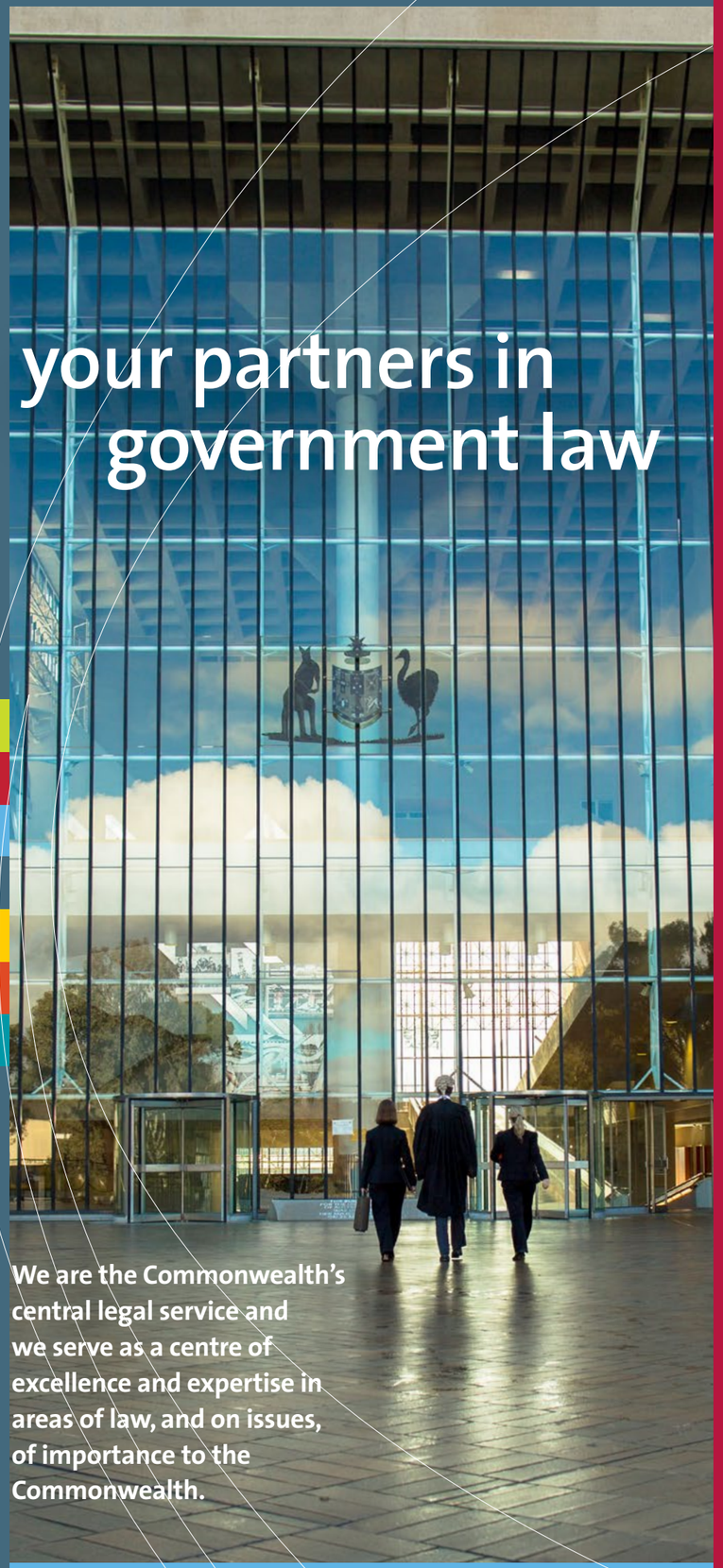
Robert Orr PSM QC
On the 25th anniversary of the Mabo decision

Sir Gerard Brennan
Reflections on the creation of the Federal Court

Articles on class actions, legal technology, securities and Constitution s 44

AUSTRALIAN Government Solicitor



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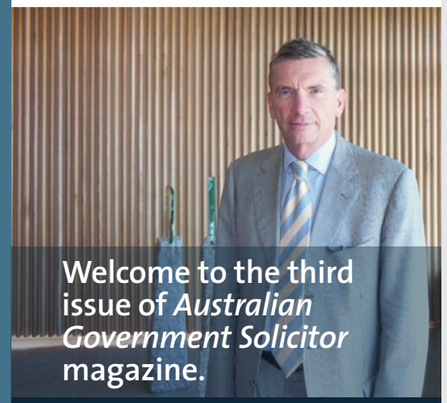


Welcome to the third issue of *Australian Government Solicitor* magazine.

This time we profile 2 of our professional leaders, our Chief General Counsel Guy Aitken QC and Chief Counsel Dispute Resolution Tom Howe PSM QC. As Commonwealth Queen's Counsel, their work has been recognised for its influence and excellence over many years, many cases and many matters.

We also asked former Chief General Counsel Robert Orr PSM QC if we could publish his excellent speech on the 25th anniversary of the Mabo decision that was so influential in recognising the native title rights of Indigenous Australians.

There was another anniversary this year and we are delighted that Sir Gerard Brennan AC KBE GBS agreed that we could publish his reflections on the founding of the Federal Court of Australia 40 years ago.

In the legal core of the magazine, our lawyers have written useful articles on class actions, unconditional bank securities and technology-assisted discovery, as well as some very interesting case studies from each of our practices, showing a wide variety of work across the Commonwealth.

We think there is something of interest for every government lawyer in this issue.

Please send your comments or feedback by email to ags@ags.gov.au

Michael Kingston
The Australian Government Solicitor

In this issue

On the **25TH ANNIVERSARY** *of the* MABO DECISION

Image courtesy of the Royal Australian Mint

'We are surrounded by the tales that shaped, and shape, this country.'

Ambelin Kwaymullina[1]

Robert Orr PSM QC

Currently Special Counsel at AGS, Robert was previously Chief General Counsel. He was awarded a Public Service Medal in 1994 and appointed a Commonwealth QC in 2000. His expertise covers public law, including constitutional law, administrative law, legal policy development, decision-making and statutory interpretation, native title and Indigenous legal issues, and land and environmental law.

This article is based on a talk I gave at the offices of the Attorney-General's Department in Canberra on 5 June 2017.

I thought it particularly important to begin the talk by acknowledging the traditional owners of the land on which those offices sit. They are quite close to Lake Burley Griffin, on the Molonglo River, and the Indigenous people of the region used this river as a primary resource corridor. Ceremonies beside the river were conducted as late as the 1860s, and at times included feasting on Bogong moths which migrated from Queensland and western New South Wales to spend the summer in the mountains near Canberra.

In this article I briefly do 4 things: first, outline my involvement in native title issues; second, provide some important historical context; and then, third, note key features of the *Mabo [No.2]*[2] decision in 1992, the original Native Title Act passed in 1993, the *Wik*[3] decision in 1996, and the Native Title Amendment Act passed in 1998. I conclude by discussing some general themes arising from these events.

My involvement

I am not an Indigenous person, and occupy a privileged position in Australian society. I do not think that this means that I should not speak or write about native title. But I do think that this is a subject which particularly and deeply affects Indigenous people, and that I, along with other non-Indigenous Australians, need to make efforts to seek out, listen to, respect and take account of Indigenous voices on this issue, of which there are many.[4] The native title events which I discuss enabled me to hear first-hand many such voices, which was a very moving experience.

I do write from the perspective of a government lawyer. I came to this after studying at the University of New South Wales and working for a commercial law firm. I have been a government lawyer with AGS for about 35 years, in Sydney and then in Canberra. During this time I also worked for 2 years for a Papua New Guinea provincial government where customary law is an accepted part of the legal system.

I think government lawyers play very important roles. One is to assist to maintain the basic machinery of our government. A second is to assist in the development of policies, the implementation of those policies, most importantly in laws, but also in decisions, agreements and other forms, and the defence of those policies and their implementation. A third role is to assist the government itself to comply with the law.

