbell J
218. Arlidge, Eady & Smith, "On Contempt", Sweet & Maxwell, 2005, 3rd ed, [12-79]
219. NSWLRC Report 100 Appendix E pp 457-473
220. NSWLRC Report 100 Appendix F pp 474-476

REVIEWING THE IMPACT OF TORT REFORM AT A STATE AND NATIONAL LEVEL.

The Honourable Justice Anthony Whealy

29 June 2004

There was a front-page article in the Sydney Morning Herald on 30 April 2004. You probably noticed it since it was something of an eye-catcher for the medical profession. The headline was –

“Courts make it tougher to sue doctors”.

Those of you in the medical profession probably thought “and about time”. The headline, however, was quite misleading.

The particular decision was that of the New South Wales Court of Appeal. The cases before the Court involved moral, ethical and legal issues of the most difficult kind. The plaintiffs were children each born disabled to a catastrophic degree. They claimed damages being the harm they suffered by being born in their disabled condition. Neither child asserted that the medical practitioners had brought about their disabled condition. Rather, they claimed that, had the doctors properly diagnosed the particular circumstances that resulted in each being born disabled (maternal rubella and paternal AT3 deficiency, respectively), the suffering that each has had and will endure, and the needs and expenses that each has had to and will incur, would not have materialised. That is because the mother or parents of the children would have taken steps to ensure that, in the case of one child, she would not have been born; and in the case of the other child, - he would not have been conceived. Cases of this kind have come to be described, perhaps inaccurately, as “wrongful life” claims. The title of the cases was Harriton (by her tutor) v Stevens; Waller (by his tutor) v James & Ors; Waller (by his tutor) v Hoolahan (1).

Two of the judges (Spigelman CJ and Ipp JA) held that the medical practitioners did not owe the children duty of care of the kind asserted. The third judge, Mason P dissented.

It is fair to say that the decision of the New South Wales Court of Appeal, and the difficult issues involved in the decision, are likely to come before the High Court of Australia in the course of the next year or so. It is impossible however to predict, with any certainty, the view the High Court may take of the admittedly difficult problem posed by the two cases.

For present purposes however, the point I wish to make is a simple one: a careful reading of the Court of Appeal's decision – and it is a difficult decision in many respect – does not, in any sense, justify the headline attached to the article. All the majority decision did was to refuse to extend the existence and scope of duty of care. In effect, the decision was one to maintain the status quo. The claim that the decision, in some way, made it “tougher” to sue doctors was, by no stretch of the imagination, a fair or even accurate commentary.

One of the themes of this paper, as will be seen, is that there is often something of a gap between the rhetoric regarding law reform and the substance of the reform that has been achieved. This is not to say, however, that the reforms have not been substantial. Nor is it to say they have not achieved a considerable impact.

The objects of the paper

The objects of this paper may be briefly stated as follows:

1. To describe briefly the background to the broad movement for Tort reform that emerged in Australia during 2001-2002.
2. To describe, as an important reference point, a number of the recommendations of the Ipp Report, (2) especially in relation to actions against Health Care providers, especially doctors.

3. To categorise the reforms that have been introduced by legislation throughout Australia since 2002. The emphasis, for practical purposes, will be on New South Wales Law, although details will be provided for other States and Territories.

4. To note the early direction of reform, based on a brief number of recent decisions in the field of medical negligence; and to ponder the future development of the law as it is likely to impact on negligence actions against doctors.

In preparing this paper, I would like to mention the assistance I have obtained from a considerable number of papers, articles and speeches that are available in the public arena. May I make particular reference to the papers prepared and delivered by the Chief Justice of New South Wales, the Honourable James Spigelman; and by the Honourable Justice David Ipp, a Judge of the Supreme Court of New South Wales and the Court of Appeal. (3)

A brief history – a change in emphasis

When I began practice in the early 1960's, there was still a discernable bias in court decisions in negligence actions. It was generally in favour of the defendant. This was especially so in case of actions against professional people and in particular members of the medical profession. "Dr Knows Best" was not merely a moral truth embraced by patients and practitioners alike. It was, in the majority of cases, a starting point in cases where it was alleged that a doctor had been negligent in the treatment of his patient.

Gradually, over the course of the following thirty years, I noticed, as did many of my fellow practitioners, a significant swing in favour of plaintiffs. Anecdotally, it appeared that nine out of ten plaintiff's cases resolved in favour of the plaintiff or at least led to a generous settlement. Why was this so? The answer seems to be rooted in two major considerations. The first was the inevitable historic swing away from a defendant orientated system. The second factor appears to have undoubtedly related to the emergent underlying assumption, generally correct, that a defendant had the benefit of insurance. Spigelman CJ, in one of the papers to which I have earlier made reference, suggests that Judges may have proved more reluctant to

make findings of negligence, if they knew the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. It is hard to quarrel with this assumption.

The practical result of the major two factors I have identified, was this: a burgeoning number of both judge and jury decisions began to incur the wrath of the community generally. This mounting wave of concern, especially in the last ten years or so, was reflected in heated editorials in the newspapers and talkback radio commentary. Once it was accepted that insurance was generally available to defendants, an enlightened compassion for the injured and a desire to compensate handsomely those injured by the negligence of others tended to outweigh practical considerations as to the cost these attitudes might perhaps have on the community generally.

In this climate, public concern was expressed about a number of court outcomes. For example, a swimmer recovered damages against Waverley Council when diving into a sandbank on Bondi Beach. A number of pedestrians fell over and injured themselves on public roads or on footpaths in circumstances where it might have been thought that, by keeping their eyes open and their wits about them, they would not have been injured. In 1996, a general practitioner was held liable in these circumstances: he had been at his surgery one morning when a young woman, a stranger, knocked on his door and asked him to examine her brother who was lying on the roadway some three hundred metres away, having had a seizure. The doctor declined to attend to the young man on the basis that he was not his patient but, as I say, was held negligent nevertheless. In a celebrated diving case, a young man was injured when he dived into water at Rottnest Island. He hit his head on a submerged rock. It was a popular holiday spot and people had been diving there for a considerable period of time. The majority of the High Court held that the diver's injury was caused by the Authority's failure to warn of the presence of submerged rocks that were ordinarily plainly visible. (4)

A landmark case

In a famous case that went to the High Court of Australia (**Rogers v Whitaker** (5)), the Court considered two controversial aspects of modern medical negligence cases.

These were, first, the scope and content of a doctor's duty to advise and inform a patient of the risks and implication of proposed treatment; and secondly, the High Court addressed the weight to be given to expert evidence by members of the medical profession on the issue of negligence, and the power of a Court to override that evidence and to substitute its own assessment of a defendant's conduct.

It is perhaps worth digressing for a moment to discuss the facts of this case. This is not only because the decision itself has evoked considerable sympathy for the medical practitioner involved; but because controversy has continued over the last twelve years in relation to the impact of the decision on negligence cases.

Dr Rogers was an ophthalmic surgeon. The plaintiff was his patient. The plaintiff had been nearly blind in her right eye since a penetrating injury at the age of nine but had lived a substantially normal and working life despite this disability. In 1983, at the age of 47, after a routine eye check-up in which reading glasses were prescribed, she was referred to the doctor for possible surgery. He advised the plaintiff that he could operate on her right eye to remove the scar tissue. This, he told her, would improve its appearance and would probably restore significant sight to that eye as well as assisting in preventing the development of glaucoma. Following the operation, not only was there no improvement in her right eye; but as well the plaintiff developed inflammation in the treated eye and inflammation and sympathetic ophthalmia in her left eye. This led, unhappily, to a total loss of sight in the left eye thus leaving the plaintiff almost totally blind. At the trial before Justice Campbell in the Supreme Court of New South Wales, the evidence was that there was slightly more than a one in fourteen thousand chance of sympathetic ophthalmia developing after such surgery. During the trial there was expert evidence that, although a body of reputable medical practitioners would in the light of the plaintiff's desire for information as to the likely outcome of the surgical procedures, have warned the plaintiff of the risk of sympathetic ophthalmia, there was also a solid body of medical opinion that, without a specific inquiry about the effect on the good eye, no such warning would have been given.

In the High Court of Australia, to which the unsuccessful doctor brought his appeal, there were two main legal issues in contest. The first issue of significance was the

examination by the High Court of the scope and content of the duty to inform a patient. If I may be permitted to quote the following brief passage from the decision (at 490): -

“The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege”.

The second issue related to the “Bolam” test. This, I should interpolate, is a matter of considerable importance to the medical profession currently because the reforms that have recently been implemented in tort law have brought back a modified version of the Bolam test, notwithstanding that the High Court in **Rogers v Whitaker**, in general terms, rejected that test.

The Bolam principle (derived from the direction to the jury in **Bolam v Friern Hospital Management Committee** (1957) 1 WLR 582) has been stated in the following terms: -

“A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice”. (Per Lord Scarman in **Sidaway v The Governors of Bethlehem Royal Hospital** (1985) AC at 881).

This principle, in its original form, had given the defendant, in matters of diagnosis and treatment, the benefit of genuine differences of opinion in matters of medical expertise. The High Court however held that, in matters relating to the provision of advice and information, it was for the Court to adjudicate on the appropriate standard of care after giving weight to “the paramount consideration that a person is entitled to make his own decision about his life”, citing the words of Chief Justice King in **F v R** a 1983 decision in South Australia. The Court drew a distinction in this regard between cases involving diagnosis and treatment, on the one hand, and cases involving the provision of advice or information to a patient, on the other. The High Court’s view was that the question as to whether the patient had been given all the

relevant information to make a choice did not generally depend on medical standards or practice. The joint judgment described evidence of acceptable medical practice, in this area, as merely “a useful guide”. It also endorsed the proposition that the amount of information or advice to be given by a careful and responsible doctor depended upon a complex of factors:

“The nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances.”

I have allowed myself to digress into this considerable detail in relation to **Rogers v Whitaker** because of the level of concern that arose at the time it was decided. In a very helpful article written recently by Thomas Addison, (6), the author referred to a statement by Callinan J in a later High Court case that the medical profession received the decision of the High Court in **Rogers** with “some consternation”. According to one medical commentator, the floodgates of informed consent litigation appeared to be opening, at least in the field of cosmetic plastic surgery. It is appropriate to comment, however, that the Addison paper itself drew two conclusions relevant to the present discussion. First, an overwhelming conclusion from the case law was that courts were not at all slow to characterise risks as material thus requiring the doctor to inform patients of those risks. Fifty-seven decided cases were examined in the period since **Rogers** and there were only seven cases in which courts had held a risk not to be material. Secondly, and more of interest to the legal profession, was the conclusion that the decision had not in fact opened the floodgates to a multitude of cases alleging a negligent failure to inform. As the author noted, a breach of a medical practitioner’s (admittedly onerous) duty of disclosure did not equate to liability in negligence for a failure to inform. Causation must also be established. The more recent approach of the courts, by 2001, had made it increasingly harder for patients to prove that they would not have undergone the particular treatment even if warned of the risk that eventuated. (7)

If I may allow myself an irrelevant aside, Dr Rogers was involved in a recent bout of litigation which concluded with a decision of the High Court. He was successful in maintaining his entitlement to a substantial sum of damages awarded in the District Court of New South Wales against the publisher of the Daily Telegraph which had

defamed him in relation to his treatment of Mrs Whitaker. The High Court noted that the unfortunate consequences suffered by Mrs Whitaker were not the result of any lack of care or skill in the performance of the operation that had been carried out by Dr Rogers even though imputations of this kind had appeared in the defamatory newspaper articles. It was probably a matter of inadequate consolation to Dr Rogers but it is interesting to note that, in the ultimate, he received a degree of vindication.

