

# Counsel

The Journal of the Tasmanian Bar

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# Welcome

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Welcome to the first edition of Counsel—the new electronic newsletter of the Tasmanian Bar. At the outset I express my gratitude and that of the Bar Council to Greg Barns for his work involved in getting Counsel up and running. Greg raised the idea of editing a newsletter for the Tasmanian Bar with me earlier this year, and the Bar Council approved the concept and appointed Greg as editor with an agreed terms of reference. Since his appointment as editor Greg has worked to develop his concept, gather together a team of volunteers to assist him, and to publish the first edition of Counsel.

Greg's terms of reference describe Counsel as being “intended to be an informative and relatively informal publication containing editorial comment, articles and opinion pieces of interest to barristers and predominantly relating to the law and the practice of barristers.” The first edition certainly achieves those expectations.

While announcing congratulations I also take this opportunity to congratulate Hon. Justice Michael Brett on his appointment

to the bench of the Supreme Court of Tasmania. Justice Brett was a barrister and member of the Tasmanian Bar before being appointed a magistrate and Chief Magistrate. He brings a wealth of legal and civic experience to the Supreme Court and his appointment has been extremely well received by all that I have spoken to.

In March the new Bar Council was elected. The members of the Bar Council are myself (President), Phillip Zeeman (Vice-President), Tom Cox (Secretary/Treasurer), Ken Stanton, Kate Cuthbertson, David Lewis, Mark Rinaldi, Todd Kovacic and Sanchia Chadwick. Sanchia was elected to the newly created position exclusively dedicated to a junior barrister of less than five years experience as a barrister.

Members of the Bar Council dedicate many hours of their time on an entirely volunteer basis working on various issues confronting barristers in Tasmania, developing policy, and responding to requests from government for submissions on draft legislation. Work is also done lobbying government on matters relevant to the rule of law and barristers, responding

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to requests regarding the position of the Tasmanian Bar on issues as they arise, and spending considerable time providing advice to the Law Society of Tasmania regarding practising certificates from time to time. The work of the Bar Council members increases the profile and professionalism fo the Bar, and I take this opportunity to thank all of them for their work and dedication. I encourage others who believe that they can contribute to the betterment of the Bar to stand for election to the Bar Council or to offer to assist the activities of the Bar Council.

There are a number of issues currently confronting the Bar. As observed by Mr Bruce McTaggart SC in his President's Report at the annual general meeting in March, the Bar has largely been provided with administrative support through the generosity of Malthouse Chambers. The size and nature of the Bar is such that a model relying on the generosity of one (or more) sets of chambers is not sustainable. Ideally the Bar would employ an administrative assistant. For so long as the Law Society is responsible for issuing practising certificates for barristers, and does not provide any direct funding to the Bar that it receives from practising certificate fees, it is difficult to envisage how the Bar could afford to employ even a part-time administrative assistant. As a group we are going to need to consider how best to further develop the Bar in light of the fiscal constraints that are the present reality. Ideally the Tasmanian Government would permit the Bar to issue practising certificates and hence raise funds through practising certificate fees.

The Bar Council continues to aggitate for the appointment of a seventh judge to the Supreme Court. It is patently obvious that

the Supreme Court is in desperate need of an additional judge to reduce the ever increasing and unsustainable workload on the judges.

A number of issues relevant to the bar continue to be addressed by the Bar Council. They include continued and absolute opposition to mandatory sentences of imprisonment—something that is once again an issue, and the ongoing defence of the rule of law.

From a personal perspective, my priorities include: addressing gender equality at the Bar and equitable briefing; increasing the profile and quality of work for the junior bar; and increasing the public profile of the Bar and barristers.

I am available to speak to members about any issues that may arise and concern them—or indeed to receive compliments on behalf of the Bar Council. I encourage all members to become involved in the activities of the Tasmanian Bar.

Finally, I wish to record my thanks to Bruce McTaggart SC, the immediate past-President. Bruce took over the role as President from Mr Michael O'Farrell SC and spent the next three years in that role, which from my brief research make Bruce the longest serving president—at least in recent years. The role of President takes a considerable amount of time and Bruce led the Bar with distinction. I hope to build on much of his work. I also congratulate Bruce on being elected as Treasurer of the Australian Bar Association earlier this year.

**Chris Gunson SC**  
President  
Derwent and Tamar Chambers

# Editor’s Letter

Greg Barns, Salamanca Chambers



The Tasmanian Bar has been around for a few decades now but this is the first time its voice is being reflected in what we hope will be a quarterly offering of articles, case notes and news. Welcome to the first edition of Counsel.

Counsel was the idea of this editor but the idea got legs courtesy of President Chris Gunson SC, so thanks Chris. It is important for the Tasmanian Bar to lift its profile. This is the only Bar in Australia that does not regularly update its website, let alone publish a newsletter or journal. Counsel is about changing all that.

In this first edition Justice Stephen Estcourt of the Supreme Court has generously written an important and extremely informative article on making bail applications. David Walker has provided a number of very helpful case summaries of cases from the Supreme Court, the Full Court, Court of Criminal Appeal and the High Court. Case notes will be a regular feature of Counsel. Mary Anne Ryan, who commenced at the Bar earlier this year, provides insight into what happens at the Australian Bar Association's Advocacy Course.

We have also obtained permission to publish a thought provoking and erudite speech by Western Australian Chief Justice Wayne Martin on how the law deals with cultural diversity. Chief Justice Martin has been a very innovative leader of the Western Australian court system who has created strong links with the media and sensibly abolished wigs!

While Counsel will be a quarterly journal the webpage will be updated regularly between editions with important cases, announcements about appointments and importantly media releases and submissions from the Tasmanian Bar.

Can I thank Maggie Saunders, a final year Law student from the University of Tasmania who has worked with me on editing this first edition.

In terms of moving forward to future editions we will be commissioning papers and articles. If members are delivering papers at seminars or conferences we would be happy to republish in Counsel. If you have ideas for articles, again get in touch.

Finally, it is the editor's prerogative to opine on an issue and so let me make a few comments about the rule of law in Australia. At the time of writing we are facing legislation in the federal parliament that will enable the detention without trial of persons convicted of terrorism offences. At the end of October the Turnbull government announced an extraordinary proposal to amend the Migration Act 1958 (Cth) to permanently ban from entry into Australia any person who has arrived in Australian territory by boat seeking asylum. Recently, we witnessed the Solicitor-General Justin Gleeson SC resigning because the first law officer of this nation George Brandis forced requests for advice to the S-G to come through his office.

There is a disturbing pattern emerging in which fundamental rights and the independence of statutory offices are being undermined. All lawyers should be concerned about it because it represents an attack on the rule of law.



# Bail – Some People Don’t Get It

Justice Stephen Estcourt

Any person accused of committing a crime is presumed innocent until proven guilty in a court of law. It follows that a person charged with a crime should not be denied freedom without conviction unless there is a good reason.

A word search in a random transcript of the opening and closing addresses of counsel, and the trial judge’s summing-up in a criminal trial, will generally disclose at least nine, sometimes a dozen references to the presumption of innocence, yet the allied presumption of freedom until conviction does not appear to be universally appreciated.

The essential question to be determined on any application for bail is whether or not the applicant will appear to answer bail if it is granted; *R v Fisher* (1964) 14 Tas R 12 at 13, per Crawford J (Snr).

The nature of the offence charged, the severity of the possible sentence, and the strength of the State’s case are said to be additional considerations, but, properly regarded, they are really only matters that are relevant to the central question of whether the applicant will answer bail.

Prima facie every accused person is entitled to their freedom until trial. No one should be punished by imprisonment before conviction, and to place too much reliance on the strength of the State’s case is to prejudge the matter.

The safety and security of members of the public are matters to be taken into account, and special considerations apply

to persons who have allegedly committed offences while on bail.

Murder is a special case. The common law rules provide that bail will only be granted on a charge of murder if the applicant shows exceptional circumstances.

A moment’s reflection however, will reveal that the reason for murder amounting to a special case is that there is a far greater likelihood that the accused would abscond than in the case of an accused who faces a less serious charge. That was particularly so when a sentence of death or life imprisonment was an inevitable consequence of conviction. The arguments against granting bail in a case of murder are no longer as strong.

The risk of flight in all bail applications is the key issue. However, it needs to be appreciated that people with prior convictions for failing to appear are often little more than forgetful or disrespectful nuisances. Prior convictions for breaches of bail conditions may be a more serious consideration, but the central question is still whether the individual will answer his or her bail if it is granted. It is not a case of punishing someone by refusing them bail because they have failed to appear or have

breached bail conditions in the past.

There are numerous ways in which bail hearings come before a Supreme Court judge. Some of them are:

- Bail application: the *Criminal Code*, s 304.
- Bail appeal: *Justices Act* 1959, s 125C.
- Appearance following arrest for breach of bail condition: *Bail Act* 1994, ss 10(2) and 11.
- Appearance following arrest on warrant: *Bail Act*, s 12.
- Oral applications for bail: *Bail Act*, s 22.
- Applications for variation of bail: *Bail Act*, s 23, to be made “as prescribed”.
- Applications for revocation of bail: *Bail Act*, s 24, to be made “as prescribed”.
- Revocation of bail by judicial officer: *Bail Act*, s 24.

Some of these applications are to a judge in chambers and some to the Court or a judge. Some are to be heard in court as in chambers and some in court. It is very confusing and it has been my view that all applications should be adjourned into court and heard with the judge and counsel robed and wearing wigs. The judges of this Court have now agreed, and a Practice Direction has recently been promulgated to that effect.

The only remaining justification for wearing robes and wigs in criminal matters is anonymity as I apprehend it, and in my experience bail applications can see emotions run sufficiently high to warrant the same court conditions as in any criminal matter.

Speaking extra-judicially, and of course only for myself, I tend to think that there are sometimes bail applications or appeals that are brought which are unmeritorious, and equally some are opposed without sufficient justification.

I am, of course, well aware of the pool of public sentiment stemming from cases concerning serious offences committed by individuals who were, at the time, on bail for other serious offences. That is why the public interest is a consideration with which I will deal shortly. However, the rule of law is threatened by any unjustified weakening of the presumption of innocence and the presumption of an accused’s prima facie entitlement to bail pending trial. Utilitarian considerations must not be allowed to dilute basic freedoms.