I was involved as a government lawyer in all these roles in relation to native title. In particular, I was a member of the team which developed the government's response to the *Mabo [No.2]* decision, most significantly the *Native Title Act 1993*, under Prime Minister Paul Keating and Attorney-General Michael Lavarch.[5] Also, I was a member of the team which developed the response to the *Wik* decision, in particular the *Native Title Amendment Act 1998*, under Prime Minister John Howard and Attorney-General Daryl Williams.[6]

[1] 'Living together in country: creation, terra nullius and "the trouble with tradition" ' in Simon Young, *The trouble with tradition* (2008), p xvi.

[2] *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

[3] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[4] In the talk, I read out the poem 'Urbanised reeboks' by Lisa Bellear, written in 1996.

[5] There were a wide range of others involved in this task, and I mention in particular: from the Attorney-General's Department (AGD) Peter Jeffery, who went on to provide outstanding advice in this area over many years, Kym Duggan, Helga Johnsen, Deborah Nance, Grahame Tanna, Lachlan Kennedy, and Janine Ward; from the Office of Parliamentary Counsel (OPC) Kerry Jones and Peter Quiggin; Sandy Hollway, who led the team, Dennis Richardson, Michael Dillon, Mark Cunliffe, Colin Walters and David Hanna from the Department of the Prime Minister and Cabinet (PM&C).

[6] This included many of those involved in the earlier process and others, in particular Peter Jeffery, Chris Horan, Sonali Rajanayagam and Grahame Tanna from AGD; Kerry Jones and Peter Quiggin from OPC; Ken Matthews and Philippa Horner, who led the team, Sandra Ellims, Julie Yeend and Anne McDermott from PM&C.

Historical context

To understand the importance of these events it is useful to note 4 aspects of history before the settlement of Australia by the British.

First, Aboriginal people lived here for tens of thousands of years before the Europeans arrived. As the High Court confirmed in *Mabo [No.2]*, those Indigenous Australians had subtle and elaborate laws to regulate their communities.

Second, 1492 is an important date in European history, particularly in Spain. It is representative of the age of exploration, when Christopher Columbus set out to find other worlds.

But third, this and other events of that year had a darker side. For some periods in the middle ages, Christians, Jews and Muslims lived together in Spain in reasonably tolerant communities. But 1492 saw the expulsion of Jews and Muslims, unless they converted to Christianity. This was what we would now see as a terrible religious persecution, but at this time there were also emerging 'blood purity' laws – which stigmatised groups on the basis not just of their beliefs, but because of an alleged inherited status which could not be eradicated. This was the beginning of modern racism, defined by George Fredrickson as 'when one ethnic group or historical collectivity dominates, excludes or seeks to eliminate another on the basis of differences that it believes are hereditary and unalterable.' This belief was one factor which led to slavery and the position of African-Americans in the USA, to anti-Semitism and the Holocaust in Europe, and to colonialism and settler societies, including in Australia.[7]

Fourth, the common law of England developed to deal with what happened when new territories were acquired. AGS lawyer Gavin Loughton is an expert in this area, and based on his summary and the discussion in *Mabo [No.2]*, the 'colonies rule':

- divided new territories into settled lands, sometimes called empty lands which involved the concept of *terra nullius*, and lands acquired by conquest or ceded under treaties
- provided that in 'settled lands', the English settlers took English law with them to their new home, and all land there vested in the King, since there were no other laws or proprietors
- in contrast, in conquered or ceded lands, the old laws of those lands remained, as did rights under those laws, unless and until the King changed them.[8]

These 4 historical streams were all relevant to the settlement of Australia. Great Britain acquired sovereignty over New South Wales from 1788, and although legal issues were not at the forefront of the settlers' minds, though practical interactions with Indigenous people were, the legal effect of what occurred then was addressed over time. It was held that the Australian colonies were settled, not conquered or ceded, lands, that English law therefore operated, and the land was vested in the King.[9] Local Indigenous laws and ownership rights under those laws were not recognised.

The practical reality was that Indigenous laws continued to govern Indigenous communities. It was also that, as Deane and Gaudron JJ noted in *Mabo [No.2]*, there was a 'conflagration of oppression and conflict which was ... to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.'[10]

The laws which were developed over the 19th century and the first half of the 20th century in Australia, including the Constitution, reflected the racism central to most western thought and the colonial experience at that time. There were 2 mentions of the Aboriginal 'race' in the Constitution, both dismissive.[11] Early laws passed under it included the *Commonwealth Franchise Act 1902* which provided in s 4 that 'no Aboriginal native of Australia ... shall be entitled to have his name placed on an Electoral Roll,' subject to s 41 of the Constitution. No matter what an Aboriginal person believed, or their education, occupation or wealth, this prohibition applied, because of an alleged inherited status which could not be eradicated.[12]

Principally after World War II the legal position began to change, with the 1967 referendum to amend the Constitution, the International Convention on the Elimination of All Forms of Racial Discrimination implemented in the *Racial Discrimination Act 1975*,[13] and the first statutory land rights regimes.

Mabo [No.2] and the Native Title Act

Mabo [No.2]

Yet despite these developments an underlying principle of Australian law remained that any rights of Indigenous people under their laws were not recognised. However, proceedings were commenced in 1982 in the High Court by Eddie Mabo and others on behalf of the Meriam people who claimed rights to the Murray Islands in the Torres Strait, based on their customary law. This was initially referred to the Queensland Supreme Court for finding of facts. The claim also survived the *Queensland Coast Islands Declaratory Act 1985* (Qld) which purported retrospectively to abolish all such rights and interests as the Murray Islanders may have had before its enactment; in the first *Mabo v Queensland*,[14] the High Court held that this Act was inconsistent with the Racial Discrimination Act and invalid under s 109 of the Constitution.

The substantive claim was decided in *Mabo [No.2]*, handed down on 3 June 1992, 25 years ago. This directly reconsidered the accepted common law position that Australia was a settled territory, with the effect that English laws were immediately in force, and no other laws were recognised. The High Court rejected this position by 6 Justices to 1, with leading judgments by Brennan J and Deane and Gaudron JJ. In doing so, the judgments had regard to:

- international law developments, in particular the holding that inhabited land was not *terra nullius*[15] and the Racial Discrimination Convention

> '... any rights of Indigenous people under their laws were not recognised.'

- the law in other countries, especially Canada, former African colonies, and New Zealand, where there was much greater respect for Indigenous land rights
- anthropology, which demonstrated that Indigenous peoples had subtle and elaborate systems of laws, as shown by evidence taken by Moynihan J of the Queensland Supreme Court concerning the Murray Islands
- the history of Australia, in particular that dispossession had in fact not occurred by the transfer of beneficial ownership when sovereignty was acquired by Britain, but by the subsequent recurrent exercise of power to exclude Indigenous people.

The judgments indicate a concern for remedying the law's role in the discrimination and dispossession which had taken place. Jeremy Webber refers to this as the 'jurisprudence of regret',[16] regret that the past has shaped our society in a way that we now take to be wrong, and that in this light legal doctrines created by the courts which enabled or rationalised these events, despite their long acceptance, should be removed. As Brennan J stated: 'The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged doctrine of *terra nullius* and to persist in characterising the Indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.'[17]

Therefore the majority in *Mabo [No.2]* decided that native title rights based in Indigenous law survived the acquisition of sovereignty by the British and were recognised by the common law. The Court held that such rights had been extinguished by specific governmental acts, such as the grant of freehold and leases. Subject to such acts, the Meriam people were held to be entitled 'as against the whole world to the possession, occupation, use and enjoyment of the lands of the Murray Islands.'[18]

Native Title Act 1993

The decision was significant, controversial and left many issues concerning native title uncertain. The government therefore began considering its response, including a possible Native Title Act. There was clearly a need for extensive consultation. There were meetings with State and Territory governments, which traditionally had responsibility for land management. There were meetings

7 George Fredrickson, *Racism: a short history* (2002), pp 31–34 and 170.

8 Gavin Loughton, *The extension of English law following conquest and settlement: the origins of the colonies rule* (2002), pp 1–2; *Mabo [No.2]*, see esp 25–38, Brennan J.

9 *Attorney-General (NSW) v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286; *NSW v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act case); *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (the Gove Land Rights case).

10 At 104.

11 Sections 51(xxvi), amended in 1967, and 127, removed in 1967. Section 25 also still refers to 'persons of any race'.

12 Former senior AGS lawyer John McCorquodale has collected and written on these types of laws, see *Aborigines and the law: a digest* (1987).