A brief history – public concern with Judicial decisions

I shall have some more to say about the Bolam test later. For the moment, may I return to an examination of the historical swing of the pendulum away from defendants. The situation had changed markedly by the early 2000's. It is fair to say that undisciplined findings in relation to liability and what were perceived as overly large damages awards, fanned no doubt by politic statements and media coverage, excited a degree of fierce public resentment. Judges were perceived – myself included no doubt - as being unduly generous with insurers' money. Whether this criticism was justified or not, premiums rose sharply and insurance cover became difficult to obtain. In the areas of health care, sporting events, charitable fund raisings and public recreation there arose a degree of panic. There was much public consternation over the early retirement of medical practitioners and their refusal or threatened refusal to perform certain services, particularly obstetrics, in country areas. Developments in the insurance industry brought the matter to a head. As Chief Justice Spigelman noted in his paper – “by 2002 what had for many years been a buyers market in insurance had become a seller's market. At an international level there had been series of natural disasters which had drawn down the capital of insurance companies, particularly that of re-insurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand exceeded supply in the Global re-insurance market. This was immediately reflected in premiums and in decisions as to what kind of businesses to write and where.”

In this country there were, in addition, the problems sustained following the collapse of HIH. In the area of medical insurance, Australia's largest medical indemnity

insurer was faced with insolvency and was only saved by the financial support of the Commonwealth Government. In addition to a package of other remedies, the government has indicated it will subsidise premiums in certain fields of practice where the damages are large, such as obstetrics.

I have thus far dealt with this history briefly and in a very generalised way. There are some qualifications that need to be made. For example, although it was rarely reflected in the media reports of the time, there were, during the same period, many instances, particularly in the appellate courts throughout Australia, where extravagant findings on both liability and damages were remedied. This can be seen on a regular basis over the last ten or fifteen years. Secondly, there have been in existence for some time legislative schemes which had endeavoured, as one of their aims, to keep down, for example, third party insurance premiums in relation to motor vehicles. Thirdly, by 2001, New South Wales had also sought to make important changes to the common law for recovery in medical negligence cases. (8). This legislation had the unfortunate consequence, in the short term, of promoting a spate of claims before the cut-off date, a factor which threatened the liquidity of UMP. There remained, however, a clear need for reform on a broader basis.

The Ipp Committee Report

Because of the reality of the insurance crisis, and for that matter the problems it spawned in the medical world, the Australian Government convened a series of meetings with ministers from all jurisdictions and a representative of municipal government. With surprising rapidity, a non-partisan accord was reached by all jurisdictions to consider the implementation of major reforms to Australian law, in a consistent manner, in an endeavour to restore confidence and a degree of affordability and predictability.

In Australia, there are six States and two Territories. Each has its own government with powers and responsibilities within its own jurisdiction. Then there is the Commonwealth with its range of powers and responsibilities in respect of all Australian jurisdictions.

The common law, including the law of negligence, falls within the jurisdiction of the States and Territories. States and Territories also have responsibility for the administration of their own court systems including the hearing of claims falling within their jurisdictions and the implementation of statutes relating to civil liability in their areas. There is, although there is no need for me to attempt to detail it here, an overlapping of responsibility between the Commonwealth and the States in certain areas of insurance. For example, the States and Territories have the control of compulsory third party motor vehicle insurance.

This level of potential disparity highlighted the need to have some sort of partisan or uniform approach to tort reform, otherwise it would be likely to achieve very little.

A significant contribution to setting the reform on the right path was the 2002 report commissioned by ministers to review the law of negligence. The committee was chaired by the Honourable Justice David Ipp and included Professor Peter Cain, Professor Don Sheldon and Mr Ian Macintosh. The report made sixty-one recommendations to governments on a principled approach to reforming the law.

At the Fourth Ministerial meeting in November 2002, ministers made a significant breakthrough, agreeing to a package of reforms to put in place a number of the main recommendations of the Ipp Report. Each jurisdiction agreed to introduce the necessary legislation as a matter of priority. The Australian Government confirmed that, within its own jurisdiction, it would amend the **Trade Practices Act 1974** to underpin the changes being made by States and Territories so as to avoid plaintiffs circumventing the range of reforms in other jurisdictions. The resultant legislative reforms in the various States and Territories of Australia, subsequently enacted, are at the heart of this keynote address. The topic of tort reform is however a vast one; and it may well be that certain parts of it only are of interest to this conference. But may I preface a brief analysis of the reforms of most interest to the medical profession by a brief overview of the changes. They may be broadly grouped into three types: -

First, there are changes to the law governing decisions on liability, including contributory negligence and proportional liability. Secondly, there are changes to the

amount of damages paid to an injured person for personal injury claims or for economic claims against a professional. Thirdly, there are new time limits and methods for making and resolving claims, including improved court procedures, control of legal conduct and legal costs. Each of the groups of reforms has elements that focus on, but are not limited to, personal injury claims thus impacting both on issues of public liability and medical indemnity.

The reforms generally – an example

May I give an example of the first category: prior to the reforms, critics argued that the negligence arena in Australia had altered so that events with a very low probability of occurring could still be held to be foreseeable. In tort law, a basic principle is that a person owes another person a duty of care if the first person could reasonably have foreseen that, if he or she did not take care, the other would suffer either physical or economic injury or death. In **Wyong Shire Council v Shirt** (9), the High Court found that persons could be held liable for failure to take reasonable precautions to avoid foreseeable risks, that is risks which were other than farfetched or fanciful. Critics argued, perhaps not entirely correctly, that this benchmark may have required a person to take precautions against a risk of very low probability simply because it was foreseeable.

In general terms, the reforms were designed first to replace the test of foreseeability as established by **Wyong Shire Council v Shirt** with a test that persons can only be held liable for risks that are “not insignificant”. In addition, legislative changes were designed to bring about a situation where foreseeability is a necessary but not a sufficient condition for a finding of negligence. A person will not be liable merely by reason that a risk was foreseeable.

Under Part 1A Division 2 of the **Civil Liability Act 2002** – the New South Wales legislation – there are certain general and other principles relating to liability and negligence resulting from a failure to take precautions against a risk of harm. Under s 5B, a person will not be liable for harm unless the person knew or ought to have known of the risk; the risk was not insignificant and, in the circumstances, a reasonable person in that person’s position would have taken precautions against the

risk. Section 5C sets out the matters that the Court is to consider when determining whether a reasonable person would have taken precautions against the risk.

The matters in s 5C are a reference to what has been described as “the negligence calculus”. This is a statement of the factors which have to be balanced out in establishing whether failure to guard against a foreseeable risk should be deemed negligent (ie, determining whether the standard of care has been breached). The calculus has also been described as providing a framework for deciding what precautions a reasonable person would have taken to avoid the harm that has occurred; and what precautions the defendant could reasonably have been expected to have taken. There are four named components:

- The probability that the harm would occur if care were not taken
- The likely seriousness of the harm
- The burden of taking precautions to avoid the risk of harm; and
- The social utility of the risk creating activity (that is, is it more worthwhile to take risks for some activities than for others – for example, if life is at stake).

The calculus involves weighing the first two matters against the last two. It should be noted that there is nothing new or novel in these matters. They were the very matters mentioned by Mason CJ as relevant factors to be taken into account (see **Wyong Shire Council v Shirt** at 478).

The High Court of Australia had in relatively recent times, prior to the reforms, emphasised again the need to bring considerations of this kind to account especially in the context of assessing foreseeability (**Tame v New South Wales; Annetts v Australian Stations Pty Limited**) (10).

In the event, reforms of the kind I have set out above are now in place in all States and Territories with the exception of the Northern Territory (11).

Reforms – areas other than medical negligence

This paper is, of course, concerned primarily with tort reform and its impact in the specific area of health care. Participants in this conference will be aware, no doubt, that the raft of reforms that came about following the Ipp Report embraced a much wider area than medical negligence. May I mention briefly a few of those areas: legislation has been passed in every jurisdiction, including the Commonwealth, protecting volunteers from liability for work carried out in community organisations; “Good Samaritans” have been protected in certain circumstances from civil liability when assisting injured persons in an emergency; significant limitations were placed on the right to recover damages for injury arising from participation in dangerous recreational activities. This limitation occurred in New South Wales, for example, where the harm was suffered as a result of the materialisation of “an obvious risk” of the activity. Moreover, a duty of care is not owed to a plaintiff in certain circumstances where, in relation to a recreational activity the risk was the subject of a “risk warning” to the plaintiff. The contributory negligence of a plaintiff, if it is sufficiently extensive, may defeat a claim brought against a wrong doer. These, as I say, are but a few of the areas of reform.

Reforms affecting the law of medical negligence – a modified return to Bolam

This was of course, a specific area of concern for the Ipp Report. The proposal was to consider a number of general and specific measures intended to limit medical liability and damages. This was directly done to meet problems relating to recent increases in medical indemnity premiums and the effect of that matter on medical service generally. The Ipp committee recommended that the test for determining the standard of care in cases in which a medical practitioner was alleged to have been negligent in providing treatment to a patient should be:

“A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the Court considers that the opinion was irrational.” (Rec 3)

The first point to note is that this relates to treatment only. It does not relate to negligence arising from a duty to disclose relevant information prior to treatment being carried out. The second point is that the recommendation is in terms different from the Bolam test which applied in Australia until 1992; and which applied in England until its modification in 1998 in **Bolitho v City & Hackney Health Authority** (12).

The Ipp Report pointed to the fact that, when strictly applied, the Bolam test can result in outcomes which may be unacceptable by community standards. It may allow small pockets of medical opinion to play a determinative role in the setting of the requisite standard of medical treatment even in situations where the bulk of medical opinion would take a different view.

My earlier remarks relating to the judgment in **Rogers v Whitaker** will have brought home to you that, in the light of that decision, a Court's duty had been to consider the entirety of the expert evidence in relation to diagnosis and treatment to determine whether, in its view, the professional had acted negligently.