For those readers not fortunate enough to have a copy of the annotated *Justices Act* 1959, prepared originally by the late and highly respected Justice Bill Zeeman (during a brief year in the 1980s when he was a magistrate sitting in Launceston), a copy of which he kindly gave me all those years ago, I will set out his passage under s 35 as follows:

“The fundamental question to be determined upon an application for bail is whether or not it is probable that the defendant will appear to answer the complaint if bail is granted (*Forrest v Huffa* [1968] SASR 341; *Burton v R* [1974] 3 ACTR 77; *R v Mahone v Smith* [1967] 2 NSW 154). Although the nature of the offence charged, the severity of punishment and the probability of a conviction have been said to be additional questions (*R v Vos* (1894) 7 QLJ (NC) 74) they are in fact but matters which are relevant to the probability of a defendant answering to his bail (*R v Lythgoe* [1950] QSR 5; *R v Fisher* [1964] 14 Tas R 12). Where the complaint is one alleging a summary offence a defendant ought normally to be granted bail. In summary cases bail ‘should only be refused if there is real and substantial reason to fear that the defendant will not appear on his trial, or that he would be likely to commit

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offences during the period of bail' (per Bray CJ in *Forrest v Huffa* [1968] SASR 341 at 344).

Other matters to be taken into account and not directly relevant to the question of the likelihood of the defendant appearing to answer the complaint have been said to be as follows (*R v Light* [1954] VLR 152 followed by Crawford J in *R v Fisher* [1964] Tas R 12):

- (a) the defendant's state of health;
- (b) any possibility that the defendant might tamper with prosecution witnesses;
- (c) the attitude of the prosecution to the application;
- (d) any prejudice that the defendant might suffer in the preparation of his defence;
- (e) the safety and security of members of the public; and
- (f) the delay (if any) before the determination of the proceedings.

The matters there considered relevant to the question of the likelihood of the defendant answering to his bail, and which are directly relevant to the degree of inducement he has not to answer bail, are as follows:-

- (a) the nature of the case;
- (b) the degree of probability of conviction;
- (c) the severity of punishment that might be expected in the event of conviction;
- (d) any property which the defendant might have and to which he might be required to give attention;
- (e) the state of the defendant's family;
- (f) the character and antecedents of the defendant; and
- (g) the state of the defendant's business (if any).

All of these matters go to the exercise of the discretion, which should be exercised having regard to them and any other factors which might be said to be relevant in a particular case. In the exercise of its discretion the court must reconcile as best as it is able a number of conflicting principles. No person ought to be punished by imprisonment before he has been convicted of the relevant offence and of which he may well not be convicted at all, but an offender once apprehended should not be able to avoid conviction by absconding from bail.

Given that in a particular case punishment is likely to include an element of protection of the public, the public ought to be protected no less because the offender, although apprehended, has not yet been convicted. In no way ought a refusal of bail to be treated as some form of retribution for any guilt which might be supposed from the circumstances by which the defendant comes to be before the court (*R v Mahoney-Smith* [1967] 2 NSW 154).

Questions as to the onus of proof and procedure generally can arise. Many of the cases suggest that the onus is upon the applicant to establish that he is entitled to bail. That was the view taken by Manning J in *R v Pascoe* (1960) 78 WN (NSW) 59 at 61, but in *R v Fisher* [1964] Tas R 12 *R v Light* [1954] VLR 152 and *Burton v R* [1974] 3 ACTR 77, it was held that prima facie every accused is entitled to his freedom until he stands trial. It is suggested that that is now the correct view and that the onus is therefore upon the prosecution to make a clear case for the refusal of bail (*Burton v R* [1974] 3 ACTR 77).

Special considerations may be said to apply to persons who are charged with serious offences allegedly committed whilst on bail in respect of other serious matters. The principles were expressed by Isaacs J in *R v Appleby and McMahon* [1966] 1 NSW 35 at 36 as follows: 'Save in very special circumstances persons committed for trial who during such committals commit serious offences against the community cannot hope to be liberated on bail once these later offences have been prima facie established and there has been a committal in respect of them. Magistrates are only doing their duty towards the community in stamping out crime and the opportunities for further crime by refusing bail in those circumstances. That is a protection which the public is entitled to ensure from the courts and is a course which may in its turn lead to the suppression of this current spate of these kinds of crimes which daily terrorise the public.'

The same principles apply in cases where there is a substantial prospect that a defendant might, whilst on bail, commit other offences which would result in very serious consequences to the public (*Burton v The Queen* [1974] 3 ACTR 77).

The practice in courts of petty sessions is for the facts in support of and in opposition to an application for bail to be stated from the bar table. It follows that in the event of the parties being in dispute upon any material fact it must be the subject of sworn evidence. However, the facts to be established may be quite different from those which might be required to be proved upon the trial of the defendant. For example, if as part of an alleged strength on the part of the prosecution case, a written confession is alleged, it is no part of the function of the court hearing the bail application to determine the question as to whether the defendant made the confession. Rather it must determine whether there is confessional evidence available to the prosecution, and taking its nature and quality into account, consider what effect that has upon the total strength of the prosecution case."

Prosecution and defence counsel should be guided in all cases by these well-established principles and endeavour to fit the case they have within the framework of these considerations before taking the decision to give advice to either bring or oppose an application.

Clearly, for example, there would be little point in prosecuting counsel recommending opposition to bail in a case where relatively minor summary offences only are involved, even where the applicant has relevant prior convictions, and even convictions for failing to appear, unless there is a past history of the applicant offending while on bail for like offences, or the applicant has in the past absconded, perhaps interstate, requiring extradition. It is not the law that petty thieves and recidivist disqualified drivers can be kept in custody because of their records, even where they may have a suspended sentence hanging over them.

Utilitarian custodial remands pending trial, or even sentence, in such cases cannot displace the notion of freedom from imprisonment without conviction. Practical forensic manoeuvring even less so. For example, where an applicant has not entered pleas to summary charges and could expect to receive an immediate custodial sentence if pleas of guilty were entered.

And counting up the number of prior convictions for failing

to appear may demonstrate an egregious disrespect for the law and authority, but the punishment for those breaches is by way of the sentence imposed on conviction for those breaches, and not by way of refusal of bail when the person is not really likely to flee the jurisdiction.

Serious offences, as can be seen above, put the case into a different category where they have been committed whilst on bail for similar offences, or there is a substantial prospect that an accused might, whilst on bail, commit other serious offences.

The seriousness of a single offence, or a series of related serious offences, does not of itself militate altogether against bail, even where there is a strong prima facie case against the person, unless public interest can be legitimately invoked on a basis other than just the crime charged. The central question remains whether the accused will answer bail. If it were not so, persons charged with serious offences of violence including grievous bodily harm, rape and attempted murder would never qualify for bail.

On the other side of the coin, defence counsel waste their own time and that of the Court when they advise an appeal against a refusal of bail by an experienced magistrate on no better ground than having a second "go". Experienced magistrates make mistakes. I know I did. Magistrates work at the coal face every day in very busy courts and time frequently does not permit the luxury of lengthy consideration of an application for bail such as judges enjoy. But far more often than not, in my experience, refusal of bail in the Magistrate's Court is justified. Applicants should be disabused of the idea that they only need to appeal to be granted bail by a judge for the variety of personal and convenience reasons that they might genuinely feel should justify bail.

Particularly, I think, defence counsel need to advise their clients of the very real difficulties they face in being admitted to bail in cases where s 12 of the *Family Violence Act* 2004 is engaged.

I will turn to the observations of the Full Court in the decision of *DPP v JCN* [2015] TASFC 13 in a moment, but, as is well known, Parliament has decreed that a judge is *not*

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*permitted* to grant bail unless he or she is satisfied that the release of the applicant would not be likely to adversely affect, not only the *safety* of the affected person (and/or any affected child), but also his/her/their “wellbeing and interests”.

Applicants for bail need to be aware of this as they will waste their own and others' time in making applications to this Court without compelling circumstances or a carefully structured plan to secure the safety, wellbeing and interests of the affected person/s.

Clients with a history of family violence offences, in particular breaches of family violence orders, need much more to satisfy the preconditions to bail under s 12 than to have their counsel assure the Court that the relationship is over, that they will henceforth abide by the conditions of an extant order, and are willing to accept a condition of bail that they will not enter the neighbouring suburb to their bail address, in which neighbouring suburb the affected person and children reside.

In *DPP v JCN* (heard 7 October 2015) Pearce J, with whom the other members of the Full Court agreed, said at [16]:

“Absent statutory intervention, a person accused of an offence or crime is generally entitled to his or her freedom until they stand trial. In some cases it is proper to refuse bail if there is an unreasonable risk that, even with appropriate conditions, an accused person will fail to appear in court to answer the charge. A court may also consider whether an accused person poses such a risk that, notwithstanding the presumption of innocence, the protection of the community requires his or her detention until trial. It is unlikely that a trial of the indictable charge faced by the respondent can be ready to proceed until at least February 2016, and possibly later. The remaining summary charges may take longer to be dealt with. There is potential for injustice if he is acquitted of all or, even if found guilty of some of the charges, sentenced to imprisonment for a period less than the period of his remand. Although it will be for another court to consider, I consider there to be little risk of injustice if he is convicted of the most serious charges he now faces. He owns a house at Sorell. His mother lives in Hobart. I do not see that there is a significant risk that he would abscond

to avoid appearing in court to face trial. Any such risk may be adequately controlled by bail conditions. In my view, there is a risk that, if granted bail, he will continue to offend. That issue is largely subsumed however by a consideration of the operation of the Family Violence Act, s 12, to which I now turn.”