13 Upheld by the High Court in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

14 (1988) 166 CLR 186.

15 *Advisory Opinion on Western Sahara* [1975] ICJR 12.

16 Jeremy Webber, 'The jurisprudence of regret: the search for standards of justice in Mabo' (1995) 17(5) *Sydney Law Review* 5.

17 *Mabo* [No.2] at 58.

18 *Mabo* [No.2] at 217.

with Indigenous leaders, including Lowitja (Lois) O'Donoghue, Noel Pearson, Mick Dodson, Patrick Dodson, Marcia Langton, David Ross, Darryl Pearce, Darryl Cronin and Peter Yu; it was a privilege to deal with these articulate, committed and grounded advocates. And there were many others interested: miners, graziers and farmers, fishers, environmentalists, local councils, aid agencies, lawyers, academics; it felt like everyone.

The Bill which was developed accepted the decision in *Mabo [No.2]*, and followed in particular the judgment of Brennan J, with whom Mason CJ and McHugh J agreed, for its definition of native title and the principles of extinguishment. It included a Preamble, along with key provisions for the recognition and protection of native title. It provided for the validation of past acts possibly rendered invalid by the Racial Discrimination Act or other laws before it was known native title existed, a concern stemming from the reasoning in the first Mabo decision. It allowed future governmental acts to affect native title if those acts could affect freehold land, with a special 'right to negotiate' for some mining and compulsory land acquisitions. The Bill provided for a claims process with an emphasis on mediation, registers and a National Indigenous Land Fund. It was criticised from many sides; but Paul Keating called it the most broadly consulted on and negotiated Bill that had been through the Parliament.

The Bill was introduced into the Parliament on 16 November 1993, and was debated in the Senate, which the government did not control, from 14–21 December. Gareth Evans masterfully led the debate for the government there, and at the time, this was the longest Senate debate on record. The Bill with 120 amendments passed the Senate with Democrat and Greens (WA) support, by a 34–30 vote.

The passage of the Bill through the Senate late at night after a marathon sitting was very emotional. Many Indigenous representatives were present, and Parliament House was full of Bogong moths, as if in memory of the generations of Indigenous people who had feasted on them and lived in the area around Canberra. The House agreed to the Senate amendments, the High Court rejected a challenge by Western Australia to the Native Title Act, and upheld a challenge to Western Australia's alternative legislation.[19]

Wik

But given the nature of these changes, there were always going to be further developments. The Howard government was elected on 2 March 1996, and on Christmas Eve eve of that year the High Court delivered its decision in *Wik*, which held by 4 Justices to 3 that Queensland pastoral leases did not necessarily extinguish all native title in the areas involved. This meant that native title rights could continue to exist on such pastoral leases, and therefore in a greater area of Australia than the discussion in *Mabo [No.2]* had suggested.

> "... Paul Keating called it the most broadly consulted on and negotiated Bill that had been through the Parliament."

Native Title Amendment Act 1998

This decision and the development of amendments to the Native Title Act to deal with it were matters of further significant controversy. The Howard government applied principles and processes which reflected their policy approach to the task. The public servants and lawyers involved implemented these within constitutional and legal principles, the logic of *Mabo [No.2]* and the structure of the Native Title Act. The Bill addressed key issues arising from the *Wik* decision and of concern to the government, in particular providing for the confirmation of some historical extinguishment and the position of current pastoral lessees, but the Preamble, the protection provisions and basic framework of the Act remained, and non-contentious improvements were made in relation to Indigenous Land Use Agreements (ILUAs) and the ability to claim native title over land subject to historical extinguishment.

The Bill was introduced on 4 September 1997; its passage was even more tortuous than the original Act; it became a possible trigger for a double dissolution election; it went to the Senate 3 times before it finally passed by 35–33 votes, with the support of Brian Harradine. Nick Minchin skillfully led the debate in the Senate for the Government, and this was and remains the longest Senate debate on record.

There was no High Court challenge to the amendments; however, in an indication of the growing relevance of international law, a complaint was made to the United Nations Committee responsible for the Racial Discrimination Convention, which was upheld. However, the amendments have generally remained in place, and whilst there are a range of views about the Act,[20] this has provided a framework for claims of native tile, regulating government acts affecting native title and agreements with native title holders.

Issues

This was a major, controversial change

It is interesting re-reading the *Mabo [No.2]* decision to note that at some points Brennan J seeks to understate the change involved, no doubt to bolster his position that it was an appropriate development. But this was a change, however framed, which went to the fundamental nature of Australian law. It recognised a new source of law, the traditional rights and interests of Aboriginal people. It adjusted the legal effect of what happened at European settlement. It also had a major practical effect on contemporary land ownership and management, and because of this, was from the beginning highly controversial. I was present at many meetings with many representatives which were usually civil, but revealed the deep impact of native title on Indigenous and non-Indigenous groups. Travelling with Michael Lavarch to Western Australia and John Howard to a public meeting outside the Stockman's Hall of Fame in Longreach, it was clear that the general community was very engaged. This level of change and its controversial nature was a challenge for Australian governmental processes, and demonstrated to me the importance of compliance with basic constitutional and legal principles and the moderating positions of community leaders, politicians and public servants in these processes.

But a change which is now generally accepted

Despite the controversial beginnings, the *Mabo [No.2]* decision and the native title framework which emerged are now broadly accepted. In my view, the fact that the change was made by both judicial and legislative processes, and that there were legislative processes under different governments, was a key factor in consolidating these developments. Native title determinations are now routinely made by the Federal Court, and are generally seen as a basis for celebration. Mining companies, many of whom were ferocious in their criticism of the *Mabo [No.2]* decision and the Native Title Act, have developed strong relations with Indigenous people in Australia, and routinely make ILUAs with native title holders. Australian property law now clearly involves 2 legal regimes from 2 different cultures. Brendan Edgeworth has written of the 'genuinely blended system' which has emerged and the 'hybrid character' which 'marks out its uniqueness: it is no longer seen simply as a transplanted model of English law, but a truly new form of national land law.'[21]

In which Aboriginal people participated and benefitted

The *Mabo [No.2]* and *Wik* decisions were initiated by Indigenous plaintiffs. Indigenous representatives played a very significant role as negotiators of the original Native Title Act, and a key though more limited role in the Amendment Act. And the courts, government and the Parliament listened to them.

The system which was implemented gave native title claimants and owners significant rights. The position now is that statutory 'land rights' land and Aboriginal reserves make up about 13% of Australia; exclusive possession native title about 10%; non-exclusive possession native title about 11%; and with registered claims over another

19 *Western Australia v Commonwealth* (1995) 183 CLR 373 (the Native Title Act case).

20 The Australian Law Reform Commission has proposed changes in its report *Connection to country: review of the Native Title Act 1993* (ALRC Report 126, 2015).

21 Brendan Edgeworth, 'The Mabo "vibe" and its many resonances in Australian property law', in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native title from Mabo to Akiba* (2015), p 75, at p 91.

nearly 40%. This is a total of about 72% of Australia where some level of Indigenous land rights does or may exist.[22] Over this land there are a range of registered ILUAs and similar agreements with miners and others which bring significant benefits to the Indigenous people.

But which reveals the limits of law

I have focused on the legal changes brought about by the recognition of native title. Important as it is, this recognition is limited. Native title claims are challenging and difficult processes. Native title has been extinguished in many places, especially in urban and suburban areas. And it is important to ask whether the recognition of native title did change the plight of Aboriginal people for the better, or 'did it merely reinscribe in another form a longstanding and negative pattern to their historical experience.'[23] Despite the recognition of native title, other factors have left Indigenous Australians disproportionately affected by criminal law processes, and in a disadvantaged socio-economic position.

Conclusion

I do not want to oversimplify the complex legal history of Australia, but I think it is clear that the law played a significant role in the racially discriminatory treatment of Indigenous Australians from 1788, including in the foundational principle that from settlement their laws and rights under them were not recognised.

The *Mabo [No.2]* decision, and the Native Title Act, have revised this legal principle and recognised and protected the native title rights of Australia's Indigenous people. These developments have importantly involved an acknowledgment of regret for this aspect of our history and the law's role in it, and transformed Indigenous Australians, who had to a large extent become outsiders in our society, into the holders of extensive property rights and significant legal and political voices.[24] ■

> The *Mabo [No. 2]* decision, and the Native Title Act, have ... recognised and protected the native title rights of Australia's Indigenous people.