The modified Bolam formulation, recommended by the Ipp Committee, recognised that the current law did not automatically require a Court to defer to medical opinion, although it noted that, in the normal run of cases, it would normally do so. The new formulation was intended to give guidance as to the circumstances in which a court would be justified in not deferring to medical opinion. It adopted the word "irrational" on the basis that this was the proviso laid down by the English House of Lords in **Bolitho**. (A careful reading of **Bolitho**, however, suggests that the phrase adopted by the House of Lords was that the body of medical opinion should be "reasonable or responsible": Lord Browne-Wilkinson at 243). The Ipp Committee thought that the formulation of the recommendation in the terms adopted would give doctors as much protection as was desirable in the public interest. This was because the chance that an opinion which was widely held by a significant number of respected practitioners in the relevant field would be held irrational was very small indeed. On the other hand, if the expert opinion in the defendant's favour were held to be irrational, it seemed right that the defendant should not be allowed to rely on it.

In one form or another, the modified Bolam test has been adopted in New South Wales, Victoria, Queensland, South Australia and Tasmania. I understand that a Bill has been drafted to address the situation in Western Australia. I will not burden you with the precise language of the statutory enactments that have brought about this reform in a number of jurisdictions. I do point out that there are differences of expression in the various enactments. This lack of uniformity may have a tendency to impair consistency and promote legal argument at appellate level.

In New South Wales Division 6 of Part 1A of the **Civil Liability Act 2002** contains the following sections: -

“Division 6 Professional negligence

5O Standard of care for professionals

- (1) A person practicing a profession (“a professional”) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in

respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

You will see that the test in New South Wales applies not only to medical professionals but to all professionals.

By way of contrast, the Victorian situation (13) speaks of wide acceptance in Australia “by a significant number of respected practitioners in the field (peer professional opinion)”. Moreover, peer professional opinion can only be rejected by the court if it is determined to be “unreasonable” (14). (Victoria rejected the word “irrational” because it was ambiguous).

I have not unearthed any decisions of appellate courts applying the new modified Bolam test. But perhaps I may respectfully and hesitantly make a few observations about it. It is fair to say that the medical profession has expressed itself as most concerned to see a return to Bolam. The principal reason that this has been so, I think, is that the medical profession has taken the view that the High Court of Australia had substituted for the “Doctor knows best” test, a test that “Judges know best”. For reasons that I have briefly touched on, I do not think that this was really the case. Where the medical profession’s concern was justified, I think, was that a number of trial judges had, somewhat irrationally, refused to defer to medical opinion in circumstances where there was no warrant for rejecting that opinion.

There is no doubt that the modified Bolam test enshrined in the present legislation in the various States requires a court to take into account in an important manner an opinion widely held by a significant number of respected practitioners in the field. This opinion may well determine whether a medical practitioner is or is not negligent in relation to treatment provided to a patient. But it leaves the court with the undoubted task of determining for itself whether a particular opinion is “irrational” or, in some jurisdictions, “unreasonable”. Moreover, judicial experience suggests, lamentably perhaps, that expert evidence is often available to support contrary opinions held by a significant number of apparently respected practitioners in the field in relation to particular matters of treatment. This difficult situation is unlikely to change unless there is an overall legislative restructuring of the manner of the usage

of expert evidence in medical negligence cases. This is one recommendation of the Ipp Report that has not been taken up in the reforms.

For myself, I would have no real certainty that the presence of the modified Bolam test is likely to alter, in any dramatic way, the way in which medical negligence trials are conducted throughout the Australian court system. This is essentially because, in most important cases relating to treatment, the courts have, and now necessarily will, continue to take medical consensus and standards into account to a high degree. It will however help to dispel the perception that, in matters of diagnosis and treatment, medical opinions and practices carry no weight with Judges.

The modified Bolam test does not apply to the duty to inform

May I now turn to the second aspect of this present topic. This is the fact that the modified Bolam test does not apply to claims of negligence against medical practitioners arising from an allegation that inadequate warning, advice or information has been given to a patient. Let me put it this way: the presence of the modified Bolam test in the New South Wales legislation, had it existed at that time, would not have saved Dr Rogers from sustaining the adverse judgment he did in the High Court twelve years ago. Nor would it do so today.

In this regard, the Ipp Committee said: -

“An important implication of the patient’s right to give or withhold consent is that the opinions of medical practitioners about what information ought to be given to patients should not set the standard of care in this regard. The giving of information on which to base consent is not a matter that is appropriately treated as being one of medical expertise. ... The Court is the ultimate arbiter of the standard of care in regard to the giving of information by medical practitioners”. [Para 3.38]

It must be said that liability for failure to warn had created a great deal of concern among medical practitioners. While this is an issue for all professionals, the committee recommended legislation in this area only in respect of medical practitioners; and that the obligation should be expressed as no more than an obligation to take reasonable care (Recommendation 6). This recommendation has

only been taken up in three of the jurisdictions. For example, in Queensland s 21 of the **Civil Liability Act 2003** provides that a doctor has a duty to advise the patient of information relevant to any risk of personal injury to that patient. The information must be sufficient to enable the patient to make an informed decision about whether to undergo the treatment and must also include information of the type the doctor knows or should know that the patient wants to be given. It is immaterial whether or not the patient seeks or requests the information. The duty extends to providing information to a person responsible for making any decision on behalf of a patient.

The Ipp Committee divided the duty to inform into “proactive” and “reactive”. It recommended an exemption from the proactive duty to inform of “an obvious risk”. The Committee considered that the reactive duty to inform was a matter best left to the common law. New South Wales has implemented part of this in that, as a general matter, no duty of care for failure to warn arises where there is an obvious risk (15). There are however important exceptions to this provision. For example, the section does not apply if the plaintiff has requested advice or information about the risk from the defendant. More importantly, from the point of view of medical practitioners, the section does not apply if the defendant is a professional and the risk is a risk of the death of, or personal injury to the plaintiff from the provision of a professional service by the defendant (s 5H(2)(a) and (c)).

Queensland and Tasmania have partially implemented the recommendation whereas other jurisdictions, at this stage, have not.

The general raft of reforms has taken on board another important issue. Its impact on medical negligence cases arises in relation to statements made by a plaintiff as to whether he or she would have had an operation (which ultimately led to damage) if an appropriate warning or relevant information had been provided at the time of consultation. Invariably, evidence is given by a plaintiff in these circumstances that he or she would not have undergone the operation or treatment. The legislation in New South Wales, for example, provides that if it is relevant to the determination of factual causation to determine what the person who has suffered harm would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances. Any statement made by the

person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest (16). Similar reforms appear in the legislation in Victoria, Queensland, Western Australia and Tasmania. This particular aspect of reform, as I have said, is of general application and is not limited to medical negligence cases.

It is apparent from a reading of the Ipp Report, that the committee formed the view that the medical profession viewed as unsatisfactory the then legal specification of the proactive duty to inform. This was because it gave insufficient guidance as to what information the medical practitioner has to give the patient in order to avoid legal liability for negligence. One complaint had been that medical practitioners spend more time giving patients information than in examining them. The Ipp Report did not recommend that detailed prescriptive legislative provisions should be framed in this regard. Such a course, it considered, would be impractical and undesirable.

Under current Australian law, the proactive duty remains the duty for the medical practitioner to put the patient in a position to make an informed decision about whether or not to undergo the treatment by telling the patient about material risks inherent in the provision of the treatment, and by providing other relevant information. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position would attach significance to it in deciding whether or not to undergo the treatment. The duty is not however, confined to information about risks but extends to other types of information that may be needed to enable patients to make an informed decision about their health.

Causation

There has been a high degree of uniform response to the Ipp Report recommendation in relation to this issue.

In tort law, a person cannot be liable for damages for failure to take care to prevent injury or death unless negligent conduct on his or her part (whether by act or omission) caused the harm and unless that harm was not too remote from the negligent conduct.

The committee's recommendation (Rec. 29) in relation to these issues may be briefly stated as follows:

- The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation
- The two elements of causation should be separately considered – factual causation and scope of liability (or remoteness)
- The basic test of factual causation (the “but for” test) is whether the negligence was a necessary condition of the harm. In appropriate cases, however, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.
- For the purpose of deciding whether the case is an appropriate one where negligence may be said to have materially contributed to the harm or the risk of the harm so as to be sufficient to establish factual causation, it is relevant to consider: -
 - (i) Whether (and why) responsibility for the harm should be imposed on the negligent party, and
 - (ii) Whether (and why) the harm should be left to lie where it fell

As I have said, most jurisdictions have implemented these recommendations (New South Wales (ss 5D, 5E); Victoria (ss 51, 52); Queensland (ss 11, 12); Western Australia (ss 5C, 5D); Tasmania (ss 13, 14); and the ACT (ss 45, 46)).

Causation – Recent cases

There have been a number of recent cases in the New South Wales Supreme Court where the principles underlying these reforms on the issue of causation have been applied, notwithstanding that the reforms did not themselves apply to the litigation. In

addition, there has been one case where the **Civil Liability Act** did apply. I shall mention these briefly.

In **Ruddock v Taylor** (18), the New South Wales Court of Appeal considered an appeal from a verdict awarded by a District Court Judge against the appellants for the wrongful imprisonment of the respondent. It was not a medical negligence case. The Commonwealth of Australia had deprived Mr Taylor of his liberty on the sole basis that he was an alien. The High Court however decided, in separate litigation, that the Commonwealth had never been entitled to detain the respondent on the basis asserted by the Ministers.

The Court of Appeal upheld the decision of the District Court Judge both on liability and damages. Ipp JA agreed with the reasons of Spigelman CJ and Meagher JA. His Honour however, addressed the issue of causation. Ipp JA approached the matter in this way: in his view, there was first the factual aspect of causation. There was no doubt, on the facts of the case, that but for the ministerial decision to cancel Mr Taylor's visa, he would not have been thereafter placed in detention. Thus, the plaintiff succeeded on the first limb of the causation approach. On the second aspect of causation – the normative question – Ipp JA said that it was a fundamental purpose of the common law that the personal liberty of individuals should be protected. This reflected “a basic value with very deep roots in our society”. In the present case, the appellants had unlawfully deprived the respondent of his liberty. Accordingly, for normative reasons, Ipp JA considered the appellants ought to have been held liable to pay damages for the harm Mr Taylor suffered.

Harvey & Anor v P D (19) was an interesting and difficult case. It was not a case that was covered by the **Civil Liability Act**. This was because the proceedings had been launched before the commencement of the reform legislation. The appellants, Drs Harvey and Chen, appealed to the New South Wales Court of Appeal against a decision of Cripps AJ in favour of the plaintiff. The circumstances of the case were these: the plaintiff was a patient at a Marrickville Medical Centre for about fourteen months. In 1998 she attended the centre with her future husband for the purpose of seeing her doctor and having blood tests to ensure that neither person carried the HIV virus or any other sexually transmitted disease. This was because the pair was

proposing to get married. They were at the time in a sexual relationship but practising protected sex. Both the plaintiff and her boyfriend came to the centre for testing at the request of the plaintiff. The plaintiff was concerned about the status of her future husband because she believed that there was a higher risk that a person from his country of origin might be HIV positive than one from Australia. The plaintiff believed that she would have her partner's results and that he would have hers. But the topic was not in fact raised specifically by the doctor at the consultation. Both gave blood at the joint conference in the presence of each other and left the surgery. The doctor told them to return to his surgery in about a week's time when the pathology tests would be available.