His Honour then set out s 12 and continued at [18]:

“Thus, because the respondent is charged with family violence offences, he is not to be granted bail unless he satisfies this Court that his release on bail would not be likely to adversely affect the safety, wellbeing and interests of the complainant and her children. The Act thereby creates a presumption against bail: *Re S* (2005) 157 A Crim R 451. The onus is on the respondent to displace the presumption: *Olsen v State of Tasmania* [2005] TASSC 40. In the affidavit sworn by the respondent in support of his application for bail he advances a number of contentions in support of his application. He denies his guilt of the most serious charge of violence against the complainant. He does not deny approaching the complainant in April 2015 but contends that the approaches were ‘instigated’ by her. He says his health is affected by a back injury suffered at work for which he requires medication. His father is elderly and in failing health. His mother is prepared to offer a surety of \$4,000 to secure his attendance in court and compliance with bail conditions. She is also in poor health. She requires dialysis and the respondent, if released, wishes to care for her. The respondent says he will comply with bail conditions, including curfew and reporting conditions and a geographical condition preventing him from going near the complainant’s home.” (Emphasis added.)

The Full Court revoked the respondent’s bail and remanded him in custody. Of note in considering the matters required by s 12(2) of the *Family Violence Act* to be assessed on an application for bail to which s 12 applies, Pearce J noted that the respondent’s own home was quite close to the complainant’s residence, and that, if he lived at that address, monitoring his movements and conduct would be very difficult and that it would achieve little to reduce the risk.

The respondent’s mother was put forward as offering a

surety in the sum of \$4,000, and the respondent was ready to live at his mother’s home in Hobart. Pearce J noted that would increase the physical separation from the complainant, but observed that his presence at that home had not, in the past, prevented breach of the order.

In my view a consideration of the reasons of Pearce J in that case, notwithstanding the respondent had a bad prior record for family violence, should give pause for thought to defence counsel advising a bail application or appeal, unless the applicant can demonstrate some concrete proposals to secure the well-being and interests of the complainant.

I will conclude with a word about murder. As I have already noted, murder is a special case. However, when the facts of the cited cases and the outcomes in them are examined, there does not seem to be any relevant distinction between the expressions used as qualifying a case for bail. The terms variously used are “special or unusual circumstances”; “exceptional circumstances”; “extremely exceptional circumstances”, or a “rare case that is sufficiently exceptional”. See *Re a Bail Application* [1966] VR 506; *R v Hughes* [1983] Qd R 92 at 94; *Lim v Gregson* [1989] WAR 1 at 13 and 32; *Mercanti v WA* [2005] WASCA 254 at [17], [44] and [45]; *Milenkovski v WA* [2011] WASCA 99 at [21], [28], [35], [50] and [51]; *Re an Application for bail by Costa* [2013] ACTSC 15 at [2]-[4].

While it can no longer be said that a grant of bail on a charge of murder is very unusual, stringent conditions are often applied as for example in *R v Hallas* (2001) 81 SASR 1, where electronic monitoring was a condition of bail. In one Tasmanian Supreme Court unreported decision some years ago two cash sureties, each of \$40,000 were required, one from a family member and one from a non-family member. In a more recent case in this Court, again unreported, bail of \$100,000 was required from a non-family member, with \$20,000 deposited with the Court in cash.

And, one last word. As to surety, the Court can have no regard to the character or antecedents of the proposed surety. In *R v Barrett* (1985) 16 A Crim R 123 at 125, O’Loughlin J said as follows:

“In *Badger* (1843) 4 QB 468, 114 ER 975, Lord Denman CJ made it quite clear that the Court was not entitled to enter into:

‘An investigation as to the character or opinions of such bail, provided (the Court) is satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose.’

Although *Badger’s* case can not now be considered the law in the United Kingdom (by virtue of the introduction of the *Bail Act* in 1976), it must nevertheless, in my opinion, be regarded as the law in South Australia. Hence, whilst I acknowledge the common sense force of Mr Millstead’s argument, I must, so far as they relate to the character of the intended surety, reject them.”



Justice Stephen Estcourt

Justice Stephen Estcourt has been a Judge of the Supreme Court of Tasmania since April 2013. He was Inaugural President of the Tasmanian Bar Council from 2004-2007.



# Embracing Diversity in the Law: solutions and outcomes

An address by The Honourable Wayne Martin AC, Chief Justice of Western Australia for the The Hellenic Australian Lawyers Association (Queensland Chapter) on Friday 10 June 2016.

**Introduction**

I am greatly honoured to have been invited to address this seminar dealing with the important topic of cultural diversity and the law. I am particularly grateful to the Queensland Chapter of the Hellenic Australian Lawyers Association for providing this opportunity. Hellenic Australians have provided a paradigm example of the ways in which cultural diversity can enrich and advance all facets of the life of our community, over a period almost as long as European colonisation during which migrants from Greece have gone from transported convicts<sup>1</sup> to positions of leadership in business, the professions and government.

**Acknowledgement of traditional owners**

Given the topic I am addressing this evening, it is more than usually appropriate for me to commence by acknowledging the traditional owners of the lands on which we meet, on this side of the Brisbane River the Turrbal people and on the southern side the Jagera people, and by paying my respects to their Elders past and present, and acknowledging their continuing stewardship of these lands.

**A monochrome judiciary**

It will be obvious to all that neither background nor experience qualifies me to address tonight’s topic. Regrettably,

although I am a proud philhellene, I cannot claim any Greek heritage. My Anglo-Scottish origins place me within a cultural grouping which has dominated colonial Australia, and which remains significant, although not nearly as dominant as it once was. I speak only one language. I am male, and although I like to think of myself as middle-aged, others might say I am pushing the upper end of that classification,

These characteristics are stereo-typical of the majority of Australia’s judiciary. It can fairly be said that I epitomise the lack of first-hand experience of cultural and linguistic diversity amongst much of the judiciary. This has the capacity to impede the provision of equal justice to all in a community which has become multicultural rather than monochromatic. Put bluntly, I am typical of the problem, not the solution.

There is not much to be said in response to this entirely justified self-criticism. Perhaps all that I can suggest is that one needs to have a full appreciation of any problem, and its depths and facets, in order to arrive at an effective solution. The knowledge which I have gained since taking up the role of chair of the Judicial Council on Cultural Diversity has, I hope, provided me with some insights into the problems of cultural competency and comprehension which I face in common with many other members of Australia’s judiciary.

**The Judicial Council on Cultural Diversity**

The Judicial Council on Cultural Diversity (the Council) was formed under the auspices of the Council of Chief Justices at the suggestion of the Migration Council of Australia (MCA), which generously provides secretariat resources and support to the Council, although the Council remains independent of the MCA and reports to the Council of Chief Justices. The primary function of the Council is to provide advice and recommendations to Australian courts, judicial officers and administrators, and judicial educators, for the purpose of improving the response of the courts to evolving community needs arising from Australia’s increasing cultural diversity.

The Council comprises judicial officers from all Australian geographical jurisdictions and all levels of court. Unlike me, many of the judicial officers serving on the Council come from diverse cultural backgrounds. There are also a number of judicial officers who, like me, have no claim to represent culturally diversity but have a particular interest in this topic. Our judicial resources are augmented by additional members with particular expertise and experience in issues associated with cultural diversity.

It is important to emphasise that the Council’s interests are not restricted to cultural diversity arising from recent migration, but extends to and includes the issues associated with the cultural diversity of Aboriginal and Torres Strait Islander communities.

The question of whether Aboriginal and Torres Strait Islander people are properly included within the grouping “culturally and linguistically diverse” (CALD) is controversial in some quarters. With the greatest of respect to those who

have expressed a view on the topic, it seems to me that the issue is one of terminology, rather than substance. As a matter of substance, there can be no doubt that the issues which arise when the descendants of the first Australians interact with our justice system are of profound significance to both indigenous communities and the justice system. Because of the significance of those issues, the Council also has an Aboriginal member, although the fact he has had to be recruited outside the judiciary should not go unremarked.

As I have noted, the primary function of the Council is to assist courts to provide equal justice to all in a community of significantly increasing cultural diversity. Later in this paper I will identify specific ways in which the Council hopes to further those objectives in two important areas under current consideration, namely:

- (a) equal justice for indigenous and CALD women; and
- (b) the use of interpreters in courts and tribunals.

I would like to set the scene for my discussion of those two projects by explaining what I mean by “equal justice”, and how it differs from equal treatment.

**Equal Justice**

“Equal justice” embodies the norm expressed in the term “equality before the law”. It is an aspect of the rule of law. It was characterised by Kelsen as “the principle of legality, or lawfulness, which is immanent in every legal order”. It has been called “the starting point of all other liberties”<sup>2</sup>

When lawyers talk about “equality” before the law, they generally connote the notion of equality often attributed to Aristotle that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion

<sup>1</sup> Department of Immigration and Citizenship, ‘Community Information summary – Greece-born’ (2014), available at: [https://www.dss.gov.au/sites/default/files/documents/02\\_2014/greece.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2014/greece.pdf)

<sup>2</sup> Per French CJ, Crennan & Kiefel JJ in *Green v The Queen*; *Quinn v The Queen* [2011] HCA 49; 244 CLR 462 [28].

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to their unalikeness”<sup>3</sup>

Application of this notion of equality to the legal system: requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:

Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect. [emphasis in original]<sup>4</sup>

So, the provision of equal justice depends critically and fundamentally upon the identification of all the characteristics that are relevant to the legal outcome. Thus, in *Bugmy v The Queen*<sup>5</sup> the High Court held that the Aboriginality of an offender was irrelevant to the sentencing process, although the circumstances of social deprivation often associated with Aboriginal communities may be relevant to that process for individual Aboriginal offenders. Because the relevant characteristic is social deprivation, not Aboriginality, equal justice does not require Aboriginal offenders to be sentenced differently to non-Aboriginal offenders, but it does require offenders who have suffered extreme social deprivation to be sentenced differently to those who have not. Equal justice also requires all who have suffered extreme social deprivation to be treated alike, irrespective of whether or not they are Aboriginal.

The legal relevance of culture

However, in other circumstances the High Court has held that the culture of an alleged offender can be relevant to the legal process. Those decisions have been controversial - especially in cases in which the purported behavioural norms of a defendant are not considered consistent with the standards of “ordinary” persons.

In *Masciantonio v The Queen*,<sup>6</sup> McHugh J considered that the culture of an accused was relevant to the application of that

aspect of the law of provocation which relates to the loss of self-control by the accused. In that context he observed:

... unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.

If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood.<sup>7</sup>

On one view this approach is entirely consistent with the provision of equal justice because it treats differently those who have different cultural perspectives of provocative behaviour. On another view, this approach could be seen as the legal condonation of purported cultural norms which are not acceptable to mainstream Australian society, such as the subordination of females, if necessary by violence. I note that McHugh J was in the minority on this point in *Masciantonio*.