22 Jon Altman and Francis Markham, 'Burgeoning Indigenous land ownership', in *Native title from Mabo to Akiba* (2015), p 126, at p 135.

23 PG McHugh, *Aboriginal title: the modern jurisprudence of tribal land rights* (2011), p 339.

24 See generally Jeremy Webber, footnote 17; Brendan Edgeworth, footnote 23, esp p 96.

A filming licence agreement with the ABC

CASE STUDY

Image reproduced with permission Australian Broadcasting Corporation Library Sales

You may have seen the recent ABC production of *The House* hosted by Annabel Crabb and screened on the ABC.

That production provided a fascinating insight into the operations of a complex building and grounds. This is the first such production with such access to personnel that work within Parliament House.

There are a number of existing rules and procedures about accessing and filming areas within Parliament House. Ultimately access to the parliamentary precinct is within the control and powers of the Presiding Officers (the Speaker of the House and the President of the Senate).

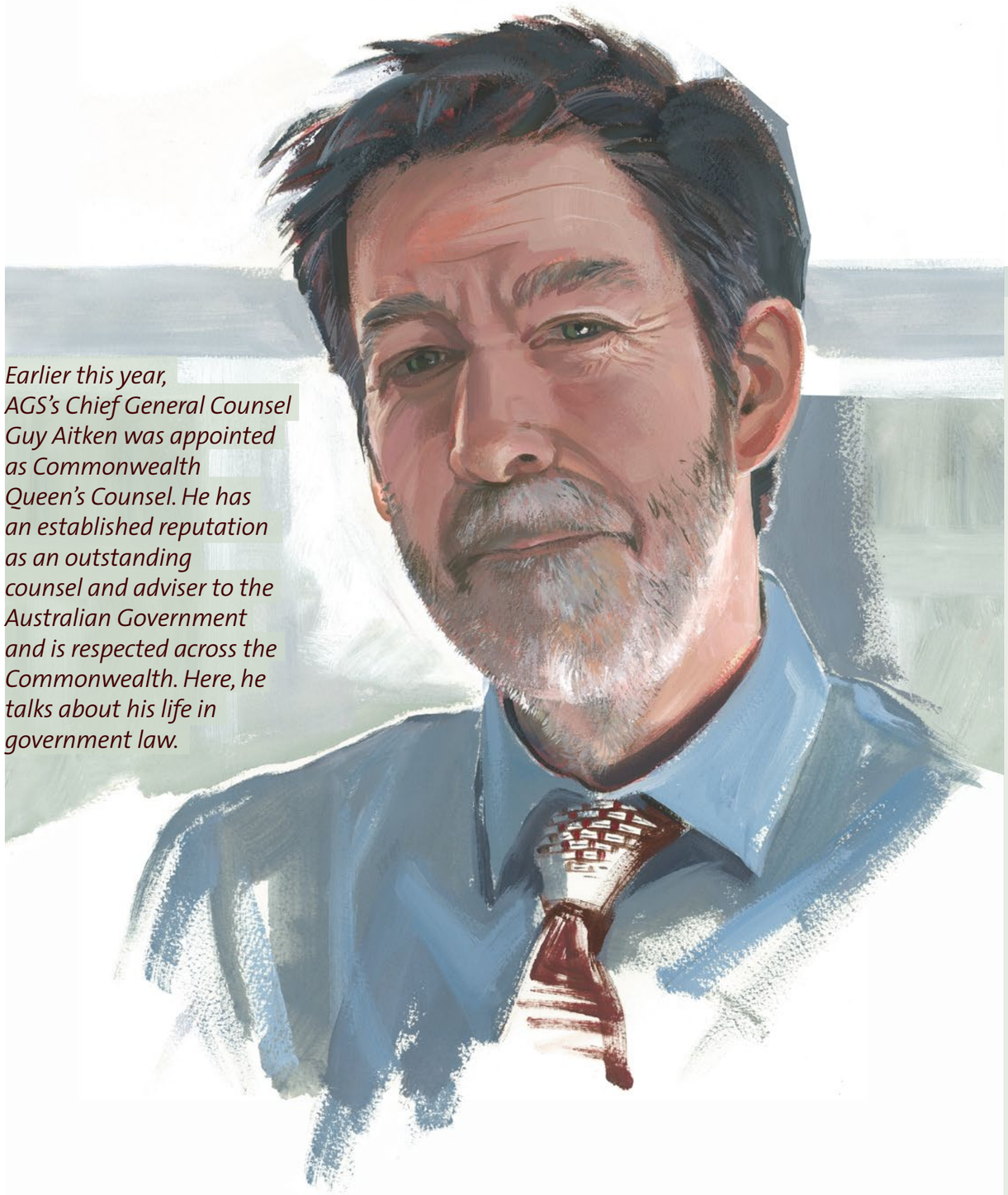
AGS worked with the Department of Parliamentary Services (DPS), the Department of the Senate and Department of the House of Representatives personnel to prepare an agreement for filming arrangements, and assisted with negotiations with the ABC and finalisation of the agreement.

AGS had assisted DPS with some earlier agreements for limited access for filming scenes for commercial productions, and we were able to use the previous template work we had done to prepare the agreement – however the nature and purpose of this ABC documentary required some customising of the drafting, and needed to cover the various requirements of all the 3 parliamentary departments mentioned above.

The negotiations and consequent agreement needed to cover arrangements for access to the building; protections for the heritage aspects of the building (which include some lighting limitations); clarity about the permitted scope and purpose of the documentary; a desire to ensure the dignity of the Parliament was maintained as well as minimising disruptions; clarity about ownership of the film footage and use of footage owned by DPS; concerns about security; and costs for escort and liaison arrangements.

Because of timing issues – in that the commencement of the new parliamentary term was imminent – AGS also assisted with preparation of a letter to the ABC setting out agreed arrangements about filming activities prior to the full agreement being finalised.

It was an interesting agreement to work on for all involved as it required working through a range of issues for which there was no existing precedent or guidance. And it was pleasing to see what was an entertaining and interesting look at parliamentary life. ■



Earlier this year, AGS's Chief General Counsel Guy Aitken was appointed as Commonwealth Queen's Counsel. He has an established reputation as an outstanding counsel and adviser to the Australian Government and is respected across the Commonwealth. Here, he talks about his life in government law.

Guy Aitken QC

Born in Canberra, there is a sense it was inevitable.

'People tend to make the assumption that you would make a good lawyer if you've been interested in debating,' Guy said, 'and I was. I liked talking in public – so they assume you'll end up in a court room. But probably it was my older brother Lee who influenced me the most. From an early age, say 11 or 12 years old, he had a great interest in law and English barristers like Norman Birkett and Sir Patrick Hastings and their famous victories in criminal trials.'

So Guy found himself studying law part-time at the Australian National University (ANU) while working in the Commonwealth Public Service.

'At 18 years old, I was a Clerk Class 1 in the Department of the Capital Territory for 2 and a half years,' he said. 'Because it had huge numbers of junior staff under the age of 20, it was like one long Contiki tour.'

Guy took a year off mid-way through his studies to travel. 'I spent most of 1981 travelling in Europe and the USA,' Guy recalls. 'I sent my mother a postcard saying I had seen Bruce Springsteen in Munich and then again in Rotterdam. She was pleased I had caught up with a friend and wondered whether Bruce had attended Campbell Primary.'

He then returned to the ANU and studied full-time to finish his degree.

After graduating in 1983, Guy got a job in the Attorney-General's Department (AGD) and there was quite an adjustment. It was quiet and studious. 'I enjoyed the legal issues and found the work suited me,' he said. 'It seemed like the place to be if you were interested in constitutional law.'

He commenced in what is now the Office of General Counsel (OGC) in AGS, which he leads, but was then known as the General Counsel Division of AGD. There was much to learn for a young lawyer – and some memorable early mentors.

'My Branch Head Denis Jessop was a good lawyer and wrote particularly well – he was very clear and concise in his writing,' Guy recalled. 'I also learnt a lot from my Principal Legal Officer Ian Deane; and 2 years later, Dennis Rose again became Head of the Division and he had wonderful analytical skills; and, oddly, the Secretary Pat Brazil – I say oddly because I probably had more to do with him, as Secretary then, than I've had with any Secretary since. He had a great interest in the machinery of government and statutory interpretation.'