About a week later the doctor received the plaintiff's pathology report which was negative for both Hepatitis B and HIV. The following day he received the boyfriend's report which was positive for both Hepatitis B and HIV. The plaintiff returned to the centre about a week or two after the initial consultation. She was handed a copy of her pathology report by the receptionist. She asked this person for a copy of her boyfriend's pathology report but was told it was confidential and it could not be given to her. It was common ground at the trial that the plaintiff should not have received her result from the receptionist but from a medical practitioner. The doctor in question failed to have a face-to-face meeting with either the plaintiff or her boyfriend immediately after the handing over of the pathology report. The doctor however, did speak to the plaintiff's boyfriend and told him he had tested positive. The doctor did not see this gentleman again nor did he speak to the plaintiff again although she continued to attend the centre on a couple of occasions where she saw a different doctor. She did so for the purposes of obtaining a contraceptive pill and some vaccines for travel purposes. The plaintiff's boyfriend deceived her when she asked him about his report and told her that he was free of any adverse virus or condition.

Santow JA found that the trial judge had been correct in concluding that the doctor owed both his patients a duty to address, in the course of the initial joint consultation, the need for consent to disclosure, the manner of disclosure and the possibility of discordant results. Secondly, Santow JA found that if the boyfriend had not been prepared to have his results made available to the plaintiff she would have discontinued her relationship with him. In that circumstance, the trial judge had been

correct to conclude that, had the doctor carried out his duty to his patient, the plaintiff would not have continued her relationship with her boyfriend and would not have contracted the HIV virus as she subsequently did. Santow JA applied the second limb of the test of causation adopted in Ruddock v Taylor. The normative question to be asked, he said, is ought the defendant be held liable for the harm sustained, to which the answer was “Yes”.

Ipp JA also applied the two stage test on causation. It was his view that the doctor had been negligent in failing to counsel the plaintiff personally when she attended to receive her tests results. It was wrong to leave it to the receptionist to deliver the results (20). As an alternative, he should have arranged for another doctor to counsel her if he were not available. It was Ipp’s view that the doctor’s conduct was an essential springboard to the boyfriend’s deceit and in that respect the negligent conduct of the doctor was undoubtedly an historical cause of the plaintiff’s loss. Moreover, Ipp JA thought it would be “quite wrong” to allow the appellants to rely on the doctor’s breach of duty so as to defeat causation.

Spigelman CJ agreed with Santow JA that there was negligence in the conduct of the initial joint consultation and this had led to the damage suffered by the plaintiff.

There was another important issue in the case. After the plaintiff became aware that she was HIV positive, she divorced her partner/boyfriend. Later she commenced a relationship with another man who was also HIV positive. She made an informed decision to have a child, even though she knew that she was HIV positive. Fortunately, the child was conceived and born without contracting the Aids virus. The facts established that, because of her condition, the plaintiff would be able to care for the child until about 2014 but not after that date. The plaintiff had unsuccessfully sought damages before the trial judge for the cost of future child care for the child during those later teenage years.

Santow JA thought that it was reasonable, in the abstract, for the plaintiff to have a child in the circumstances outlined above. He noted, however, that that was not the end of the matter. There was a second question that had to be answered; this was whether, accepting it may have been reasonable for the plaintiff to have the child,

was it reasonable to hold the doctors liable? Thus, it was necessary to consider the appropriate scope of liability for the consequence of the tortious conduct: that is to say, necessary to consider the appropriate scope of the duty of care. This was to be determined by applying a normative principle. Santow JA thought that, whether one puts the matter in the neutral terms of “legal concerns” or in the more influential sense of “legal policy, albeit still awaiting final recognition as binding principle”, it was his view that the trial judge had been correct in denying this head of damages. He concluded that the doctors had been involved in the causal link between negligence and the later injury (demonstrated by loss of capacity to care for the child in its teenage years). However, he thought that the causal link was too attenuated and its quality altered in a normative sense by the plaintiff’s considered decision to have the child, knowing of her condition. In short, while it was reasonable from her point of view to have the child, it was unreasonable to hold the doctors legally responsible for the financial consequences of this decision.

Ipp JA dealt with this difficult issue quite shortly. He accepted that the trial judge had been plainly correct in finding that there was an historic involvement between the negligence of the doctors and the particular loss claimed by the plaintiff relating to the care of the later born child. The real issue, he said, related to the normative question. This was whether, having regard to all the circumstances and in particular the plaintiff’s fully informed decision to have the child, causation recognised by the law had been established? This led his Honour to consider questions of policy. His Honour thought that the law should not provide an incentive to children being born in such circumstances. He said that, in his view, “the law should not provide any encouragement to deliberate decisions to have children in circumstances where those children could at birth be infected with HIV”. Thus, he answered the normative question in favour of the doctors on this issue.

Spigelman CJ generally agreed with Santow JA. In relation to the issue relating to the care costs for the later born child, he agreed with Ipp JA, subject to two observations. First, he said the two-limbed test for causation was apt in the circumstances of the case. But, the Chief Justice said, he wished to reserve his position on its more general application. Secondly, he rested his conclusion in relation to the normative issue on the plaintiff’s informed decision to have the child.

He did not find it “necessary or appropriate” to give weight to the other policy factors to which Ipp JA had referred.

The next series of cases to which I wish to make reference were decided in the New South Wales Court of Appeal on 29 April 2004. Again, these cases did not involve the direct application of the **New South Wales Civil Liability Act 2002**. The appeals related to two separate actions which were heard together. They were the “wrongful life” cases to which I made reference at the commencement of this paper (**Harriton v Stevens; Waller v James; Waller v Hoolahan** (1)).

I shall not repeat the facts agreed for the purpose of the legal analysis in the decisions of the Court of Appeal. They are set out at the beginning of my paper, as will be recalled.

The issues in the appeals before the New South Wales Court of Appeal were of the most profound and difficult kind. This paper is no place to discuss in detail the complexities of the legal issues. Relevantly, however, Ipp JA again applied the two-limbed causation test to the issue of the appeal. The first question he asked was whether the omissions of the medical practitioners were a historical (factual) cause of the children’s damage. Ipp JA acknowledged that this was not ordinarily a difficult issue but it was so in the present circumstances. This was because, while it was true that the respondent’s conduct had led to the appellants’ birth, that conduct did not have any effect on the foetus in each case. Nothing the medical practitioners did had resulted in the existence of the disabilities. Rather, the conduct of the respondents failed to prevent the birth of the appellants “with disabilities”. Notwithstanding this conceptual difficulty, his Honour ultimately came to the conclusion that the respondents had caused the children’s loss by causing them to be born in a disabled condition. However, his Honour had no difficulty in coming to a conclusion that, in relation to the second limb, that is the application of normative considerations, the doctors should not be held liable for the appellants’ damage. In this regard, Ipp JA referred to a number of policy matters that were, in his view, determinative of the normative issue.

Spigelman CJ essentially founded his decision on the proposition that the scope of duty of care owed by the doctors to the children did not extend to make the doctors liable as such a claim did not reflect values generally, or even widely, held in the community. He agreed, albeit with some qualifications, with the general reasoning of Ipp JA that the interests of appellants did not attract the protection of the law.

Mason P, in a careful and thoughtful judgment dissented from the conclusion reached by the other judges of appeal. It was his view that the doctors did owe a duty of care to Keeden and Alexia of the kind asserted. He also concluded that policy considerations ought not acquit the respondents of causal responsibility for the appellants' injuries. In a passage of considerable interest, his Honour (at para 164) wrote:

“Ipp JA suggests that acceptance of the appellants' claims involves the common law going beyond the “keep out” signs erected by Parliaments throughout the country in their recent response to the pressures on insurance funds said to stem from the march of tort law. This, with respect, is extra-legal analysis. I do not deny that legislation may exercise a gravitational pull upon the development of legal principle in particular fields ... but I know of no legal principle that directs the common law to pause or to go into reverse simply because of an accumulation of miscellaneous statutory overrides”.

In this regard, Mason P noted that Part 11 of the **Civil Liability Act 2002** (s 70-71) effectively reversed the High Court's decision in **Cattanach v Melchior** (21) (a “wrongful birth” claim where the parents had sued for damages, namely the cost of rearing a perfectly healthy child born to them but born in consequence of the negligent failure by a doctor to warn of certain consequences associated with a sterilisation operation the mother had been contemplating). The New South Wales Parliament had expressly refrained from precluding “any claim for damages by a child in civil proceedings for personal injury ... sustained by the child prenatally or during birth (s 70(2)”. Even the capping of parental claims, Mason P noted, “does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arises by reason of the disability”. (s 71(2)).

In short, Mason P saw no pattern or guidance in the spate of statutory modification operating in areas other than the one presented for determination in the appeals then before the Court.

The last case I wish to refer to in this context is one in which the **Civil Liability Act 2002** had direct application. This was the case of **Finch v Rogers** (22), a first instance decision of Kirby J. The claim was one seeking damages for medical negligence arising from delayed treatment after surgery following diagnosis of testicular cancer. As a consequence of the delay, it was alleged that the plaintiff required four cycles of chemotherapy instead of three. It was claimed that the fourth cycle brought with it ototoxic and neurotoxic effects causing significant damage to the plaintiff which would not have occurred had the treatment been confined to three cycles.

Breach of duty was admitted but the issue was whether the plaintiff's disablement was caused by the defendant's breach of duty. There was thus involved, as the principal issue, the question of causation.

The decision is interesting for a number of other reasons but I will confine my comments to the causation aspect of the **Civil Liability Act**.

Kirby J referred to the relevant passage in **Ruddock v Taylor**. He found that the defendant's negligence was a necessary condition of the harm that ensued to the plaintiff. Thus, he found that it was factually caused by the negligence. Secondly, Kirby J decided that it was "appropriate that the scope of the defendant's liability extend to the harm so caused". He said that Dr Rogers himself recognised that a failure to detect an early change in the tumour may have created the need for more chemotherapy than might otherwise have been needed.

Causation - Conclusions

It may be argued that causation reforms have not in substance altered the law as it previously existed. It can be said with some confidence, however, that uncertainty existed, so far as causation was concerned, about the necessity of applying both

tests in circumstances where the factual test was met. The reforms are likely to improve the understanding of this area of the law by providing both a clear legislative statement as to the principles applicable on the issue of causation and a clear methodology of approach. The aim is to place a question mark over the imposition of liability where the defendant's conduct was only remotely responsible for the loss.