In another case involving provocation however, *Moffa v The Queen*,<sup>8</sup> the High Court accepted that ethnic and cultural background of the offender was relevant to the assessment of the character of the provoking conduct. Some considered the decision to be laudable judicial recognition of multiculturalism.<sup>9</sup> However, others were less complimentary:

In *Moffa’s* case, an Italian male was partly excused for the killing of his wife because of his ethnically linked hot bloodedness.<sup>10</sup>

Associate Professor Bird condemned the decision which she considered embedded “stereotypes in the law which are profoundly racist” and because the “inclusion of male versions

of ethnic characteristics and belief systems into a structure that is already male further disadvantages women”<sup>11</sup>

Associate Professor Bird's comments highlight some of the difficulties in this area. How can the courts know what the norms are for diverse cultures and who should inform them? Clearly there might be reason to be cautious of the arguments put forward on behalf of the accused by defence counsel.

The issue of stereotypical and often highly derogatory characterisations, together with the marginalisation of women's perspectives, in particular indigenous women, has made this a fraught area.<sup>12</sup> These observations have a particular resonance with the work of the Council, and highlight the importance of working in consultation with CALD and indigenous women on the issue of family violence - a topic to which I will return.

It is also the case that the legal relevance of culture may turn upon factual issues of nuance and degree particular to each case. Cases in which a witness wishes to give evidence wearing clothing which obscures her face from view provide an example of the potential significance of the particular facts of the case. In those cases, the nature of the evidence to be given by the witness and its significance, the likelihood of a significant contest with respect to the credibility of the witness, whether the tribunal of fact is a judicial officer or a jury and the source and strength of the witness's conviction with respect to facial covering are all considerations properly taken into account by a court when deciding the appropriate course in a particular case.<sup>13</sup>

Addressing Disadvantage

Despite these observations, or perhaps because of them, it is important that the likelihood of contention with respect to the appropriate judicial response to cultural and linguistic diversity is not overstated. In many areas, it will be clear beyond

argument that cultural and/or linguistic differences place persons at a significant disadvantage in relation to the justice system generally, and with respect to particular aspects of that system. In those cases there can be no doubt that the principles of equal justice require the court to take all reasonable steps to ensure that such disadvantage is ameliorated as far as possible. In those cases, equal treatment of all will not provide equal justice to all. Equal justice requires that disadvantage within the justice system be identified and ameliorated to the greatest practicable extent.

The two areas to which I will now turn – namely, justice for CALD and indigenous women, and the use of interpreters by courts and tribunals both provide examples of areas in which disadvantage is manifest. The consequence is that the courts must take all reasonable steps to ameliorate those disadvantages in order that justice is equally available to all irrespective of their cultural background or the language they speak. The achievement of that objective motivated the Council to embark upon each of the projects to which I will now turn.

Justice for CALD and indigenous women

With financial support from the Commonwealth Office for Women,<sup>14</sup> the Council is undertaking a project aimed at strengthening the capacity of Australian courts to provide access to justice for women facing cultural and linguistic challenges. Although the project was not specifically focused upon family violence and family law issues, perhaps unsurprisingly, research and consultation showed that these are the two areas in which women most commonly come into contact with the justice system. The attention given to issues associated with family violence is timely, given the long overdue focus of public attention upon this important issue, facilitated by the two most recent Australians of the Year – Rosie Batty

3 Aristotle, *Ethica Nicomachea* (Trans W D Ross) (1925) Volume 3 at 1131a-1131b, as summarised by Prof Peter Weston, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 543.  
4 Per French CJ, Crennan and Kiefel JJ in *Green v The Queen*, n 2.  
5 [2013] HCA 37; 249 CLR 571.  
6 [1995] HCA 67; 183 CLR 58.  
7 At 74.

8 [1977] HCA 14; 138 CLR 601.  
9 The Hon Justice M D Kirby "The 'Reasonable Man' in Multicultural Australia" (Ethnic Communities Council of Tasmania, Cultural Awareness Seminar, Hobart, 28 July 1982) 7, 8.  
10 Associate Professor Greta Bird "Power politics and the location of 'the other' in multicultural Australia" (1995) 5.  
11 *Ibid*.  
12 See for example the controversial sentencing of a 55 year old Aboriginal man in the Northern Territory for one month for the assault and sexual assault of a 14 year old girl, whom it was claimed had been promised to him under traditional law (*The Queen v GJ* (Sentence) SCC 20418849, 11 August 2005) and Irene Watson, 'Aboriginality and the Violence of Colonialism' 8(1) (2009) *Borderlands e-Journal* available at: [www.borderlands.net.au/vol8no1\\_2009/iwatson\\_aboriginality.pdf](http://www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.pdf)  
13 The Council hopes to issue guidelines for use by courts in relation to these issues later this year.  
14 Augmented by executive resources generously supplied by the MCA.

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and David Morrison, and the recent report of the Victorian Royal Commission into the subject chaired by the Hon Marcia Neave AO.

The Council's project involves three phases:

- Research and consultation;
- Development of a framework of best practice guidelines and protocols for use by courts throughout Australia;
- Advice on training packages for judicial officers and court administrators relating to gender, culture and family violence.

The first phase of the project is complete, and we are partway through the second phase, having published a draft framework which will be the subject of consultation with interested parties.

Research and Consultation

It soon became apparent that although there was likely to be a significant overlap between the issues confronting indigenous women and women from CALD communities when they come into contact with the justice system, there are also significant differences. For that reason, during the research and consultation phase of the project, the issues confronting indigenous women were addressed separately from those confronting women from CALD communities. Separate reports have been published in relation to each group and are available on the Council's website.<sup>15</sup>

The following portions of this paper draw upon the published reports. The full reports make very interesting reading, and are highly commended to all with an interest in this important area.

CALD women – research

Data relating to family violence

Before undertaking consultations, the existing literature relating to the experience of CALD women in Australia's justice system was surveyed.

The literature relating to family violence generally establishes that one very significant characteristic of such violence is under-reporting, the precise extent of which is, almost by definition, very difficult to estimate. It follows that data relating

to the prevalence of family violence in Australia cannot be relied upon to establish the precise extent of the phenomenon, or even comparative trends over time, because it is impossible to know whether increases or decreases in reports are due to increases or decreases in prevalence, or to increases or decreases in reporting rates. For the same reason, data relating to the prevalence of family violence amongst people from English- speaking backgrounds as compared to people from non-English speaking backgrounds does not provide a reliable guide to the comparative prevalence of violence experienced by those groups.

However, the literature does establish that family violence in CALD communities can have particular characteristics including:

- Migrant and refugee women are more likely to move in with their husband's family after marriage and suffer abuse from their in-laws and other extended family members;
- Migrant and refugee women are particularly vulnerable as a result of their immigration status, which may in turn limit their capacity to access welfare;
- Issues relating to dowry and bride price can result in violence;
- Migrant and refugee women are more likely to be vulnerable to forced marriage and female genital mutilation or cutting;
- The literature reports increasing evidence of human trafficking for sexual and domestic servitude.

The difficulties confronting CALD women who are victims of family violence, with or without these particular characteristics, are often exacerbated by linguistic difficulties, the lack of an independent rental history, lower employment rates, lack of transport, lack of friend or family support, social isolation or, perhaps, cultural ostracisation, barriers to accessing welfare, lack of understanding of the Australian legal system and lack of an awareness of available support systems.

The research indicates that perpetrators of family violence often exploit the particular vulnerability of CALD women as a result of the combination of one or more of these

disadvantages.

CALD women – consultation

The consultation phase of the project relating to CALD women involved the engagement of CALD women from all regions of Australia in focus groups. The outcomes of those consultations have been presented in three key areas:

- Barriers to reporting family violence;
- Communication barriers - working with interpreters;
- Attending court – barriers to full participation

Barriers to reporting family violence

The focus groups consistently revealed that women from CALD communities face particular barriers to reporting family violence as a consequence of their backgrounds.<sup>16</sup> The barriers most consistently reported were:

- Lack of legal knowledge and understanding, including the lack of a realisation that they were being subjected to behaviour which is not acceptable by contemporary Australian standards, a lack of comprehension of the Australian justice system and its capacity to protect victims of violence, and a lack of understanding of Australia's family law system resulting in fear that children will be taken away if family violence is reported;
- The lack of financial independence, often exacerbated by language barriers, lower education levels making it difficult to obtain work or manage finances, visa status which precludes working, visa status which precludes access to welfare, all of which can make it difficult for CALD women to leave a violent relationship;
- The importance of integrated support services so that, for example, legal, settlement and domestic violence service providers have a better appreciation of the issues arising from family violence, including in particular training of case workers on legal issues;
- Poor police responses, including failure to encourage reporting, failure to engage an interpreter where required, lack of understanding of the impact of culture and failure to enforce intervention or restraining orders;
- The impact of pre-arrival experiences including a history

of torture and trauma inducing, perhaps, post-traumatic stress disorder or lack of trust in police and the courts;

- Community pressures arising from cultural stigma relating to divorce and family breakdown, or which assume the subordination of women;
- Uncertainty about immigration status and fear of deportation in the event of family breakdown including the possible loss of Australian born children;
- The cost of securing legal representation in order to render the Australian legal system comprehensible.

Communication barriers – working with interpreters

The focus groups consistently reported serious concerns with respect to the use of interpreters, including key issues with respect to:

- Lack of clarity about responsibility for engaging the interpreter;
- Failure to assess the need for an interpreter or incorrectly assessing need;
- The lack of training and qualifications of translators sometimes engaged;
- Lack of awareness amongst judicial officers, lawyers, police and others in relation to the proper way of working with an interpreter;
- Failure to ensure that interpreters are appropriate for the individual woman, particularly having regard to gender, the importance of maintaining confidentiality, and the need for separate interpreters for protagonists in a situation of conflict;
- Unethical or inappropriate professional conduct by interpreters.