After 8 years in General Counsel, Guy moved to the Office of Litigation where he learnt much about general litigation from Peter MacDonald and Barry Leader. 'I also learnt much about constitutional litigation and the intellectual rigour required to analyse different and contestable legal issues from David Bennett,' he said.

Guy has extensive experience in representing the Commonwealth and its agencies before a wide range of courts, including the High Court and Federal Court.

Looking back, Guy says, 'The pace of work has changed – along with technology, of course. Obviously, when I started, we didn't have computers. Matters were received by post and not even acknowledged. There was a standard response time of 2 months. Now there is an expectation that you will be accessible.'

'It would be wrong, however, to assume that people couldn't move quickly in the good old days – that is simply not true. They could move very quickly and well. Despite the extremely complicated legal issues involved, Dennis Rose and OPC produced the Commonwealth Places Act in 3 weeks,' Guy recalled. 'But there is no doubt that the environment was more relaxed in those days.'

Working effectively across the Public Service

Guy provided advice on the government's legislative response to the adverse decision by the High Court in Lane v Morrison *(2009) 239 CLR 230, which response was upheld in* Haskins v Commonwealth *(2011) 85 ALJR 836.*

'In *Lane and Morrison*, the High Court struck down the Australian Military Court as being unconstitutional, which invalidated all the actions of the Military Court,' Guy said. 'While the result was not a complete surprise, it required close collaboration with Defence lawyers, particularly Paul Cronin (now of AGD's Office of International Law).

'Paul and his team, along with the Office of Parliamentary Counsel (OPC), had to produce complicated legislation to ensure the sanctions imposed on people who had been convicted by the Military Court could stand and to provide continuity of Defence discipline.

'This was all achieved over a 2- or 3-week period and showed the Public Service working very well. Defence Legal was under enormous pressure to get all the policy and principles right – and they accepted our rather inconvenient advice that allowed the sanctions to be reviewed. But the legislation was introduced and passed within 4 weeks of the decision being handed down.

'Later, it was very gratifying to see it survive a High Court challenge,' Guy said.

"Constitutional law has got a political dimension to it,' Guy says. 'That lends it a great deal of interest ..."

Working in constitutional law

Guy has advised the Government on complex and difficult legal matters across the full range of constitutional issues. He has also demonstrated his expertise in areas of special importance to the Government – judicial review of administrative actions, public finance, national security and anti-terrorism measures, and parliamentary practice – as well as the development of many significant legislative initiatives.

He was head of the Constitutional Policy Unit of OGC when it was first established and was head of the Finance and Revenue Unit in OGC from 1998 to 2006. He was subsequently appointed as Special Counsel and then Deputy General Counsel.

At the end of January 2014, he commenced acting as Chief General Counsel, and was permanently appointed to that position in May 2014.

'Constitutional law has got a political dimension to it,' Guy says. 'That lends it a great deal of interest. There is also the range of issues that you need to consider – precedent, for example. But understanding that precedent won't control the result; though it will inform the issue. It is intellectually challenging to identify those considerations.'

As Chief General Counsel, Guy has advised the Commonwealth on an extraordinary range of public law matters, including the most complex constitutional and statutory interpretation matters. He provided advice on the Government's response to the possible adverse decision in *Williams v Commonwealth*, on the actual decision, and on the development of the *Financial Framework Legislation Amendment Act (No.3) 2012*.

He advised the Department of Health and Ageing about the National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012, which (in conjunction with State legislation) established the National Health Funding Pool, the Administrator of the National Health Funding Pool and the National Health Funding Body.

He has advised on a range of issues raised by minority government, including the limitations on the role of the Senate in the law-making process (s 53 of the Constitution), the need for a message from the Governor-General in relation to laws appropriating revenue (s 56), and other issues about the status of the government in the House of Representatives.

He advises on most of the legislative proposals that raise significant constitutional or legal issues – for example, the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill; the Plebiscite (Same Sex) Marriage Bill; the Criminal Code Amendment (High Risk Terrorist Offenders) Bill; and the Government Procurement (Judicial Review) Bill.

'We have worked on national security legislation and anti-terrorism measures and work closely and well with AGD colleagues who develop the policy,' Guy said. 'The advice is often the relatively easy part. They have to ensure that the legislation is workable.'

'We have also worked with the Department of the Prime Minister and Cabinet on constitutional matters related to royal succession and what happens on the demise of the Crown, as well as the Sovereign's approval of royal marriages.'

Commencing with the landmark constitutional case of *Re Australian Education Union*; *Ex parte Victoria* (1995) 184 CLR 188, Guy has appeared as junior counsel in a range of important matters. These have included *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 concerning the executive power of the Commonwealth to spend money; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 involving a range of issues concerning the *Western Australian Constitution, the Australia Act 1986* (Cth), and a manner and form provision in the *Electoral Distribution Act 1947* (WA); and *Williams v Commonwealth [No. 2]* (2014) 252 CLR 416 concerning the scope of the executive power under s 61 of the Constitution, and the power to provide benefits to students under s 51(xxiiiA).

Guy has also appeared as counsel in some of the most significant Australian cases dealing with parliamentary privilege, including *Egan v Willis* (1998) 195 CLR 424; *Laurance v Katter* [2000] 1 Qd R 147; and *Rann v Olsen* (2000) 72 SASR 450.

He has demonstrated in his role as counsel a high level of skill, a broad knowledge and deep understanding of Commonwealth and public law, and a great ability to develop sophisticated arguments in support of the Commonwealth's interests.

The role of professional leader

Guy also tries to put significant effort into training and developing government lawyers in AGS and across the Commonwealth.

'There is a range of things you can do to lead, but the demands of this position limit your time,' he admits. 'I present publicly on matters when I can – and a substantial presentation is expected. I'm very aware that such presentations demonstrate that AGS is a professional leader with a unique set of skills.'

In developing lawyers within AGS, he says, 'I try to keep my door open and I encourage the view that I can always be consulted – not just by OGC, but by the other practices as well. What I have learnt is that a lot of skills traverse the work of the different practices. I work with a wide range of lawyers and try to pass on what I've learnt professionally. I try to engage closely on the details of the advice and also on the general approach to the advice – but I am sensitive that comments be constructive so as not to discourage others.

'Pushing yourself and exposing yourself to new challenges,' is part of the reward for being in his present role, he says. 'I am pleased to have had the opportunity to be Chief General Counsel, to be part of an excellent team and to have had the responsibility to get it right – though, of course, that is also the burden of the role – the potential for getting it wrong.'

If he was to offer some tips to other lawyers, they would include, 'Be honest about your interests and capabilities. The study of law is obviously not a definitive test of intelligence and not for everybody. You need to have the intellectual tenacity – but also recognise whether you are enjoying the work enough to make a career out of it.

'One necessary characteristic, at least in being a happy lawyer, which I think is sometimes overlooked is an element of humility – because your views are going to be challenged, assessed and discussed. There should be a cooperative and respectful atmosphere in such discussions, but people can get agitated if that cooperation is missing and take setbacks to heart.'

Guy loves VS Naipaul's 1961 novel, *A House for Mr Biswas*. 'It's a great book about a man's comic but dignified struggle for self-identity,' he says.

Perhaps it was inevitable that Guy would end up where he is. ■

Damian Page
Deputy General Counsel

Damian advises clients on a broad range of constitutional and public law issues, including the operation and effect of Commonwealth privacy and secrecy laws, telecommunications interception legislation, health and social security law, defence and national security legislation, and the application of State and Territory law to the Commonwealth. He has been closely involved in assisting clients to develop significant legislative schemes and amendments. While outposted to an intelligence agency for several years, he gained significant experience in advising on the effect of national security legislation.