The decisions to which I have referred point the way to the manner in which courts in New South Wales, at least, are likely to approach the causation issue in the new legislation. The "normative" question remains, in some respects, an uncertain one. The cases leave unresolved the ambit of pure policy based on moral and ethical grounds; the scope of "legal policy not yet settled" into principle; and the scope of legal principle itself and its capacity to unsettle the reach of policy. At the very least, it may be hoped that the resolution of those difficult issues will occur in a more structured and consistent manner than has occurred in the past.

Miscellaneous Reforms

I propose now to consider very briefly a number of individual matters of reform under this heading. I do not suggest, that, for this reason, they are in any way unimportant or insignificant. Quite the contrary: within the framework of the various matters I shall now mention reside the very best hope for legitimate and principled control of the tort law "blow out" and its disastrous impact on the availability and affordability of insurance.

Apologies

The first matter I will mention is, in my view, an important one. At a recent Health Care Seminar conducted during the Insight programme on SBS television, the issue of an apology by a medical practitioner came to the fore. Many of those involved in the forum made the point that dissatisfied patients are looking, more often than not, for a simple explanation and, if required, an apology where treatment has gone wrong. A number of experienced health practitioners at the conference indicated that this was simply not possible because of the legal ramifications involved in an apology.

Yet every jurisdiction has now legislated to prevent liability arising out of a simple apology, either by making the apology itself inadmissible or by providing that an apology may not be construed as an admission of liability. The definition of apology, for example, in the New South Wales legislation is very wide. Section 68 provides –

“Apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”.

All this seems eminently reasonable and suggests that an important problem has been remedied. A closer analysis, however, reveals that there remain problems that may need to be resolved in at least two areas.

First, there is a difference of terminology in the definition of “apology” as it appears in a number of the jurisdictions. May I give an example. The **Queensland Civil Liability Act 2003** contains s 71. It is in the following terms: -

“An ‘expression of regret’ made by an individual in relation to an incident alleged to give rise to an action for damages is any oral or written statement expressing regret for the incident to the extent that it does not contain an admission of liability on the part of the individual or someone else”.

This might be described as a narrow definition. Definitions of this kind are to be found in Western Australia (Part 1E s 5AF); Victoria (s 14I and 14J) whereas there is wide definition in the Australian Capital Territory (s 13).

Let me give a practical example of the problem: a doctor in New South Wales might say to a patient “I am sorry for what happened. It was my fault”. This statement would fall within the definition of an apology in s 68 of the New South Wales Act. By virtue of s 69, it would not constitute either an express or implied admission of fault or liability, notwithstanding that it was expressed in terms that clearly admitted fault. Nor would it be relevant to the determination of fault or liability in connection with a later damages claim. It would not in fact be admissible in any civil proceedings as evidence of the fault or liability of the doctor in connection with the proceedings.

If a Queensland doctor were to make the same statement in a Queensland hospital to a patient, the first part of the expression would not be admissible but the second part arguably would be so as to amount to an admission of liability against the doctor.

The broad consequence of the distinction I have attempted to draw is that, despite assurances that uniform legislation would be provided in the various jurisdictions, there are in fact differences of expression throughout which are capable of having significantly different consequences for the outcome of litigation, depending on the State or Territory involved.

The second point I wish to make is one that may be made shortly. An admission of liability by a doctor in the context of an apology may, depending on the terms of the relevant insurance policy, entitle an insurer to decline to meet its contractual obligations under the policy. A doctor would want to examine very carefully his policy before deciding what he should say in terms of rendering an apology. This is one of the difficulties that the legislation has sought to avoid but I am by no means confident that it has achieved its result.

There may be scope, depending on the view taken at a broad policy level, for the Commonwealth to intervene in relation to the **Insurance Contracts Act** to prevent insurance companies from declining liability where an apology in wide terms has been proffered to the patient. This could be achieved in those jurisdictions where the “apology” definition is expressed in its wider form.

Limitations of action

The next matter I wish to mention relates to an important area of reform. This concerns limitations of action. The Ipp Report mentioned that there was a negative perception of negligence law that arose from the view that people can unfairly be sued many years after an incident. For example, the time which may pass between the actions of an obstetrician or midwife who delivers a child and the last date on which the child may be able to sue has been a matter of concern.

The committee recommended that the date from which time should run should be the date of discoverability. In ordinary circumstances, the limitation period is three years running from and including the date on which the cause of action is “discoverable” by the plaintiff.

The date of discoverability under these recommendations, is not when the claimant in fact discovered the damage and that the damage was caused by the negligence of another, but rather when a reasonable person in the claimant’s position should have made the discovery. There should be, the Committee recommended, an ultimate “long-stop” bar of 12 years from the time the negligent occurrence happened. This could be extended at the discretion of the court but not beyond the three years after the cause of action was discoverable.

The Ipp Committee also gave anxious consideration to the difficult question as to whether the limitation period should be suspended in the case of minors and incapacitated persons. After giving the issue careful consideration, the committee came to the view that it would be in the overall interest of the community that, as a general rule, the limitation period should run against minors and incapacitated persons. This was subject to the exception that the limitation and ultimate bar periods should not run against minors not in the custody of a parent or guardian; and should not run against incapacitated persons in periods during which no administrator had been appointed in respect of the person. The relevant knowledge, for the purposes of determining when the limitation period commences, would be that of the parent, guardian or administrator, as the case may be and not that of the minor or incapacitated person.

Where the parent or guardian is the defendant, the committee recommended that the limitation period would only commence when the plaintiff turned 25.

New South Wales and Victoria have incorporated these recommendations into their **Limitation Acts** (see ss 50C, 50D/F, 62A, 62B of the **Limitation Act 1969 (NSW)** and ss 27D/M of the **Limitations Act 1958 (Vic)**). Queensland has implemented the provisions suspending limitation period during the time of disability; and the recommended provisions have also been incorporated into the **Commonwealth’s**

Trade Practices (Personal Injuries and Death) Bill (No 2) 2004. So far, the other jurisdictions have not followed. This is despite the Ipp Report recommendation that “any sensible reform of the law relating to claims for personal injury or death arising out of negligence should include limitation rules that, as far as possible, are of general application and have nationwide effect”.

Mental trauma

A third area of major interest is the codification of the law in relation to mental harm issues. Where a baby is born with catastrophic injuries in circumstances where there is an arguable claim for negligence against the medical practitioner involved, this, in the past, has often led to additional actions being brought by the parents for damages for so called nervous shock. An important recommendation by the Ipp committee in this regard was that a committee of experts be appointed to develop a set of guidelines for assessing psychiatric illness for legal purposes. In particular, there was a recommendation that the expert panel should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts. This was thought desirable, indeed necessary, particularly in the area where expert evidence was necessary to detect the presence of a recognised psychiatric illness. So far as I can ascertain, no jurisdictions have implemented this recommendation.

In general, the response to the Ipp Report in relation to mental harm has been to enshrine in statute the standard view of the majority opinion in the well known High Court cases of **Tame v New South Wales**; **Annetts v Australian Stations Pty Ltd**. No duty is owed to a person unless the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness. This is to be determined in accordance with “the circumstances of the case”.

In New South Wales and South Australia, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or who were a close family member of the victim (**Civil Liability Act 2002 (NSW)** s 30).

It is worth noting that the Ipp Report proposal in relation to consequential mental harm has been taken up by all jurisdictions except Western Australia, Queensland and the Northern Territory. The committee gave consideration to situations where there was consequential mental harm from physical injury giving rise to a claim for damages for economic loss such as loss of income or the cost of care. The committee proposal was that to recover such damages the plaintiff would have to establish that the defendant owed the plaintiff a separate duty to avoid inflicting mental harm, as well as the original duty to avoid inflicting physical harm. In some respects, this recommendation demonstrated a tendency which was against the trend of contemporary medical views by attempting to treat mental harm as an entirely separate phenomenon from physical harm. However, the committee thought it very important to distinguish between damages for non economic loss and damages for economic loss in this area.

Section 30(3) of the **Civil Liability Act 2002** provides that any damages to be awarded to a plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim. Importantly, there is no liability whatsoever to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness (s 31).

Damages - Generally

I turn now to a consideration of a very important aspect of the reforms which have occurred throughout Australia. This is the calculation of personal injury damages and the particular reforms which have taken place in this area. It will be well understood that there are differences in the various jurisdictions throughout Australia and that therefore, for the purposes of this paper, I shall deal with the general topic without descending into precise detail. The kind of changes that have been introduced include the following:

- Establishment of thresholds of a percentage of permanent impairment below which a person may not sue at all

- Establishment of an indexed maximum for the recovery of economic loss
- Establishment of a threshold and maximum for recovery of non economic loss
- Restrictions on the recovery of damages for gratuitous services
- Fixing and in all cases reducing the rate of interest that can be awarded
- Fixing and increasing the discount rate established by the courts for the determination of the present value of future loss

It is fair to say that all jurisdictions have enacted controls and caps on damages awards but uniformity has not been entirely achieved.

Damages: The threshold and cap

New South Wales has enacted the Ipp Committee's recommendation, namely a threshold for general damages in terms of 15% of a most extreme case. Victoria has set a threshold of 5% for personal injury and 10% for psychiatric injury, whereas Western Australia has set a fixed amount threshold. On the other hand, the capping of general damages is a reform which has been accepted by almost every jurisdiction, although a sliding scale has been introduced in most cases. In New South Wales, for example, the maximum amount for non-economic loss (\$350,000) is indexed on an annual basis. The indexation is geared to the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of fulltime adults in New South Wales over the four quarters preceding the date of the annual declaration.

Damages: Loss of earning capacity

In addition, the Ipp Report proposed a cap on damages for loss of earning capacity in order to provide high earners with an incentive to ensure against loss of the capacity to earn above the limit. The proposed cap was twice the average annual fulltime adult ordinary time earnings. ("Average adult earnings") As it has turned out, the new legislation capping civil damages around the Australian jurisdictions has found this to be too limited. All jurisdictions, with the exception of Tasmania and South

Australia, have chosen three times the average adult earnings as their limit. South Australia has selected a cap of \$2.2 million. Tasmania has selected a cap of 4.25 times average weekly earnings.

Damages: Gratuitous Services

Two of the major components in major injury cases have shown themselves to be the cost of future care and the cost of gratuitous services. The latter, in particular, has been blamed by many commentators as a specially significant factor in the escalation of damages awards over the last quarter of a century. Past gratuitous care damages also have had applied to them an interest component.

Damages for the costs of medical care are determined on the basis of reasonableness; (New South Wales (s 13) and Queensland (s 55)). The committee had recommended that reasonableness be determined by reference to public hospital facilities and Medicare scheduled fees. This recommendation has not been adopted. In relation to gratuitous services, these have now been restricted in New South Wales, South Australia, Western Australia and the Northern Territory. There is no limit in the ACT. Tasmania had already abolished such damages. A number of the other jurisdictions had already restricted damages for gratuitous services in compensation schemes relating to motor accidents.