CALD women attending court – barriers to full participation

The consultations with CALD women consistently showed significant barriers to full participation in the court process by those women. The barriers most frequently reported were:

- The intimidating process of arriving at court, where there is often inadequate signage, even in English;
- Safety concerns while waiting at court arising from inadequate secure waiting areas separating women from

15 www.jccd.org.au

16 Although some of these barriers might also be experienced by women in the cultural mainstream.



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alleged perpetrators;

- A lack of understanding of court processes resulting in a failure to adequately engage with those processes;
- Difficulty understanding forms, orders and judgments;
- The dynamics of the courtroom, including the requirement that women must sit in the same room as the alleged perpetrator;
- Lack of cultural awareness by judicial officers and court staff;
- The limited availability of men's behavioural change programmes generally, and culturally appropriate programmes in particular;
- The abuse of court processes by perpetrators.

Indigenous women – research

As with CALD women, a review of the existing literature relating to the experience of indigenous women in the Australian justice system was undertaken prior to the commencement of consultations.

Violence against indigenous women

The research establishes conclusively that indigenous women are significantly more likely to be victims of violence, including particularly family violence, than non-indigenous women. That violence includes assault, including serious assaults resulting in homicide, sexual assault, and violence towards children. Indigenous women are also over-represented in the data relating to self-harm and suicide. Previous research has also confirmed very high levels of under-reporting of family violence in indigenous communities, and the increasing prevalence of such violence in rural and regional communities, as compared to metropolitan communities. The research also showed an association between family violence and alcohol abuse in indigenous communities, together with cannabis and increasingly, the use of amphetamine type stimulants and prescription medication abuse.

Indigenous women – consultation

As with CALD women, the consultation phase of the project involved a series of focus groups conducted around Australia. However, in the case of indigenous women, participants in the

focus groups were representatives of agencies engaged in service delivery to indigenous communities, rather than by way of direct engagement with members of those communities.<sup>17</sup>

As with CALD women, the results of the focus group

consultations have been reported in three areas:

- Before court - barriers to reporting family violence;
- Communication barriers;
- Attending court - barriers to full participation.

Indigenous women: before court - barriers to reporting family violence

As with CALD women, consultation revealed that indigenous women experience barriers to reporting family violence associated with their indigenous background. The barriers to reporting family violence most consistently reported were:

- The need for greater understanding of the impact of intergenerational trauma, experiences of discrimination and racism, poverty, a past history of abuse, difficulties with literacy, health and mental health issues, and welfare dependency on Aboriginal or Torres Strait Islander women's access to the justice system;
- Fear that reporting violence will result in the removal of children;
- Geographic isolation from police, courts, child protection agencies, support services and welfare agencies;
- Poor police responses including discouraging of reporting and not taking complainants seriously;
- Family and community pressure discouraging women from reporting violence;
- The potential complexity of the inter-related legal issues which confront indigenous women reporting violence, including criminal law, family law, child protection and residential tenancy issues;
- Limited access to legal assistance;
- Lack of legal knowledge and understanding of legal rights.

Indigenous women: communication barriers - working with interpreters

The difficulties experienced by indigenous women requiring the assistance of an interpreter reported during the consultation phase were similar to those reported by CALD women, including:

- The lack of funding for indigenous interpreter services;
- Uncertainty with respect to the responsibility for engaging an interpreter;
- The lack of appropriately trained interpreters in many indigenous languages;
- The practical difficulty of obtaining an appropriate interpreter without a connection with one or other of the participants in the dispute;
- Failure to assess when an interpreter is required;
- Lack of knowledge by judicial officers and court staff as to the proper ways of working with an interpreter;
- A failure to appreciate the need to engage separate interpreters for the protagonists in a dispute.

Indigenous women: attending court – barriers to full participation

Again, the barriers to full participation in court proceedings reported by indigenous women are similar to those reported by CALD women. The key issues arising from the consultations were:

- The intimidating nature of arriving at court without adequate signage or appropriately staffed reception areas;
- The burden of lengthy waiting times;
- The poor case coordination for women who often have complex legal needs across a variety of criminal, family children's and drug courts;
- The lack of safe and secure waiting areas in which victims can be separated from alleged perpetrators;
- A lack of understanding of the court processes, resulting in failure to adequately engage with those processes;
- Difficulty understanding forms, orders and judgments of the court;
- Courtroom dynamics, including the need to be present in the same courtroom as the alleged perpetrator;

- Lack of cultural awareness by judicial officers and court staff;
- Abuse of court processes by perpetrators.

The Proposed Policy Framework

Following on from the research and consultation phase of the project, the Council has prepared and published a draft policy framework responding to the issues identified and is currently consulting with interested parties in relation to that draft framework. The key components of the draft include:

- Emphasising the importance of leadership from senior judicial officers and court administrators and the need to adjust court practices and procedures to achieve equal justice for indigenous and CALD women;
- The establishment of cultural diversity committees in each court, charged with various responsibilities including monitoring the implementation of the framework, overseeing judicial education programmes, raising awareness among the judiciary and court staff, coordinating community outreach events, overseeing the development of resources for indigenous and CALD court users and reporting to the Council on progress;
- Improving court engagement with communities, including through community education forums, regular meetings with key stakeholders amongst indigenous and CALD communities, regular visits to communities, court open days and tours, and the celebration of diversity;
- The need for court planning and policies to address issues identified in the consultation phase of the project and to consider other positive steps such as development of reconciliation action plans;
- The importance of the education of judicial officers and staff in relation to the particular issues which confront indigenous and CALD court users;
- The implementation of employment strategies which would increase the engagement of indigenous and CALD staff members;
- The possible engagement of indigenous and CALD cultural liaison officers to serve courts operating in areas

<sup>17</sup> Although, of course, many of the representatives of the agencies were themselves indigenous women living in indigenous communities.

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with a significant component of either indigenous or CALD communities;

- Implementing steps to improve the comprehensibility of court processes through education sessions and the provision of easy to read information, including information translated into languages used by significant groups of court users;
- Improving data collection with respect to court use by community members;
- Assessing court satisfaction levels amongst indigenous and CALD court users;
- Supporting the provision of on-site legal and other support services;
- Improving the ways in which courts utilise interpreters;
- Improving signage in courthouses and, where possible, providing secure waiting areas in which victims can be separated from alleged perpetrators;
- Ensuring victims are aware of the option to participate in court hearings through video link from a remote and secure area where this option is available;
- The establishment of key performance indicators to measure progress in the achievement of these objectives.

The consultation phase in relation to the draft framework has only just commenced, and it is therefore quite likely that the final terms of the framework may differ significantly from the current draft, although I would expect those differences to lie in the augmentation of the various policy proposals contained within the framework, rather than the diminution of those proposals.

Summary - indigenous and CALD women in the Australian justice system

The research and consultation phase has confirmed that indigenous women and women from CALD communities suffer very significant and specific disadvantages at all levels within the Australian justice system as a consequence of their cultural heritage and linguistic differences and other associated social deprivations. Disadvantages are experienced before the justice system is invoked, and discourage the reporting of family

violence, and in the barriers to communication which arise from the inadequate use of interpreters. Further disadvantages arise once the court process has been engaged, discouraging full participation in that process by women from indigenous and CALD backgrounds.

If the Australian community and the courts take the commitment to the provision of equal justice<sup>18</sup> seriously, it is imperative that action be taken to address these significant disadvantages. The framework which is currently under development by the Council should provide guidance and assistance to courts with respect to the specific steps which might be taken to address the multi-faceted disadvantages experienced by women from these backgrounds.

The next phase of the Council's work in this area will involve the provision of assistance with respect to continuing programmes of education for judicial officers and staff on these important topics.

The Use of Interpreters in Courts and Tribunals

The Council's view is that much needs to be done to improve the utilisation of interpreters by courts and tribunals in order to provide equal justice to those who do not have a sufficient command of the English language to adequately participate in court proceedings without the use of an interpreter. This was confirmed by the feedback obtained during the women's project.

In order to address those issues, the Council embarked upon a major project relating to the use of interpreters in courts and tribunals. With the assistance of the MCA, the Council was very pleased to secure the assistance of two consultants with great expertise in this area – Professor Sandra Hale, Professor of Interpreting and Translation at the University of New South Wales, and the Hon Dean Mildren AM FRD QC, formerly a judge of the Supreme Court of the Northern Territory. The project is being overseen by a Committee chaired by Justice Melissa Perry of the Federal Court of Australia.

The objective of the project is to improve the ways in which courts and tribunals utilise interpreters by developing:

- Australian national standards to be applied when

interpreters are used by courts and tribunals;

- Model rules of court for utilisation by courts around Australia;
- A model practice note, again for utilisation by courts around Australia;
- A Code of Conduct governing the work of interpreters engaged to serve in courts and tribunals.

Each of these documents has been drafted and recently reached the point at which they have been made available to interested parties for the purposes of consultation prior to finalisation, hopefully later this year.

Australian National Standards

The proposed national standards propose minimum standards to be adopted by courts, judicial officers, interpreters and legal practitioners, and also suggest a number of optimal standards which courts should consider adopting. The minimum standards for courts include standards relating to:

- The adoption of model rules of court;
- The engagement of interpreters where required to ensure procedural fairness;
- The provision of information to the public about the availability of interpreters;
- The training of judicial officers and court staff in the use of interpreters;
- The provision of adequate budgetary resources to engage interpreters where required;
- Systems facilitating the coordination of the engagement of interpreters;
- The provision of support for interpreters including working areas, positioning within the courtroom, and trauma counselling where required.

The optimal standards to which courts might aspire including standards relating to:

- The advance booking of interpreters;
- Arrangements for simultaneous interpreting, including the use of equipment to facilitate simultaneous interpreting;
- Arrangements for team interpreting;
- The provision of professional mentors to interpreters;

- The provision of professional development to interpreters.

The proposed standards relating to judicial officers include minimum standards dealing with:

- The duties of a judicial officer when an interpreter is utilised;
- The desirability of judicial officers ensuring that proceedings are conducted in plain English when interpreters are utilised;
- The training of judicial officers as to the manner in which interpreters should be utilised;
- The training of judicial officers and court staff in the assessment of the need for an interpreter;
- The conduct of proceedings utilising an interpreter.

The proposed minimum standards relating to interpreters include standards with respect to:

- The importance of the interpreter's role as an impartial, professional officer of the court;
- Adherence to the proposed interpreter's code of conduct;
- The specific duties and obligations of interpreters.