'A notable matter is the work we have done with the Department of Defence in relation to the contamination of Defence land and nearby properties with PFAS, a chemical substance in firefighting foams previously used by Defence. The issue has generated widespread public concern and led to class actions against the Commonwealth. With Defence's support and encouragement, we assembled a small team of lawyers to advise Defence on a wide range of significant and complex public law issues, often in summary form in light of the volume of legislation that needed to be considered. The team approach means that we have been able to respond very promptly and bring relevant expertise to the tasks. Although this approach has not "solved the problem" of PFAS contamination, it has helped to identify a range of potential legal and legislative issues early and provided reassurance for Defence on particular issues so that it is able to concentrate on more immediate policy responses and the class actions.'

Wancy Lam
Senior General Counsel

Wancy works primarily in statutory interpretation, legislation development, constitutional law and administrative law (particularly privacy). She has a master's degree in international law. As an outposted AGS lawyer, Wancy has worked in 8 client agencies and advised on a wide spectrum of issues relevant to the Australian Government. In 2016, Wancy led a legal team assisting with reform of the governance framework for Norfolk Island.

'As a veteran in AGS's outpost practice, I have had the opportunity to be closely involved in numerous exciting projects in areas ranging from climate change and foreign aid to the regulation of therapeutic products. But managing the legislative project for the Norfolk Island reform in the final months before its commencement on 1 July 2016, to complete the legal foundation within a compressed timeframe to transition Norfolk Island from its own legislative regime to a new regime consisting of Commonwealth laws and applied New South Wales laws, proved to be one of the biggest challenges. The scale of the project and the mind-boggling legal intricacies meant many long days in the office, often 7 days a week. The grand finale saw us working over the Easter long weekend, together with our instructors in the Department and the drafters in the Office of Parliamentary Counsel, racing against the clock to get across the finishing line.'

Adam Cason
Senior General Counsel

Adam advises on statutory interpretation, administrative law, constitutional law and legislative development. His experience includes developing and implementing complex legislation, such as the regulatory framework for the structural reform of the telecommunications industry and amendments to the telecommunications-specific access arrangements under the *Competition and Consumer Act 2010*.

'Recently I've been part of the small team of lawyers advising about possible legal measures to address the anticipated shortfall in gas in the domestic market. This has involved providing advice on a range of constitutional, international and administrative law matters, frequently on an urgent basis, and working closely with our clients in the Department of Industry, Innovation and Science to find solutions to address an important issue for the Government.'

CASE STUDY

Some members of the PBR team
BACK ROW L–R: Kev Whitton, Kim Baker, Jon Box
FRONT ROW L–R: David McKay, Emma Lindfield, Rebekah Barrett, Catherine Sainsbery, Krista Vane-Tempest

New parliamentary resources framework

In August 2015 the Australian Government established a committee to consider options for implementing an independent parliamentary entitlements system.

The committee delivered its findings, in its report entitled 'An Independent Parliamentary Entitlements System', in February 2016. The report made a number of recommendations about reforming how parliamentarians access and are accountable for their use of public resources in conducting parliamentary business. Key recommendations included establishing a principles-based framework for access to resources, and increasing emphasis on transparency and accountability.

The Government accepted in principle the recommendations made by the committee, and the Department of Finance has had primary responsibility for implementing those recommendations in conjunction with other key stakeholders such as the Remuneration Tribunal (which has particular statutory functions relating to parliamentarians' remuneration).

In January 2017, the Government also announced its intention to establish the Independent Parliamentary Expenses Authority (IPEA) as a compliance, reporting and transparency body with oversight of the work expenses of parliamentarians.

To give effect to these decisions, the Commonwealth Parliament has enacted 2 significant new laws this year, the *Parliamentary Business Resources Act 2017* (the PBR Act) and the *Independent Parliamentary Expenses Authority Act 2017* (the IPEA Act).

The PBR Act will commence on a day to be fixed by proclamation, and will play a key role in implementing the committee's recommendations. The PBR Act provides for a new parliamentary expenses framework and establishes overarching accountability mechanisms. Key features include the creation of obligations on parliamentarians to act in good faith in their use of public resources, to claim or use public resources only for the dominant purpose of their parliamentary business, and to ensure their use of public resources provides value for money for the Commonwealth.

To support the commencement of the new PBR scheme, the Department is working in conjunction with the Remuneration Tribunal and the Office of Parliamentary Counsel to translate the large number of existing instruments that set out the detail of the transition from the current parliamentary entitlements to the new more streamlined and principles-based framework, in line with the committee's recommendations.

The IPEA Act commenced on 1 July 2017. IPEA's various functions, set out in s 12 of that Act, include general oversight of payment and accountability for parliamentarians' use of travel entitlements. In managing IPEA's establishment, the Department dealt with issues involved with the movement of staff to IPEA, and instructed the Office of Parliamentary Counsel on drafting the IPEA Act.

IPEA will perform functions in respect of the current parliamentary entitlements scheme until the PBR scheme commences, at which time amendments to the IPEA Act will also commence to give effect to IPEA's transition to the new PBR framework.

AGS has provided legal support to the Department over the course of the project. Lawyers in the Office of General Counsel including **Guy Aitken QC** (Chief General Counsel), **Leo Hardiman** (Deputy General Counsel), **Olivia Abbott** (Senior General Counsel), **David Lewis** (Senior General Counsel), and **Elizabeth Southwood** (Counsel) advised on various issues relating to the establishment of IPEA and the development of legislation to give effect to the new framework. More recently, Catherine Sainsbery (Counsel) has been seconded to the Department's in-house legal area to assist with more detailed work on the new PBR instruments. ■

Guy Aitken QC

Leo Hardiman

Olivia Abbott

David Lewis

Elizabeth Southwood

Tom Howe PSM QC

AGS's most senior dispute resolution practitioner, Tom Howe PSM QC has professional oversight and responsibility for AGS's dispute resolution practice across Australia. He advises on all issues relating to public law matters, and has delivered in-house counsel services for more than 30 years, leading to more than 180 published decisions of courts and tribunals, including many precedent-setting cases. He also acts as legal adviser to commissions and inquiries into parliamentary and executive conduct.

We asked Tom to describe the circumstances that led him to a career in government law, and what's kept him interested and enthused over the years.

'I chose to study law in a fairly unthinking way. Back in the mid-1970s we didn't have much assistance at school when choosing possible career paths. The basic organising principle was to study whatever your marks corresponded to – hence I ended up studying law. It was a series of pretty random events that led me to AGS after graduation. I intended to stay for a year or 2, then do something completely different (outside the law). But I quickly developed a love for government law, blinked, and 31 years later ...

'Becoming a lawyer was a bit counter-cultural within my family. I don't think I was destined to become a lawyer, but am now very glad I did so. The clients I've worked with over the years have been fantastic – and I still shake my head at the amount of incredibly interesting work I get to do with and for them.'

Influences

Through the various stages of Tom's career, he has been affected, encouraged and sustained by the positive qualities of the people around him. Asked to identify those who've left the strongest mark on him, he cites a diverse group.

'I completed articles of clerkship rather than attending College of Law because I was a bit sick of full-time study and jumped at the chance to earn a wage. My "master solicitor" Jonathon Bell (these days a vigneron, and OAM recipient) was a terrific influence. He really encouraged hard work, independent thinking, and client service.

'After 3 years in private practice, I spent a couple of years at the ACT Legal Aid Office, which exposed me to social justice aspects of legal practice.

'Then, after arriving at AGS, I was lucky enough to work with a series of extraordinary people – principal among them being Joan Bonsey (my supervisor when I joined Government Law), Barry Leader (my predecessor as Chief Counsel Dispute Resolution) and Louise Vardanega, who was then Director of AGS's Canberra office (and has since become AGS's Chief Operating Officer).

'Joan had a passion for statutory construction. She approached a problem of statutory construction as a sort of sleuthing exercise. She always mastered the overall statutory scheme before grappling with the particular provisions of most direct relevance ("read to the bottom of the page, then keep reading ..."). Barry was extraordinarily careful and considered, but also very strategic and expansive in his approach to legal issues. Louise has a natural affinity for solving problems – legal and otherwise. She continues to be an extraordinary presence in my working life, along with AGS Executive Legal Assistant Judy O'Neill. Having worked with Louise and Judy for nearly all of my time at AGS, I cannot imagine my working life without them.

'As much as I loved the work itself, it has really been my AGS colleagues, past and present, who have kept me at AGS over the last 3 decades.'