This has been, admittedly, an emotive issue. The genuine situation of a mother caring twenty-four hours fulltime over many years for a profoundly disabled child has understandably evoked a sympathetic response from the court assessing damages. On the other hand, the proliferation of claims for gratuitous damages, even in relatively minor cases or in cases where injury has been of a relatively short duration, plainly has had a significant impact on the insurance industry.

The present situation in New South Wales is that no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided (a) for less than six hours per week, and (b) for less than six months. There must have been shown a reasonable need for the services to be provided; the need must have arisen solely because of the injury to which the damages relates;

and it must be shown that the services would not have been provided but for the injury.

Where the services are provided (or are to be provided) for not less than forty hours per week, the amount of damages that may be awarded must not exceed a certain figure. This is calculated by reference to the average weekly total earnings for all employees in New South Wales. Where the services are for a lesser time, there is a maximum hourly rate provided. Section 18 of the **New South Wales Act** provides that a court cannot order the payment of interest on damages awarded for gratuitous attendant care services.

Damages: Present value of future loss

The calculation of the present value of future loss is effected by a prescribed discount rate of 5% in most jurisdictions. The committee had recommended a discount rate of 3% and the establishment of a regulatory body with the power to change the discount rate. This has not prevailed. The point to note is that the higher the discount rate the smaller the lump sum for future loss will be.

The imposition of a threshold on general damages, and a number of the other changes to which I have made reference, have clearly proved to be effective in reducing the number and cost of smaller claims. For example, filings in the District Court of New South Wales, where the majority of lower claims are heard, has dwindled significantly over the last 12 months.

Damages: Structured settlements

The final topic under this heading is the subject of structured settlements. Typically, a court in Australia awards a lump sum for future economic loss or future expenses that will be incurred. The award proceeds on the assumption that the plaintiff is likely to invest the lump sum and receive income from the investment. There are two reasons for this historical fact quite apart from matters of legal principle: the lump sum compensation is more tax advantageous than an income stream; secondly, courts did not have the power to make structured settlement of awards.

The States and Commonwealth have moved to reform this situation. The reforms have been designed to remove the tax impediment to structured settlements; and to enable State and Territory courts to order structured settlements.

The **Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002** amends the **Income Tax Assessment Act 1997**. It provides an Income Tax exemption for annuities and certain deferred lump sums paid under structured settlements to seriously injured persons. The exemption is only available where certain eligibility criteria are met. The Act is designed, in addition, to ensure that life companies are exempt from income tax on income derived from assets that support structured settlement annuities and lump sums.

All State and Territories have enacted legislation to encourage and facilitate structured settlements in personal injury damage cases. For example, Division 7 of Part 2 of the **New South Wales Act** contains provisions to encourage and facilitate structured settlements in personal injury damages cases, including provisions for the court to notify the parties of the terms of any proposed award so as to give the parties a reasonable opportunity to negotiate a structured settlement (s 23). Moreover, a legal practitioner must advise, in writing, a plaintiff who proposes to negotiate a settlement of a claim for personal injury damages about the availability of structured settlements and the desirability of the plaintiff obtaining independent financial advice about structured settlements and lump sum settlements of the claim (s 25).

Trade Practices and Fair Trading laws

The **Commonwealth Trade Practices Act 1974** (“TPA”) and similar provisions under State and Territory law relating to fair-trading prohibit unfair practices in trade and commerce. This extends to misleading and deceptive conduct. In the main, these laws have only been rarely used in death or personal injury cases.

No doubt with the ingenuity of lawyers in mind, the Commonwealth perceived that there was a potential for conduct in contravention of the provisions of the **Trade**

Practices Act being used as the basis of claims for negligently causing death or personal injury. There was a concern that astute legal practitioners might attempt to circumvent the reforms carried out in the States and Territories by recourse to the Trade Practices legislation.

For this reason, the Commonwealth proposed amendments to its Trade Practice legislation to prevent individuals, and the ACCC in a representative capacity, from bringing civil actions for damages for personal injuries or death resulting from contraventions of Division 1 of Part V of the TPA. If these proposals are implemented, plaintiffs will have to continue to seek damages for personal injuries or death by pursuing a right of action under State and Territory civil law rather than by relying on the TPA. The proposals are presently “stalled” in the Senate.

The **Fair Trading Act 1987 (NSW)** has been amended to prevent the recovery of damages under that Act for death or personal injury resulting from misleading and deceptive conduct. There is similar legislation also enacted in Queensland and Tasmania but not in other jurisdictions so far (23).

Reforms affecting pre-litigation procedures, lawyers and costs

There have been a number of reforms implemented, which I need not detail, affecting pre-trial procedures. These reforms were designed to improve pre-litigation procedures and encourage early settlements. A second raft of reforms is aimed at the solicitors and barristers conducting litigation. For example, a solicitor or barrister in New South Wales must not provide a legal service on a claim or defence unless he or she has reasonable grounds for believing, on the basis of proof of facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success (**Legal Professional Act 1987**). A contravention of this prohibition is capable of being unsatisfactory professional conduct or professional misconduct for the purposes of disciplinary proceedings. Moreover, where legal services are provided in contravention of the prohibition, the solicitor or barrister can be ordered to repay costs that the client has been ordered to pay to another party and can be ordered to indemnify another party against costs payable by that other party. There is similar provision in the Australian Capital Territory (ss186-190 **Civil**

Law (Wrongs) Act 2002. As yet, other jurisdictions have not put in place like provisions.

A number of jurisdictions have implemented reforms aimed at restricting advertising by the legal profession in connection with certain damages claims. This has occurred in New South Wales, Queensland and Western Australia. In addition, there have been reforms restricting the recovery of legal costs by both plaintiffs and defendants in relation to small to medium size claims. These changes have reflected the philosophy that is desirable to reduce the cost of resolving small claims so as to promote the allocation of resources to provide support and assistance where it is most needed, that is in cases of catastrophic or more serious injury. The reforms were frankly designed to make legal action less attractive for smaller claims. There is no doubt that reforms in this area have been a major reason for the “dry-up” of the smaller to medium negligence actions.

Changes of this kind have occurred in **New South Wales (Legal Professional Act 1987)**; **Personal Injuries Proceedings Act 2002 (Queensland)**; **Western Australia (Legal Practitioners) Act 1893** and in both the Australian Capital Territory and the Northern Territory.

Medical Indemnity

As I mentioned at the outset of this paper, the problems experienced in the medical indemnity insurance market over recent years reflect those found in the general insurance world. There had already been expressed concern regarding the fact that the High Court of Australia’s interpretation of the **Insurance Contracts Act 1984** was causing difficulties for insurers (24). This was especially so for insurers providing “long-tail” classes of insurance. The Federal Government is currently considering amendments to the Act with a view to ensuring that claims made insurance continues to operate as intended.

With the near collapse of Australia’s largest medical defence organisation, UMP, the problems of under provisioning for “long-tail” claims were exacerbated. Premiums rose sharply at the same time as some medical practitioners threatened to cease work in hospitals and others contemplated early retirement. Actuarial calculations at the time, based on a number of judgments for high damages, provided an alarm

signal to the Directors of UMP that future damages awards were likely to be beyond financial reach. This, coupled with the reinsurance problem in the general insurance industry, made it clear that steps had to be taken to enable doctors to have access to secure and affordable medical indemnity insurance in the future.

One of the responses to this crisis, as this paper has endeavoured to point out, was the concept of tort reform. I doubt that anybody who examined the matter carefully imagined that tort reform, of itself, was a complete cure to the problems in the medical indemnity industry. The Australian Government, as a consequence, has introduced a range of reforms to meet the issues involved in the broader issue of medical indemnity insurance. This has included legislation to bring medical indemnity providers within the general insurance industry prudential regulatory regime. It has also included the promise of premium support for doctors whose premiums are high relative to their income. As I understand it, general surgeons are paying up to \$70,000 or more for annual insurance even as I speak. The issue of premium support is accordingly a most encouraging one.

In relation to the broader issue, the Australian Government has provided guarantees that have allowed UMP to trade its way back into business. Indeed, I understand the Directors of UMP are presently confident that the steps taken by the Australian Government have substantially rectified the aspect of under provisioning and the threat of inadequate reinsurance. Time alone will tell whether these cautiously optimistic expectations will be realised.

Conclusion

The broad areas of tort reform outlined in this paper occurred as a result of perceptions of crisis in the insurance world generally, including the field of medical indemnity insurance. Whatever the merits of the debate, it became clear that reforms were required on a principled and balanced basis so that the needs of the community might be urgently addressed as well as the legitimate rights of injured persons to seek reasonable redress against those responsible for their loss or damage. To a reasonable extent, I believe that the reforms have been principled. This is particularly in the area where there has been a statutory codification of the law as stated by recent decisions of the High Court. On the other hand, a number of the

reforms, no doubt considered genuinely necessary, have been more in the nature of “one off” stratagems to appease public indignation and dissatisfaction with outcomes perceived to be unreasonable.

It is certainly true that the Commonwealth Government and the various State and Territories have moved very quickly to address the insurance crisis. The potential for delay and obfuscation was present, as is often the situation in the area of legislative change. It is a credit to all concerned that the reforms have moved at such an extraordinarily rapid pace. One flaw, however, I think can be detected in the process. It is something I have briefly dwelt on during this paper. The reforms have not always been uniform across the jurisdictions and the language of the statutory enactments has been, to a degree, quite different in some areas. While this is understandable having regard to Australia’s political system, the consequent lack of uniformity carries with it a certain degree of uncertainty of outcome. This in turn has the capacity and potential to increase costs for both litigants and insurers.

The big question is – have the reforms been successful in driving down insurance premiums; or at least, in ensuring a degree of stability in the medical indemnity side of the insurance equation? It is too early to answer these questions in any definitive sense.

There is no doubt that the negligence court lists in, for example, the District Court of New South Wales have been halved during the last two years. In New South Wales, the number of actions commenced for medical negligence is definitely down. On the other hand, there appears to be a more significant number of notifications of medical claims in the Queensland court system during the same period. It is really too early for the reformers to claim complete victory.

It is my belief that tort reform will have a significant impact on the presence of small to medium claims in negligence actions generally. There is likely to be a similar impact on smaller claims for damages arising out of medical negligence. I am not as confident that the impact will be as significant on the larger claims especially those relating to catastrophic injury. The reforms relating to the calculation of damages will also have an impact on these larger claims but they will still remain as large claims.

For example, Dr Megan Keaney, the major claims manager for UMP, produced in 2003 a comparison between the Court of Appeal's award in **Simpson v Diamond** (pre-reform) and the amount which she calculated as likely to have been payable under the **Civil Liability Act 2002** had it been applicable to the claim. The Court of Appeal's award in favour of Calandra Simpson was a total of \$10.9 million (approximately). The recalculation carried out by Dr Keaney brought the damages total down to \$8.372 million, still a very considerable sum.