The minimum standards proposed for legal practitioners include standards with respect to:

- Assessing the need for an interpreter;
- Advance booking of interpreters where required;
- The terms of engagement of an interpreter where the interpreter is engaged by a lawyer rather than the court;
- The need to adequately brief interpreters in advance of the hearing;
- The use of plain English by practitioners in proceedings which are being interpreted.

The Model Rules of Court

The Model Rules of Court are intended to provide guidance to courts as to the rules which they might implement in order to ensure the optimal use of interpreters. The model rules deal with the circumstances in which interpreters might be engaged, and the circumstances in which interpreters must be engaged. They also deal with the qualifications required for the performance of the office of interpreter and specify the functions to be performed by the interpreter. The proposed

<sup>18</sup> In the sense I have described.

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model rules also include an obligation for an interpreter to comply with the proposed code of conduct. The rules also empower the court to give directions with respect to all and any matters associated with the use of interpreters.

The Model Practice Note

As with the Model Rules, the Model Practice Note is intended to provide guidance to courts as to the practices and procedures appropriately adopted with respect to the engagement and use of interpreters. Subjects addressed in the Model Practice Note include the provision of the code of conduct to any interpreter engaged to provide services to a court, the matters appropriately considered when an interpreter is engaged, the fees to be paid to interpreters, the manner in which proceedings utilising an interpreter are to be conducted, and the implementation of the proposed national standards.

The Proposed Court Interpreters' Code of Conduct

The proposed Code of Conduct is intended to be adopted by courts and by interpreters engaged to provide services during court hearings. It includes provisions relating to the interpreter's overriding general duty to the court, the obligation of complying with directions of the court, and specific duties in relation to:

- Accuracy
- Impartiality
- Competence
- Confidentiality.

Flexibility

Although the manner in which I have described these documents might suggest that they impose rigid and prescriptive standards, in fact, they incorporate a degree of flexibility which is necessitated by current circumstances in relation to the provision of interpreters. The most significant of those circumstances is the limited supply of interpreters qualified to a standard appropriate for court interpretation in many languages. Because of that significant circumstance, the proposed national standards allow for differing minimal standards of qualification and experience depending upon the language which is to be interpreted. So, if there are a

significant number of fully qualified interpreters in the language to be interpreted, the highest standards of qualification and experience are mandated by the proposed standards.

As the number of accredited interpreters in any particular language diminishes, the minimum standards required also diminish.

Similarly, the standards recognise that in some cases, practical necessity will obviate adherence to generally desirable standards. For example, there are many indigenous languages spoken only by a relatively small number of people. When an interpreter is required in such a language, it may be impossible to obtain an interpreter with a specific qualification in interpretation, or who has no knowledge of or affiliation with any of the parties to the proceedings.

The Council has worked closely with the National Accreditation Authority for Translators and Interpreters (NAATI) in the development of this project, and Mr Mark Painting, the CEO of NAATI has served as a member of the Committee overseeing the project.

Summary relating to interpreters

The Council has recognised a clear need for the introduction of professional standards with respect to the engagement and use of interpreters by courts and tribunals. The project currently nearing completion aims to provide assistance to courts and tribunals in the achievement of those professional standards.

The disadvantages suffered by persons involved in court or tribunal proceedings who lack a sufficient command of English to adequately comprehend and participate in those proceedings are so obvious and so profound as to not require any further elaboration by me. If equal justice is to be provided to such persons, the effective and professional provision of the services of an interpreter is essential. The Council hopes that the work it is doing in relation to this project will help courts and tribunals to achieve this important objective.

General Summary

The title to this seminar is appropriately optimistic and positive, in its reference to solutions and outcomes. The work of the Council in the two areas I have addressed in this

paper - namely, indigenous and CALD women in the justice system of Australia, and the effective use of interpreters by courts and tribunals shows significant deficiencies in current practices and procedures in each of these areas. I hope that in this paper I have shown the steps which the Council is taking to assist courts and tribunals to improve relevant practices and procedures in order to facilitate the achievement of the vital objective of providing equal justice to all in a community enriched by increasing cultural diversity.



The Hon Wayne Martin AC  
Chief Justice Of Western Australia

The Hon Wayne Martin was admitted to legal practice in Western Australia in 1977. In 1984 he became Senior Litigation Partner with Keall Brindsden in Perth and then in 1988 joined the Independent Bar. In 1993 he was appointed Queen's Counsel. Between October 1996 and October 2002 he was a Member of the Law Reform Commission, and from 1997 to 2001 served as its Chairman. From 2001 – 2003, he took on the role of counsel assisting the HIH Royal Commission in Sydney. In 2006, he became the 13th Chief Justice of the Supreme Court of Western Australia. In 2012, the Chief Justice was recognised nationally when he was appointed a Companion in the General Division of the Order of Australia “for eminent service to the judiciary and to the law, particularly as Chief Justice of the Supreme Court of Western Australia, to legal reform and education, and to the community”. The Chief Justice holds many positions as Chairman or Patron, and is also the Lieutenant Governor of Western Australia. Chief Justice Martin was appointed inaugural Chair of the Judicial Council on Cultural Diversity in 2013.



Book Review

# Amending Final Judgments and Orders

John Tarrant

John Tarrant’s book Amending Final Judgments and Orders, The Federation Press 2010 is now some years old and I have reviewed it before for the Journal of Contract Law. That review probably didn’t reach all of Counsel’s readers and in any the book deserves revisiting by all busy counsel.

It was a timely coincidence that when I first commenced reading this book the High Court of Australia handed down its reasons for decision in Aktas v Westpac Banking Corporation Ltd [2010] HCA 47.

Aktas makes it clear that, at least in the High Court, the compulsory course for a party seeking a special order for costs is to foreshadow, before judgment and normally at the hearing of the appeal, a possible later application for the special order in the relevant eventuality. It is, alas, too late, said a majority of the Court once a decision is handed down containing an order for costs.

Now I don’t know of course if counsel for the unsuccessful applicant in Aktas had consulted Mr Tarrant’s book but I suspect that if help was possible that is where it would be found.

As Justice JC Campbell says of it in the book’s foreword “It will be a useful working tool for practitioners and the courts”. And that, with respect, must be so, given that the compendious 200 page work by Mr Tarrant collects all of the relevant English

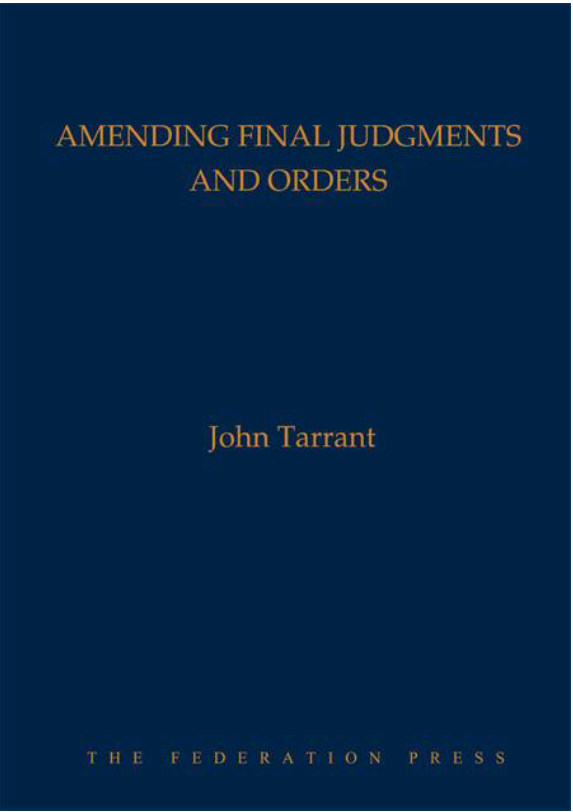
and Australian cases on the question of a court’s powers after judgment to correct mistake or oversight and meticulously digests and analyses them in detail.

The book’s obvious value is that when recourse to the law in this area is needed it will likely be required both quickly and in one place. The division of the author’s exhaustive research in this area into eight truly discrete chapters fulfils this need. Indeed, of particular use to counsel on his or her way to court after things have gone awry are the chapters “Orders Capable of Being Corrected” and “Practical Issues”

Add to this that the author writes clearly and incisively and thus his narration of the cases themselves and his discussion of the overlapping statutory “slip rules” and the wider inherent jurisdiction to correct oversight by courts and counsel, (and their often inconsistent application), is easy to read and comprehend quickly.

The author has an obvious and admirable talent for ordering

The Federation Press 2010



complex material and conflicting principle logically and well and the structure of the book and the development of his subject reflect this.

Many counsel may not be fully aware of the extent to which the scope of the inherent jurisdiction of courts to correct mistakes has been expanded in the modern context, or of the way in which the “slip rules” have been construed in more recent years.

In Aktas, the High Court re-affirmed that there was no doubt that the Court had power to recall its orders. The question it said was whether it should. The majority cited Mason CJ in Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300 at 302 as rightly saying that the exercise of the jurisdiction to reopen a judgment and to grant a rehearing “...is not confined to circumstances in which the applicant can show that, by accident and without fault on the applicant’s part, he or she has not been heard.” But, the majority judgment went on to say “The jurisdiction is however, to be exercised with great caution, having regard to the importance

of the public interest in the finality of litigation” What Aktas reveals and what Mr Tarrant’s book responds to, is that while courts have significant powers to amend final judgments and orders, the occasions on which the sparing exercise of these powers will be prayed will themselves be of significance to the parties and such applications will be met with significant opposition. The book provides the key to the possible successful arguments and enumerates those that have been unsuccessful in the past.

The reason this well researched and well-written history of the origin and scope of the “slip rule” has found its way into law libraries is precisely that it is such a practical guide to the application of the principles governing the available powers. The provision of a practical guide is what the author said in the preface to the book that he intended and that he has plainly achieved in full measure.

**Review by SPE**

# ABA Essential Trial Advocacy Course

Mary Anne Ryan



In June I had the privilege of participating in the Australian Bar Association Essential Trial Advocacy Course in Adelaide. Readers at the Bar in Western Australia and South Australia are, without exception, required to undertake this training; accordingly, the majority of participants came from those jurisdictions.