Body of work

Tom was appointed as Commonwealth Queen's Counsel in 2007 in recognition of his extraordinary contribution to Australian law and the Australian Government over many years of outstanding service. His contribution to Commonwealth legal services was further recognised by the award of a Public Service Medal in 2015.

He has appeared in very high-profile cases, such as the first tranche of terrorism-related proceedings which came before courts and tribunals following the post-September 11 reforms to national security laws; the Qantas lockout; the Federal Court challenges brought by James Hird and Essendon Football Club against the Australian Sports Anti-Doping Authority; the Oil-for-Food Inquiry; the Home Insulation Royal Commission; the 'Palace Papers' case in the Federal Court; proceedings in the High Court involving Man Haron Monis and Clive Palmer; the Montara Commission of Inquiry; and various workers' compensation and discrimination cases in the High Court and Federal Court.

Disciplinary cases Tom appeared in remain leading authorities on topics such as drug-testing of employees and the extent to which employers can discipline employees for their private conduct.

However, when reviewing cases he has been involved in Tom says that the disputes which have not progressed to court have been as rewarding and interesting as those that have been litigated: 'The opportunity to influence how government interacts with disputants, within a system governed

by the rule of law, has been a great privilege and enduring source of work satisfaction.'

Tom has advised departments and agencies on myriad issues, such as the establishment and operations of the Defence Abuse Response Taskforce and other executive schemes.

He has acted in the role of Commonwealth Solicitor-General on many occasions over the last 5 years.

Beyond AGS

Tom has been involved with the ACT Law Society (as the ACT Bar Association's nominee to the Legal Practice and Ethics Committee), the ACT Bar Association and Council, the Law Council of Australia and the National Alternative Dispute Resolution Advisory Council. His major current professional association is with an ADR think-tank called the Australian Dispute Resolution Advisory Council (ADRAC), of which he is a co-founding member.

'ADR mechanisms remain under-used in Australia in a wide array of disputes. ADRAC-related work keeps me quite busy at times, but the opportunity to contribute to it is something I value greatly. I would encourage people to visit ADRAC's website: adrac.org.au, and read the papers it has published on several dozen interesting ADR-related topics.'

Advice for new lawyers

Given the exceptional achievements and longevity that have characterised Tom's career, we asked him to offer some advice to young lawyers aspiring to similarly sustained and productive involvement in the profession.

'If a new lawyer was seeking the formula for a satisfying and enjoyable career, I would say: work hard, look for challenges and opportunities, and be prepared to really learn from your mistakes. In addition, try not to take things too seriously. Most things do usually work out OK in the end.

'I'd also recommend striving for proper work/life balance. I get it right sometimes, and sometimes I don't. I suspect that, at the end of the day, most hard-working people end up spending more time than they should at work and less time than they should with their families. Few people at the end of their lives will look back and wish they had spent more time in the office.' ■

> If a new lawyer was seeking the formula for a satisfying and enjoyable career, I would say: work hard, look for challenges and opportunities, and be prepared to really learn from your mistakes ...

Sonja Marsic
Senior Executive Lawyer

Sonja works in the Civil Regulation team and has been with AGS for 22 years. Her main client for some years has been the Australian Transaction Reports and Analysis Centre (AUSTRAC).

'It's been a privilege to run AUSTRAC's first 2 civil penalty proceedings – the first against Tabcorp and the second recently filed matter, against CommBank. We achieved a record $45 million civil penalty order against Tabcorp, and a very strong precedent for all regulated entities on the need to have appropriate risk management programs in place to counter money-laundering and terrorism financing. We intend to build significantly on this precedent with the CommBank matter and hope to see improvements in bank culture'.

Fiona Dempsey
Senior Executive Lawyer

Fiona is responsible for managing complex litigation across a number of jurisdictions and legal areas, including compensation and administrative law. She is team leader of the national Employment and Compensation team.

'Over my 10 years at AGS, I have had the opportunity to work on a wide range of interesting and important matters, in various jurisdictions, where creativity and innovation were critical to the outcome, including in the High Court. This is one of the great things about working at AGS and in litigation. One matter that stands out was a colour trademark dispute, a growing area of law and a matter that required innovative solutions to a range of challenges, including collation and presentation of evidence. Another is working on an urgent injunction brought by a candidate to stop the count in an electorate in the 2013 Federal election. Having said that, it's not just the prominent matters that are interesting and challenging. My veterans' entitlements and compensation work also often involves a range of interesting issues and challenges, including complex legislation and questions of statutory construction.'

Emily Nance
Senior Executive Lawyer

Emily has practised in administrative law for close to 20 years. She specialises in *Administrative Decisions (Judicial Review) Act 1977* and *Judiciary Act 1903* review proceedings, migration law and *Environment Protection and Biodiversity Conservation Act 1999* proceedings, as well as limited merits review proceedings under the National Electricity Law and National Gas Law.

'I have had a long and very rewarding working relationship with the Department of the Environment and Energy, representing the Minister in a range of fascinating and challenging matters arising under the Environment Protection and Biodiversity Conservation Act 1999. *Decisions made under that Act raise a range of complex legal and procedural issues, including often both international law issues and difficult questions of statutory construction. They also routinely involve volumes of detailed scientific analysis and are often high profile. It has been a privilege to help the Department successfully defend many of these decisions, and in the process obtain useful precedents on the operation of this important piece of environmental protection legislation.'* ■

The Inquest into the death of **Ahmed Numan Haider**

CASE STUDY

On 31 July 2017, the Coroners Court of Victoria handed down its finding in the Inquest into the death of Ahmed Numan Haider.

Mr Haider was 18 years old when on 23 September 2014 he was shot and killed while attempting to slay 2 police officers in a first of its kind (certainly in Australia), 'lone-actor' act of terror. The Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) were closely involved in the incident and both instructed AGS and represented the Commonwealth's interest before the Inquest.

The circumstances of Mr Haider's death

Mr Haider came to ASIO's attention in May 2014 as an Australian citizen with an expressed intention of travelling to the Middle East to fight for the Islamic State of Iraq and Syria (ISIS). ASIO began to investigate him and, when Mr Haider applied for a passport, his application was placed on hold and ultimately refused.

Mr Haider's focus began to shift towards committing a domestic act of politically motivated violence. ASIO alerted the police through the Melbourne Joint Counter Terrorism Team (JCTT), consisting of the AFP, Victoria Police and ASIO. It was agreed that JCTT would speak to Mr Haider to further assess and manage the risk he posed to public safety.

On 23 September 2014, the JCTT arranged to meet Mr Haider outside of a police station. Mr Haider met with Officer A (a Victoria Police member) and Officer B (an AFP member). He shook their hands. Then, unexpectedly, he produced a knife and began to attack Officer A, wounding him. When Officer A lost his footing, Mr Haider began to attack Officer B. As Officer A recovered his footing, he could see that Mr Haider was stabbing Officer B in the chest area. Officer A shot and killed Mr Haider in an act of self-defence.

The broader context in which the attack occurred

The circumstances of Mr Haider's death were remarkable in their own right. However, their significance and the profile of the Inquest were compounded given the wider context and timing of Mr Haider's attack on the police.

In the immediate period leading to Mr Haider's death, the terror threat faced by Australia and the rest of the world was evolving rapidly due to the events in Syria and Iraq. Increasing numbers of people were being radicalised through sophisticated online propaganda of terrorist organisations such as ISIS.

By early 2014, ASIO was investigating many young men like Mr Haider suspected of intending to travel to the Middle East to fight for insurgent groups such as ISIS.

Recruitment rates increased sharply after ISIS declared the caliphate in June 2014 and formed the so-called Islamic State (IS). However many, like Mr Haider, were prevented from traveling through passport cancellation or refusal.

On 12 September 2014, the Australian Government, on advice from ASIO, raised the national terrorism threat level from 'medium' to 'high' (meaning a terrorist act was assessed as likely). This reflected the worsening threat environment and was the first time the threat level had changed since 2001.

The days surrounding this announcement also saw the AFP executing significant counter-terrorism warrants. On 10 September 2014, through JCTT Brisbane, the AFP disrupted a network allegedly engaged in the recruitment and financing of foreign fighters to Syria. Further, on 19 September 2014, the AFP (through JCTT Sydney) executed 28 warrants as part of a criminal investigation into the planning of a terrorist attack on Australian soil (a plot to behead a random civilian in a public place).