I would like to conclude on a cautionary note. When the rhetoric surrounding tort reform has died down – on both sides – there will clearly remain a need for the medical profession and those involved in attendant health care services, including those concerned with the administration of hospitals, to reflect upon these matters: two of the strongest factors in retaining indemnity insurance within affordable limits remain, first, the need for the imposition of improved levels of education for risk management in all areas of health practice; and secondly, the maintenance of professional standards of the highest calibre. Unless those things occur, no amount of tort reform will save the situation. The pendulum will swing back, inevitably, in favour of plaintiffs with the prospect of increased medical indemnity costs a reality once more.

ENDNOTES

1. (2004) NSWCA 9
2. Review of the Law of Negligence (“Ipp Committee”) 2002
3. Spigelman CJ: Negligence: The Last Outpost of the Welfare State (2002 76 ALJ 432; Negligence and Insurance Premiums (Spender Mason Trust Lecture 27.5.03); DA Ipp Policy and the swing of the Negligence Pendulum (2003) 77 ALJ 732; Associate Prof Prue Vines: Faith Hope and Personal Injury (Aust. Civil Liability Vol 1 No 1); Reform of Liability Insurance Law in Australia (Commonwealth of Australia 2004). My thanks also to Professor Barbara McDonald, Pro-Dean Sydney University Law School, for her invaluable advice and assistance.
4. Nagle v Rottneest Island Authority (1993) 177 CLR 423
5. (1992) 175 CLR 479
6. Negligent failure to inform (2003) 11 Torts Law Journal 165
7. Rosenberg v Percival (2001) 205 CLR 434; O’Brien v Wheeler NSWCA 23 May 1997 (unreported); Johnson v Biggs (2000) NSWCA 338; Bridge v Pelly (2001) NSWCA 31
8. Healthcare Liability Act 2001
9. (1980) 146 CLR 40
10. (2002) 211 CLR 317
11. Civil Liability Act (NSW) 2002 s 5C; Wrongs Act (Vic) 2003 s 48(2); Civil Liability Act (Qld) s 10; Civil Liability Act (WA) Part 1A, Div 2; Law Reform Act 2004 s 32(2); Civil Liability Act (Tas) s 11(2); Civil Law (Wrongs) Act 2002 (ACT s 43(2))
12. (1998) AC 232
13. Wrongs on other Acts (Law of Negligence) Act 2003 s 59(1)
14. *ibid* s 59(2)
15. Civil Liability Act 2002 (s 5H)
16. *ibid* ss 5D(3)(a) and (b)
17. NSW (s 5H); Queensland (s 21) and Tasmania (s 21)
18. (2003) NSWCA 262

19. (2004) NSWCA 97
20. As to the duty of a receptionist in a medical practice: see *Alexander v Heise* (2001 NSWCA 222). In that case the doctor and his receptionist were found not liable in circumstances where it had been alleged that the receptionist had failed to detect a need to make an urgent appointment for a sick patient to see the doctor
21. (2003) 199 ALR 131
22. (2004) NSWSC 39
23. Fair Trading Act (Qld); Civil Liability Act (Tas)
24. *FAI General Insurance Co Limited v Australia Hospital Care Pty Limited* (2001) HCA 38

Swearing In Ceremony of The Honourable Anthony Gerard Whealy

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

**SWEARING IN CEREMONY OF
THE HONOURABLE ANTHONY GERARD WHEALY
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

WHEALY J: Chief Justice, I have the honour to inform you that I have been appointed a Judge of this Court. I present to you my Commission.

SPIGELMAN CJ: Thank you, Justice Whealy. Please be seated whilst the Commission is read. Principal Registrar, would you please read the Commission (Commission read).

Justice Whealy, I ask you to rise and take the oaths of office; first the oath of allegiance and then the judicial oath.
(Oaths of Office taken).

Principal Registrar, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand to you the Bible so you may have the customary inscription inserted in it in order that it may then be presented to Mr Justice Whealy as memento of the occasion.

Justice Whealy, on behalf of the Judges of this Court, and on my own behalf, I welcome you as a member of this Court. Your Honour has for many years been Senior Counsel for this State and has contributed to the development of the law in this State in and I look forward to many years of service with you on this Court.

MS RUTH McCOLL SC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION: May it please the Court. It is my honour to appear on behalf of the New South Wales Bar today to welcome and congratulate your Honour on your appointment to this Court.

You come to this Bench with the unique distinction of having already been the subject of a ceremonial sitting of a Court in celebration of your appointment.

Only six weeks ago, the Licensing Court of New South convened a ceremonial bench to farewell you, not as a member of its bench, but as the eminent practitioner in that jurisdiction.. It is rare, indeed, for a person in my position to be able to read, in effect, a dress rehearsal of this morning and to find such an abundant richness of source material.

However, to start at the beginning. Your career as an advocate started in school debating. You were captain of the Senior Debating Team at Riverview in 1958 and 1959 in each of which years you were the winner of the Laurence Campbell Trophy. In those years you argued against the proposition "that a thing of beauty is a joy forever" and that "love makes the world go round." From all that is said about your Honour, it is unlikely that your heart was in either topic. It is a tribute to your early skills as an advocate that your team triumphed on each occasion.

You studied Arts/Law at the University of Sydney. While undertaking your studies, you did articles at Murphy & Moloney during the period Murray Gleeson was the senior articulated clerk at the same firm.

The seeds of your future were sown during your time at Murphy & Moloney. That firm acted for Cahills, the restaurant chain, and you engaged in work on their behalf seeking liquor licences throughout the length and breadth of this State.

After you graduated you joined Freehill Hollingdale & Page where in your final year as a solicitor you worked in the liquor licensing area with Mr Tom Jones. It was Mr Jones, apparently, who sagely advised you that you would be better off as a barrister than a solicitor. It was good advice. Mr Jones

proved his faith in you and has continued to brief you to this day.

You were admitted to the Bar on 4 June 1971. You joined the fifth floor of Wentworth Chambers where you remained until your appointment. You were the leader of the floor at the time of your appointment.

You read with Murray Gleeson. In your early days, your practice, as would befit one reading with Gleeson, was broadly distributed through commercial, equity and common law.

Gradually your work became more concentrated in the licensing area. You appeared with notable success for the late Claude Fay and the rest, as they say, is history. This does not mean you spent the rest of your career in the Licensing Court. Your work there took you to such lofty climbs as the Privy Council, the High Court and the Court of Appeal.

I think I can say, without committing an indiscretion, because I am quoting from your speech at the ceremonial sittings of the Licensing Court, that you took silk in 1984 with the intention of trying to broaden your practice. That, of course, did not occur. Instead you got even more work in the liquor licensing jurisdiction that you could have imagined was available. Such was as inevitably going to be the case for a counsel whom solicitors and clients alike perceived to be the master of that universe.

It is hardly surprising that your Honour was a success.

Your Honour's style has been characterised by manifest civility and courtesy to the bench, to fellow practitioners, to clients, and to court staff. That elegant style conceals exceptional court craft. You have been described as a most dangerous of opponents, intelligent, far-sighted quick-witted and as having an ability to put outrageous propositions in a very appealing manner. Another describes you as a "brilliant tactician blessed with a wonderful turn of phrase." You were always fully conversant with the law, yet to some your success appeared to be achieved with what one peer described as an economy of effort. Another former colleague described your style as "laid back."

You did "break out" of licensing work at one stage. You were an acting District Court Judge between 1988 and 1991. It might be noted that appeals from your Honour's judgments were singularly unsuccessful. You also served as a member of the Legal Services Tribunal between 1995 and 1997 and again in 1998.

Your fellow practitioners say that there is no doubt that you will bring to this jurisdiction your sound common sense approach of the application of the principles of law. You will focus on the essential rather than getting caught up in the minutiae. You will apply your great capacity for decision making and your intellectual courage to the problems which come before you. One of your recent submission to the Licensing Court was, "The Court should not be gulled by forensic tactics."

Those who appear before you would do well to recall that you will no doubt view all submissions in that light.

You are known as a compassionate man with a great understanding of human frailties. Although it may make some insurers uncomfortable, it should be noted that you are a tremendously generous person.

At the ceremonial sitting you gave an insight to your approach to fellow practitioners. It bears repetition. You said:

"Try to be a gracious winner - because it is easy to perhaps be gracious when you win - but also try to be a good loser. Our clients aren't always right. We do the best for them but we can't always win."

The generous spirit inherent in those words have epitomised your Honour's approach to your career. They have stood you in good stead if the high regard in which you are held is any measure.

Your Honour, if you bring but a few of the qualities for which you are so highly praised by all before whom you have appeared and with whom and for whom you have conducted appeared, this Court will be well served.

We wish you a happy and successful life on the Bench.

May it please the court.

MR J F S NORTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: May it please the Court. Chief Justice, your Honour Justice Whealy, your Honours, ladies and gentlemen. On behalf of the solicitors branch the profession, I congratulate your Honour on the occasion of your appointment to the Bench of the Supreme Court.

Your Honour comes to the Bench with a notable academic record behind, you, having studied the demanding disciplines of the classics and of the law, coupled with an extensive litigation experience since you were called to you Bar in 1971.

Your Honour was educated at St Ignatious College, Riverview, and as the President of the Bar has said, you achieved considerable success as a debater, winning in the final year the debating competition once again. I might note that it was the solitary success of the year and your rugby prowess was to little avail.

You then undertook your tertiary education at the University of Sydney in which you graduated in law acquiring on the way, so I am told, a love of classic automobiles.

Importantly, you were admitted to practice as a solicitor, proctor and attorney of this Honourable Court in 1966 and were employed first by the firm of McHutchinson Kessel & Co. From there you moved to Freehill Hollingdale & Page, working with legendary partners such as Brian Page and John Rothery. You quickly demonstrated an aptitude and skill in the area of liquor licensing. There is no doubt the trying and testing experience in your Honour having to spend so many hours engaged in convivial consultations with those in the liquor industry.

You were subsequently called to the Bar of the Supreme Court in 1971 where your humour, talent and capacity for hard work quickly became recognised and you established a substantial and extensive practice, particularly in the area of licensing law, where you have been regarded, quite rightly as a guru but also in the Common Law and on occasions in the Equity jurisdictions.

You took silk as a relatively young man in 1984. Your commitment to the law is enhanced and supported by your charming wife and your three children, and you can see by the number of people here today, your Honour, how proud they are of you.

In the eyes of the solicitors of New South Wales, your Honour has the ability and experience for the new judicial role upon which you now embark.

Your appointment as a judge of the Supreme Court confirms the great confidence we share in your qualities and abilities.

On behalf of the solicitors of New South Wales, I congratulate you on your appointment and wish you many satisfying years on the Bench.

As the Court pleases.

WHEALY J: Chief Justice, your Honours, Ms McColl, Mr North, members of the profession, ladies and gentlemen. First of all may I say how honoured I am that the Chief Justice of the High Court and Justice McHugh are here today. Their presence is a great satisfaction to me.