However, people had also chosen to participate, as I did and had come from as far afield as Canberra, Hobart, Darwin and Hong Kong. All in all there were 32 of us, but the privilege derived from the fact 16 senior barristers, of whom 7 were silks, gave up a week from their practices to form part of the teaching faculty, on a pro bono basis – our own Bruce McTaggart S.C. among them. Additionally, Julia Moody, also formed part of the faculty; Julia is a Senior Lecturer in Acting (voice) at the Western Australian Academy of Performing Arts (WAPA).

Participants receive the court documents, exhibits, expert reports and letters of instruction in the weeks prior to attending, you are identified as either appearing for the applicant or the respondent. The mock case is a civil dispute and you are before a superior court, a procedural interlocutory application is included in the materials. The problem suitably has innumerable inbuilt red herrings, distractions and deviations to enhance the learning experience and as a bonus

kept everyone amused. Before you arrive you email off certain preparations such as summary of argument.

The course is structured around plenary sessions which include a lecture and demonstration by members of the faculty of each element of a trial, including preparation. The participants are divided into home groups of six people, each group has a home coach. My group had the good fortune to have Martin Cuerden S.C. fulfil that role. Following the plenary sessions the participants then perform that particular aspect of the trial before their home group, home coach and members of the faculty who move in and out of the groups. At any one time there are three faculty members present at each group session, their roles rotating. One member stays in the court, observes your performance and then offers constructive criticism immediately following it, that person also demonstrates an alternative way to have approached a particular part of your submission, cross-examination, examination in chief or whatever section of the trial was being concentrated on at that time.

Each participant is recorded and another member of the faculty then takes you to another space to view the video and offer further constructive criticism, reinforcement, insight and a short demonstration.

This is repeated with opening, closing, examination-in-chief and cross-examination – with respect to both major and minor witnesses. All this occurs on a background of intensive exploration of your case theory - on a macro and micro level – in plenary sessions and small group sessions.

This busy rotation of the faculty results in each faculty member observing part of each participants work throughout the course. For participants this means they have had input from 16 different barristers, who each bring their individual strengths, perspectives and styles. Again, what a privilege to be the recipient of such exposure. Julia Moody observes each participant's performance and provides advice with respect to presence, voice, breathing and much more. We all benefitted from observing our 6 peers and listening to their feedback as well.

On Day 5 your groups are reassigned and you then bring together all you have learned and undertake the trial proper before a judge of the Supreme Court or District Court.

It is compulsory to attend dinner every night with the faculty and participants, Friday being more of a celebratory dinner, each meal was different and delicious. People could socialise as late as they wished and they did. Most of us rose early to prepare for the day, being too drained to work at the end of the day. By the end of the week everyone is exhausted, they have placed themselves time and again in vulnerable and exposed

positions. However, everyone was in the same situation - the rewards were great – nothing ventured, nothing gained. It pleased me to observe a wide variety of ages and experience amongst participants, many had not been responsible for a trial before, some had years of experience as solicitor advocates and some had been working for the Crown for many years.

The course is not cheap, but the fee is inclusive of the 5-day course, the accommodation and all food and drinks; I consider it to have been excellent value. Socially, I met other barristers from all over the country and enjoyed speaking with them about their backgrounds, plans and experience. It is no exaggeration to confess we all learnt from each other in equal measure. I have never taken part in a course as intensive as this before, it is so superior to others available in its length and breadth. I commend the ETAC to you all, no matter the level of your experience. If you are interested express your interest promptly, the numbers accepted do not have capacity to increase given the model's dependence on senior members of our profession giving a week of their time without payment.

I take this opportunity to acknowledge the generosity of the faculty and thank them for everything they offered. Clearly, they all enjoy teaching and are fascinated by the art of advocacy; they all must have been just as exhausted as all of us by week's end.

Case Note

# Dimech v State of Tasmania

2016 TASCCA 3

The appellant was found guilty of 6 charges of dishonestly acquiring a financial advantage, and 15 of attempting, by placing bets with Betfair, and then claiming they were unauthorised credit card transactions. He attempted to defraud 3 financial institutions of \$94,000 and succeeded to the extent of \$56,000.

He was sentenced to 30 months' imprisonment, with 6 months suspended. He appealed conviction and sentence.

The conviction appeal was largely based on the admission into evidence of a recorded telephone conversation with Betfair. The appellant argued it should not have been admitted because it was a private conversation within the meaning of the Listening Devices Act 1991 (Tas). That argument was rejected.

Estcourt J held that it was commonplace for personal information to be provided in the course of commercial telephone transactions but that does not make the conversation private. He went on that it is not at all unusual for telephone calls of a commercial nature to be recorded. In creating the betting account, the appellant agreed on terms and conditions that reserved to Betfair the right to record all conversations. Pearce J agreed.

Porter J also referred to the terms and conditions, but went further. He noted that the call was to a large betting agency for the purposes of placing a bet, and it would defy the ordinary use of language to maintain that conversation was a private one. The nature of the call being made it obvious that it would be noted in some way. Any allegation of a mistakenly noted bet may adversely affect the interest of the operator taking the call, who was a party to the call.

An additional point of appeal was that the trial judge in his summing up referred to the appellant as “Mr Guilty”, and this caused a miscarriage of justice. This was also rejected. Estcourt J noted that it was plainly an accidental transposition of words, which was corrected in an augenblick, which could not by any dint of imagination have prejudiced the appellant's case.

The appeal against sentence was also dismissed. Porter J was of the view that the sentence was a heavy one, but not outside the range reasonably open. Estcourt J weighed up the mitigating factors and the aggravating factors (including the appellant continuing to offend after he had been detected) and noted that while it might be said that the sentence was harsh, it was not manifestly excessive.

Case Note

# DPP (Acting) V Eather

2016 TASCCA 2

The respondent professional fisherman was charged on a single charge of trafficking fish. The trial judge accepted a submission by defence counsel that s 264A(1) of the Living Marine Resources Management Act 1995, would be satisfied only if the fish in question had been “taken unlawfully or possessed unlawfully” by someone other than the accused. She directed an acquittal. The Crown appealed.

Blow CJ, with whom Porter J and Pearce J agreed, interpreted that section as containing no express requirement as to the identity of the person by whom they have been taken or possessed. Nor was there any implicit restriction as to the persons by whom the fish were taken or possessed. In dealing

with a submission by counsel for the respondent that this interpretation may lead to some absurd results, he observed that either interpretation might have absurd consequences.

There was, his Honour said, no way of interpreting the section that avoided the situation whereby trivial non-commercial misconduct can amount to the crime of trafficking fish. This was an unavoidable consequence of Parliament having chosen to define “traffic” without any reference to some belief or intention as to the future sale of the fish.

The appeal was allowed, the acquittal set aside, and a new trial ordered.



Case Note

# Chu v Russell

2016 TASFC 1

A cyclist (the respondent) was riding a bicycle approaching a junction at which he intended to turn right. The appellant was driving a car along the road behind the cyclist. The cyclist moved into the centre of the road to prepare for the turn, which was some distance away, and the car collided with him, causing serious injuries.

The trial judge found the car driver liable, but reduced damages by 30% for contributory negligence.

Blow CJ, with whom Porter J agreed, held that the most plausible explanation for the inconsistency between the driver’s evidence, and that of the cyclist (and his companion) was that the driver was not keeping a proper lookout. Further, the driver had a duty, once he saw the cyclists, to reduce his speed in case a dangerous situation developed. He breached that duty and

that, together with the failure to keep a lookout, was the cause of the collision within the meaning of section 13 of the Civil Liability Act 2002.

His Honour considered the issue of contributory negligence, and held that the cyclist’s actions was a gross departure for the standard of care required of a reasonable cyclist, and he should have pedalled on the left side of the road until the appellant’s car has passed. The cyclist unnecessarily created a dangerous situation when none had existed. The respondent’s damages were reduced by 50% for contributory negligence.

Estcourt J in a dissenting decision, held that the cyclist’s actions were negligent and were the sole cause of his injuries, and would have upheld the appellants appeal on liability.

Case Note

# Santesso v Tasmania

2016 TASCCA 4

This was an appeal against conviction. The appellant was found guilty of 5 fraud-related charges. They related to a home loan application form and accompanying documents, relating to the verification of her and her husband’s identity and certified copies of passports and drivers’ licences, submitted to a mortgage broker. She submitted these to obtain a new loan on the marital home, which was for more than the existing mortgage, and the Crown contended that she did this without the knowledge of her husband, and intended to retain the excess proceeds herself.

She forged the signatures on the documents of her husband and his brother-in-law, a police officer.

The appellant contended that there was no evidence that she had any intention to defraud anyone at the relevant time, and her

submission of the documents was too remote from the possibility of obtaining the loan to constitute an attempt to commit fraud on a creditor.

In a joint judgment, Blow CJ, Tennent J and Wood J dismissed the appeal. They said that while it was true that the application document itself was not intended to have any contractual effect, it was open to the jury to conclude that the submission of the document, apparently signed by 2 applicants, amounted to a representation that both the appellant and her husband wanted to borrow money from the financier. Further, if the appellant without the knowledge of her husband, had continued to take steps for the obtaining of the loan, the result would have been fraud on her husband.

Case Note

# Attwells v Jackson Lilac Lawyers Pty Ltd

2016 HCA 16

## Advocates’ Immunity

The appellants were guarantors of a debt owed by a company to a bank. The liability under the guarantee was limited to \$1.5 million. On the first day of trial the proceedings settled on terms that judgment would be entered against both the company and the guarantors for the full amount of the company indebtedness, \$3.4 million, but the bank would not seek to enforce that judgment if the guarantors paid \$1.75 million (inc. costs) within 5 months.

The guarantors did not do so, and judgment was enforced. They sued their solicitors alleging negligence in giving the settlement advice, and failing to advise on the effect of the orders made by consent. The issue of advocate's immunity was raised as a separate question. The trial judge declined to answer the question. The Court of Appeal in New South Wales allowed an appeal and determined that advocates' immunity applied to defeat the claim.

The High Court was asked to reconsider its 2 previous decisions confirming the existence of advocate's immunity,

Giannarelli v Wraith (1988) 165 CLR 543 and D’Orta-Ekenaike v Victorian Legal Aid (2005) 223 CLR 1. It refused to do so.

The majority held that the immunity did not extend to acts or advice of the advocate which do not move litigation towards a determination by a court. In particular, the majority held that the immunity does not extend to advice that leads to a settlement agreed between the parties, whenever that settlement occurs, and that the public policy which justifies the immunity is not concerned with the desirability or otherwise of settlements, but with the finality and certainty of judicial decisions.

The majority also held that entry of a consent judgment implementing the settlement agreement did not amount to a determination by the court, but rather created a new charter of rights between the parties. There was a strong minority decision on this point to the contrary by Gordon J with whom Nettle J agreed.

Case Note

# Badenach v Calvert

2016 HCA 18 – Appeal from Tasmania

## Solicitors’ duty to estate beneficiary

The appellant solicitor received instructions from testator D to prepare a will for the entirety of D's estate to pass to the respondent. The will was signed and later D died. D owned 2 properties as tenants in common with the respondent. A testator's family maintenance claim by D's daughter was successful, and she was awarded \$200,000 out of a \$600,000 estate and each parties' costs were paid out of the estate on a solicitor and client basis. The respondent claimed that the solicitor owed the respondent a duty of care to advise D of possible steps to avoid exposing D's estate to such a claim, in particular by converting the ownership of the properties to joint tenancies. Blow CJ dismissed the claim. The Full Court reversed that dismissal.

The High Court held that the solicitor did not owe that duty. The Court held that the solicitor could have ascertained the existence of D's daughter because earlier wills had made provision for her. It also agreed with the trial judge that given the retainer, which was not one to give general estate planning advice, the solicitor owed a duty to D to enquire about family

members and upon being advised of any the solicitor had a duty to advise D about the possibility that the properties could be changed to joint tenancies. But it could not be concluded, accepting that this duty was breached, what course D would have taken. Therefore, there was no damage established to have been caused by the breach.

Further, the Court held that while advice about the possibility of a claim being made was within the retainer, advice about inter vivos transactions to avoid such a claim was not.

The duty owed to the respondent could only arise when the respondent's interests were coincident with those of D. The interests of D were that a will be prepared which legally effected a gift of the entirety of D's estate to the respondent. The interests of D and the respondent as parties to any inter vivos transaction would not be the same as those of testator and beneficiary with respect to testamentary intentions.

The appeal was allowed, and the appeal from Blow J's decision was dismissed.

Case Note

# Coverdale v West Coast Council

2016 HCA 15

The West Coast Council sought to levy rates on marine farming leases in Macquarie Harbour. It requested the appellant Valuer-General to value the leases. He declined to do so on the basis that the leases were not over “lands” or “Crown lands that are liable to be rated” within the meaning of s 11 of the Valuation of Land Act 2001. Blow CJ held that the leases were not over lands. The Full Court (Pearce J dissenting) held that the leases were over Crown lands that were liable to be rated.

In a unanimous judgment, the High Court dismissed the Valuer-General's appeal.

The court considered the various definitions of “land”, including that in the Crown Lands Act 1976, being that land “includes land covered by the sea or other waters, and the part of the sea or those waters covering that land”. It described

a constructional choice between a meaning of s 11 which embraced the Crown Lands Act definition including the seabed and the waters above it, and a meaning which excluded them.

After considering the historical land rating and valuation legislation, the Court concluded, in the absence of any compelling contrary indication, the reference to “Crown lands” in s 11 is a reference to Crown land under the sea and so much of the sea that lies above it, as defined in the Crown Lands Act. The marine farming leases were therefore liable to be rated.

The Court also observed that this construction did not impose an onerous burden on the Valuer-General, and applied to Macquarie Harbour because the boundaries of the West Coast Council's municipal area were drawn across Hell's Gates, so as to include the water, whereas most other municipal areas were drawn so as to exclude the sea.

Case Note

# Santesso v Tasmania

2016 TASCCA 4

This was an appeal against conviction. The appellant was found guilty of 5 fraud-related charges. They related to a home loan application form and accompanying documents, relating to the verification of her and her husband's identity and certified copies of passports and drivers' licences, submitted to a mortgage broker. She submitted these to obtain a new loan on the marital home, which was for more than the existing mortgage, and the Crown contended that she did this without the knowledge of her husband, and intended to retain the excess proceeds herself.

She forged the signatures on the documents of her husband and his brother-in-law, a police officer.

The appellant contended that there was no evidence that she had any intention to defraud anyone at the relevant time, and her

submission of the documents was too remote from the possibility of obtaining the loan to constitute an attempt to commit fraud on a creditor.

In a joint judgment, Blow CJ, Tennent J and Wood J dismissed the appeal. They said that while it was true that the application document itself was not intended to have any contractual effect, it was open to the jury to conclude that the submission of the document, apparently signed by 2 applicants, amounted to a representation that both the appellant and her husband wanted to borrow money from the financier. Further, if the appellant without the knowledge of her husband, had continued to take steps for the obtaining of the loan, the result would have been fraud on her husband.



Case Note

# Allianz Australia Insurance Limited v Mercer

2016 TASFC 2

This is hopefully the last in the long running series of cases arising from a serious work injury suffered by Mr Mercer in March 2008. The writ was issued on 21 February 2012. His employer was a company which became deregistered before this action for common law damages commenced. He brought the action against the insurer pursuant to s 601AG of the Corporations Act 2001. The trial judge (Blow CJ) determined, as a preliminary question, that s 5(3A) of the Limitation Act 1974 did not apply to this action, and then assessed damages in the sum of \$5.096 million.

The Full Court overruled the determination on s 5(3A), and held that it did apply. Mr Mercer would be precluded from recovering damages if the action was commenced more than 3 years after the “date of discoverability” of the injury. The judgment was set aside, and that limitation point remitted back to the trial judge. Blow CJ held that the action was not barred, and the insurer appealed that decision.

Porter J observed that the mischief the provision was intended to remedy was where damage, being an essential element of an action in negligence, manifests itself long after the event, or injury is sustained progressively or in a form difficult to detect. In such circumstances a cause of action could easily

become statute barred before the injured person was aware of the damage.

A worker's compensation claim had been made shortly after the injury, and a report obtained from a neurologist in July 2008 to support a lump sum payment based on a whole of person impairment of more than 70%. This was agreed by the insurer in September 2008.

Porter J held that the definition of “date of discoverability” in the Limitation Act, when it refers to the personal injury being sufficiently serious to warrant bringing proceedings, did not mean that the person had to be in possession of all information enabling a full evaluation of the likely outcome of the proceedings. He was of the view that some medical and legal evaluation may be required to put the injury into context, but that did not extend to all the factors relevant to a decision to actually commence proceedings. He pointed out that in December 2008 (after the neurologist's report had been received) Mr Mercer was debating with his lawyers whether to commence proceedings, and he therefore knew, or ought to have known, that his injury was sufficiently significant to warrant bringing proceedings. He upheld the appeal on the limitation point.

Tennent J and Wood J agreed with Porter J on this point.

But, true to the form of this litigation, that was not the end of the appeal.

S 138AB of the Workers Rehabilitation and Compensation Act 1988 also applied. In its then form (it has since been amended) it had the effect that a cause of action by an injured worker does not accrue until permanent impairment is agreed by the worker and the employer, or determined by the Tribunal. Porter J held that the entire resolution of the appeal depended on when it was that the parties had made an agreement within the meaning of this section. He was of the view that the September 2008 lump sum agreement was not such an agreement, and observed that at that time Mr Mercer's injury was not stable and stationary, and there was no evidence of any assessment under s 72. He held that there was no “meeting of the minds” on the relevant agreement until around 26 February 2010. That was when the cause of action arose, and the action was therefore in time. Wood J agreed.

Tennent J dissented on this point, saying that once there was an agreement as to the level of impairment for the purposes of the lump sum payment, that agreement remained effective for all purposes, and therefore the cause of action for the purposes of s 138AB accrued in September 2008, and the action was out of time.

The judgment of Blow CJ in favour of Mr Mercer was affirmed by the majority.

But that still was not the end of the judgment. While the insurer's appeal succeeded on its argument about the applicability of the Limitation Act provision, there was an issue about whether its appeal was lodged in time. The limitation point determination was delivered on 22 December 2014, and following additional submissions on the quantum of damage, the final judgment was not pronounced until 11 February 2015. The appeal was lodged by the insurer on 23 February.

Even though the limitation point as determined by the trial judge “finally determined the rights of the parties” for the purposes of rule 655, and the insurer could have appealed against it at the time it was delivered, Porter J held that it was not the case that an appeal could only have been brought at that time. He accepted the line of authority that on any appeal from a final order an appellate court can correct any interlocutory order which affected the final result (i.e the limitation point). He held the appeal to be in time, and Tennent J and Wood J agreed.

Case Note

# DPP (Acting) v CBF

## 2016 TASCCA 1

A 17 year old pleaded guilty to charges of aggravated burglary and assault, attempted rape and attempted murder. He was sentenced to 4 and a half years' imprisonment. The sentencing judge, Blow CJ, accepted the contents of several medical reports that the offender had a variety of psychiatric symptoms, suffered psychogenic seizures, reported having multiple personalities and complex hallucinatory experiences. His Honour considered because of this, the case was not one to impose a sentence that was designed to deter others from violent sexual attacks. The Crown appealed on the ground of manifest inadequacy.

Porter J, with whom Tennent J agreed, considered the authorities dealing with an offender's mental condition contributing to conduct in a way that moral culpability was reduced, including DPP v O'Neill [2015] VSCA 325, which was delivered after argument had concluded. He noted that at the trial

the respondent's counsel did not put to the sentencing judge that he could be satisfied that the respondent's condition affected his mental functioning in such a way as to reduce moral culpability, and that the Crown did not deal with the issue of a causative connection between any mental condition and the offending. Nevertheless, the sentencing judge was entitled to act on the unchallenged contents of the reports before him, and although the offending was of "an undeniably high level of seriousness", he could reasonably conclude that an individualised approach was justified, and that the respondent was not an appropriate medium for expression of general deterrence and denunciation.

Estcourt J, in a separate judgment, also concluded that the sentence was not, by virtue of its inadequacy, unreasonable and plainly unjust.

The appeal was dismissed.

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### Case Notes

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