Mr North, may I say to you how pleased I am to hear you speak on this occasion, particularly as I knew your father very well and worked with him on a number of licensing cases in Dubbo and enjoyed the hospitality he and your mother offered on many occasions.

At the outset may I thank those who have made mostly kind, and occasionally not so kind, remarks about me. I appreciate very much all that has been said.

This is a special day for me. The Judges who sit beside and behind me, depending perhaps on their years of service, may have seen and heard it all before. As Justice Mahoney said to the then Chief Justice on his retirement:

"You and I have been friends too long, Chief Justice, not to be a little cynical about what is said on

occasions such as this."

I would like, for my part, to suspend such cynicism, because this day does mark a very special event in my life.

There are two obvious reasons; first I leave my practice as a barrister after nearly 30 years. Secondly, I take up public office and embark on a new and challenging career.

I have no doubt and no illusions that at times it will be difficult and not without its frustrations and annoyances. However, I look forward to it with a great deal of enthusiasm and anticipation.

I am particularly pleased to have present here today so many of my family, close friends, colleague and floor friends to share this special day with me.

I would just like to reflect briefly on the events which have brought me to this day. I owe a great depth of gratitude to my mother and father whose significant sacrifices gave me the benefit - one denied to them - of an extensive education at both school and university level. At the time of the announcement of my appointment, my mother having died only a few years ago, my sister remarked to me that my mother would have been very proud of me and I too would have been proud had she been able to be here.

My mother was one of some 11 children who lived in a small semi-detached cottage in Kent Street, Sydney. They were a poor family and not well educated. My mother said to me, however, that my grandfather, whose name was Joseph Patrick McGrath, may well have been the Lord Mayor of Sydney had it not been for his alcohol problem. Perhaps at that stage, subconsciously I decided to do some work in the field of liquor law.

It was my parents who introduced me to Gerald Wells, who was then the senior partner of Murphy & Maloney and I took up my position as an article clerk with that firm, after I had finished my Arts Degree at Sydney University. I worked in the famous "Blue Room", a large and singularly unattractive room at the rear of the firm's offices in Temple Court in Elizabeth Street. It was normally inhabited by five or six article clerks and a supervising managing clerk. Its luminaries included, at different times, a very good friend of mine, the late John Ward and the present Chief Justice of the High Court of Australia. Indeed, I inherited his dictating machine when I joined the "Blue Room" as he, as I recall it, had in fact gone to the Bar some months earlier.

In my first year as an article clerk I was responsible for more than 100 conveyances in the Weemala Estate at Bankstown on behalf of L J Hookers. This engendered in me an enduring dislike of conveyancing. In fairness, I think there were some early indications that I was unlikely to succeed as a solicitor. My first conveyance was one when I proudly reported back to my master solicitor, not only with the Title Deeds, but also with the cheque for the purchase money. It seems that the even younger article clerk on the other side of the transaction knew a little less than I did about the proper method of concluding a legal conveyance.

In due course, I moved on and came to one of the other great Catholic firms in the 1960s - it could hardly be called that today, I think - Freehill Hollingdale & Page. It was there I met and came under the influence of Brian Page and John Rothery, as has been mentioned and, ultimately, Mr Thomas Owen Jones, who is present here today. It is a great honour for me that he is here today. He was a solicitor who has had a great influence on my career and he has continued to brief me up until 12 March 2000.

It was he who introduced me to the vagaries of the Liquor Act 1912. It is appropriate to mention that a number of my colleagues at the Bar came from the same stable. These included Stephen Austin QC, John Timbs QC, Cliff Hoeben SC, Geoff Lindsay SC and, of course, Justice Greg James, who was even more puzzled than I by the provisions of the Liquor Act and, therefore, devoted his later life mainly to crime. I should also mention the late and lamented Frank Nugan, who was at Freehills when I was. The only Ex-Freehillian, so far as I know, who has been exhumed - to this point of time

I came to the Bar in June 1971. It was one of my parent's friends again who found a place for me as a floater on the fifth floor Wentworth Chambers. This was John McKeon, and ex-barrister and Judge from that floor who introduced me to Edgar Marks, one of the great old clerks of the building who took me under his protective wing. I read with Mr A M Gleeson and I learned a great deal at his side.

I would like to dispel some of the rumours that have been put forward about our present Chief Justice.

I had the privilege of being in his room on many occasions and I formed a view that he treated all of his instructing solicitors with the utmost courtesy and civility and there was none of the alleged conduct which has led to some less than amusing remarks from his contemporaries. There was, however, one conference I well recall. This was a particularly gruelling conference. Our client, who was then the Chairman of the Sydney Stock Exchange, had a heart attack at the end of the conference and was taken by ambulance to St Vincent's Hospital. Over a small whiskey, later that evening, Mr Gleeson informed me that he thought it had been a most productive conference.

I remained on the fifth floor for nearly 30 years and it became my second home. After David Bennett took up his position as Solicitor General, I was privileged to take over as leader of the floor. I carried out that task and enjoyed it greatly over the last two years. From a floater on the floor to floor leader in 27 years; hardly a mercurial rise, you may think, but one of great satisfaction nevertheless.

The fifth floor has a colourful and strong history. It, or its predecessor, the fifth floor Chalfont housed such greats as Barwick and Cyril Walsh. When I joined it there was a great variety of diverse talent - McGregor, Campbell, Foster, Davoren, Knoblanche, Langsworth and D E Horton and the O'Mealleys, amongst others. Helsham had joined the Equity Bench only a year or so earlier. It was a floor whose composition changed significantly over the years. It has been graced by David and Annabelle Bennett for more than 16 years. Our present Chief Justice was a member of that floor for a relatively brief period of time. Its present structure is again one of great variety and strength. It distinguishes itself from other floors, in my opinion, by the overwhelming sense of friendliness and goodwill amongst the men and women who now inhabit it. It has lost none of its sense of history and continuity. It is in good hands with John McCarthy as new floor leader, John Sheahan as floor secretary and Karen Walker-Flynn as our clerk.

I would like to take the opportunity to pay tribute to four women who, at a professional level, have played a very significant part in the advancement of my career. First, my secretary, Letitia Tomkins, who worked with me for 10 years. Her bright and attractive personality secured me many a brief, particularly from the younger male members of the solicitors' branch of the profession. I think it is also fair to say that many juniors approached me to see whether I would lead them and I am certain that it was the attractions of the outer office of my chambers, rather than any forensic skill that I possessed, which bought them to my rooms.

I very much appreciate the fact that she has come down from Port Macquarie with her young daughter for this ceremony.

Next, my present secretary, Cecilia Cordova, and her predecessor, Ciana Goodwin, who carried on the good work where Letitia had left off. Each by her hard work managed to portray me to the outside world as a model of organisation, whereas the truth was probably quite to the contrary.

Finally, may I mention my clerk, Karen Walker-Flynn, whose loyalty and diligence, more so than ever in the last few months, has been outstanding.

Throughout much of my career, I have been a specialist practitioner in the Licensing Court of New South Wales. To the outsider, the Licensing Court must appear, as do many specialist jurisdictions, as a slightly bizarre, secretive, clannish organisation, whose rituals and practices remain a mystery. In truth, the Licensing Court is a small specialist court doing important but relatively unheralded, work in the community. It is a court which often deals with the public face to face. At the same time, it is a court which has to make sensitive and sometimes harsh judgments, either for or against the commercial interests of significantly wealthy groups. It is exhorted to, and does in fact, act with the with the public interest uppermost in mind.

There are three things I would like to say about my years in this specialist field. First, after several years of a very varied junior practice, I did make a conscious decision to embrace a specialist area of work. There is no doubt that financial reward was one of the motives which moved me to that decision. But, more significantly, was the recognition I had at that time of the strain a busy and varied general junior practice might have on my relations with my wife and family and on the advancement of my own personal interests. Working seven days a week is not necessarily a great recipe for success as a husband, father or person wishing to develop his for her interests in the wider field of learning or advancement as a human being.

So, it was a decision which, in fact, gave me greater time to enjoy pursuits, which everybody knows I hold very dearly.

Secondly, when I took silk in 1984 it was with the best intentions of endeavouring to widen my field of practice. It was not to be. Despite my best endeavours, I know not why, but I became even more sought after as a specialist silk in licensing matters.

Thirdly, having accepted that situation, I must say that I have enjoyed myself hugely, particularly in the last 10 years, where there has been a rich abundance and diversity of work within the specialist jurisdiction.

I would like to pay a particular tribute to the members of the Licensing Court who have honoured me with their presence here today. This court has displayed itself as a model of fairness, courtesy and patience and I would be very pleased, if as a judicial officer in my future life, I am able to reflect the example I have been shown by the men and women of this specialist Bench.

Finally, Chief Justice, I come to my friends and family. Many of the former are, of course, my professional colleagues and clients; others are life-long friends, some of whom have come from as far afield as Melbourne. To all those I extend my deep and abiding thanks for their loyalty, support and friendship.

So far as my family is concerned, they are here today; my brother, sisters and their partners; my wife's brother, sister and her husband; my wife's mother who has encouraged me in my career since I was a young man; our aunts and uncles, nephews and nieces; there are also my cousins at first, second and third level removed.

I read with a great deal of interest and affection the speeches by Justice Bergin and Justice Bell last year, where each stressed the importance of family. I think I may have outdone them numerically today, in relation to the number of family in attendance, but at the end of day it is a question of quality of family influence and as each of those judges said at the time, it is a very sound start to one's career as a judge to have come from a stable and loving family relationship and I am very grateful for all the members of my family, at the smaller and wider levels, for their presence here today and for all they have done for me.

It is customary for a newly appointed judge to reflect on the fact that the Bar is a hard taskmaster and to tender sincere apologies to his wife for the deprivations thus visited upon her during life at the Bar. I must take the opposite course today. The truth is that my wife and I have enjoyed enormously our time together while I have been at the Bar. We have travelled widely. We have enjoyed a rich cultural life and the rewards of practice have enabled me to cover her, if not in glory, at least with the latest Italian and French fashions on a lavish scale.

So it is, I must tender my apologies to my wife, Anne, not for my time at the Bar, but for the comparative penury I am about to visit upon her in my new career. This she understands well, and accepts, if not with a good grace, then at least graciously.

I trust, Chief Justice, you will not mind if I dwell upon one personal reflection; at the time I received the note from the Attorney General, we were, as it always seems we are, on holidays and my wife said to me, "This is the news I never wanted to have." It was, for example, only two weeks ago in fair Verona, near the Roman arena, that I broke the news to her that her first joint conference with me as a Judge's wife was scheduled to take place in Brighton le Sands.

She has been, however, a wonderful companion and support for me, and I thank her very much. I am also pleased to have my three children with me here today. I am very proud of them all. I know I have the confident support of each of them out in the decision I have made to embrace this new life.

I am most grateful to all who have honoured me today with their presence at this ceremony. I shall do my very best to respect the confidence you have all placed in me by doing my work as a judicial officer to the utmost of my ability. Thank you.