On 20 September 2014, 3 days before Mr Haider attacked the police, IS issued a fatwa (specifically referring to Australia amongst other countries such as the USA and France) calling upon its supporters to carry out lone-actor attacks in their own countries and, in particular, against military and police targets.

The Inquest

In discharging its function, the Court looked closely at the knowledge and conduct of several State and Federal agencies (including ASIO and the AFP) to assess whether Mr Haider's death was preventable.

In doing so, the Coroner is not bound by the rules of evidence and can determine their own procedure. Further, their findings of fact and recommendations are not reviewable 'on the merits', but only for jurisdictional error or an error of law in making findings or recommendations.

Given this legal context, and the controversial nature of any police-shooting inquest, the coronial inquests for government agencies such as AFP and ASIO, for the most part, can involve risks rather than opportunities.

This Inquest was no different. AGS and Counsel (Dr Stephen Donaghue QC and James Forsaith) worked tirelessly with AFP Legal and ASIO to put forward strong evidence and submissions on behalf of the Commonwealth to protect the agencies and their officers from adverse findings and recommendations that the Commonwealth considered unjustified, and reputational damage in the circumstances of the Inquest that attracted significant media attention.

We were successful. The Coroner made no adverse findings against any officer or the AFP, ASIO or the Victoria Police. To the contrary, his Honour commented: *'My investigation has revealed that the men and women who work in this increasingly complex field of counter-terrorism are committed, courageous and worthy of our upmost respect, and their commitment to preserving our national security is exemplary.'*

AGS echoes the Coroner's comments. **Dejan Lukic**, the AGS lawyer who acted for the Commonwealth, in particular said:

'This was the most challenging, but certainly the most rewarding matter that I have ever worked on. It gave me immense professional and personal satisfaction that the Coroner recognised the efforts of men and women who work for AFP, ASIO and Victoria Police (many of whom I've had the pleasure of meeting and working with during the matter) that have devoted (and risk) their lives in protecting the public from harm. I also particularly enjoyed working with representatives for AFP and ASIO who always acted with utmost professionalism and care in providing instructions that achieved such an outstanding result for the Commonwealth.' ■

AGS news

AGS's Jane Lye (left) and Elena Arduca at the awards ceremony

AGS's Jane Lye finalist 'In-house lawyer of the year' at *Lawyers Weekly* Women in Law Awards 2017

On Friday 20 October 2017, Jane Lye was a finalist in the category of 'In-house lawyer of the Year' at the *Lawyers Weekly* Women in Law Awards, which recognises the success of female legal professionals who demonstrate a passion for the law and dedication to personal advancement.

Jane is an outstanding government lawyer, leader and mentor. A highly effective operator, Jane manages teams including as Director of the AGS Brisbane Office, leader of AGS Dispute Resolution's national tax team and at the helm in the conduct of high-profile legal matters for the Commonwealth.

Her involvement as Chair of the South Queensland committee of the Australian Government Leadership Network also demonstrates the priority Jane places on the provision of high-quality legal services to the Commonwealth. She excels in all areas of her work and undertakes her roles with passion and integrity.

Jane is also well-known at AGS as a first-rate supervisor and mentor, devoting her time, insights and support to many AGS lawyers both in Brisbane and nationally, in guiding their career development. In particular, she has a passion and ability for promoting engagement and advancement of women in litigation careers.

'Over many years, AGS has been a model for the employment and encouragement of women lawyers. I feel very honoured to represent AGS but also the legal profession', said Jane.

As a finalist in this award, Jane represents the highest quality of women in law in Australia. We congratulate her on this outstanding and well-deserved achievement. ■

AGS

Class actions

Recent trends in litigation – the rise of the class action against the Commonwealth

In recent years, AGS Dispute Resolution has seen an increase in the number of representative actions[1] brought against the Commonwealth. These actions raise unique and significant legal issues which the Commonwealth, and those representing it, must consider. Due to the size and complexity of the matters, class actions require collaboration with multiple government agencies and departments and a pragmatic approach to the resolution of the issues in dispute.

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The rise of the class and representative action

The types of matters which have recently been commenced as representative actions against the Commonwealth arise out of a myriad of different factual situations and out of different legislative and common law causes of action. They have been brought in both State Supreme Courts[2] and also in the Federal Court of Australia.

In this issue

The breadth and scope of the types of matters which have recently been litigated and resolved, as class actions against the Commonwealth, and in which AGS has acted, include the following matters:

- *Duval-Comrie v Commonwealth*: In 2016, the Federal Court approved the settlement of a complex and long-running class action brought on behalf of over 10,000 intellectually disabled members against the Commonwealth. In that case the class members alleged discrimination by the Commonwealth in developing and promoting the use of the Business Services Wage Assessment Tool (BSWAT) – a tool used to assess the wages of workers with disabilities in supported employment.

  The settlement involved legislative amendment to increase the amount that class members could obtain under the BSWAT Payment Scheme [see *Australian Government Solicitor* magazine issue 2 for the case study].

- *Kamasaee v Commonwealth*: In 2017, the Victorian Supreme Court approved a settlement involving a personal injury and false imprisonment damages claim, brought by nearly 2,000 persons transferred to Manus Regional Processing Centre in Papua New Guinea pursuant to the *Migration Act 1958* (Cth) against the Commonwealth and its contract service providers.
- *AS v Commonwealth of Australia & Ors*: In 2017, the Commonwealth resolved a personal injury claim on behalf of a minor, who was the representative plaintiff in a class action in the Victorian Supreme Court involving potentially 35,000 asylum seekers detained under the Migration Act at the Christmas Island Detention Centre between August 2011 and August 2014. The Commonwealth resolved the minor's claim, and therefore the entire proceedings, after successfully persuading the Supreme Court that the action should not continue as a class action.
- *Ibrahimi v Commonwealth*: In 2017, the NSW Supreme Court dismissed a claim brought against the Commonwealth on behalf of the injured passengers and relatives of passengers who perished on board Suspected Illegal Entry Vessel (SIEV) 221 when it became shipwrecked off the coast of Christmas Island.
- *Giles v Commonwealth of Australia*: In 2015, the NSW Supreme Court approved a settlement of a personal injury claim against the Commonwealth, the State of NSW and the Fairbridge Foundation, brought by 2 plaintiffs on behalf of a group who alleged that, as children, they were subjected to systemic physical and sexual abuse at the Fairbridge Farm School in NSW.

AGS is currently acting in a number of ongoing class actions, including:

- *Roo Roofing Pty Ltd v Commonwealth of Australia*, which businesses have sued the Commonwealth in the Victorian Supreme Court over the termination of the Home Insulation Program
- *Brett Cattle Pty Ltd v Minister for Agriculture and the Commonwealth*, in which the representative applicant has brought proceedings in the Federal Court on behalf of livestock producers, exporters and related industry participants, over the second suspension of the export of live cattle to Indonesia in June 2011
- *Smith v Commonwealth*, in which the applicants have brought proceedings over the contamination of their land around the Williamtown airbase in NSW as a result of the use of aviation fire-fighting foam [see case study on PFAS contamination in this issue]
- *DBE 17 v Commonwealth*, in which a minor has brought proceedings against the Commonwealth in the Federal Court, on behalf of persons who have been detained in accordance with the Migration Act between August 2011 and July 2017, alleging unlawful detention.

AGS has also seen the development of 'quasi class actions' where a claim is brought by many plaintiffs or multiple claims have been brought against the Commonwealth arising out of the same or similar factual situations, particularly in those jurisdictions where the State or Territory Supreme Courts have only limited rules and procedures to accommodate class actions. While not strictly 'class actions', these proceedings also pose similar practical and legal challenges when acting for the Commonwealth.

Challenges in class actions involving the Commonwealth

By their very nature, class actions have a number of unique features, including their size, particular court rules that apply and the process of ongoing supervision and case management by the Court throughout the duration of proceedings.

The class actions brought against the Commonwealth in recent times also raise issues of novel or new legal claims against the Commonwealth, for example alleging a duty of care that has not been previously tested or found to exist. Perhaps the most notable feature of class actions brought against the Commonwealth is their size and complexity. The claims often raise difficult issues of fact and law and require consultation and collaboration with multiple government agencies.

In some of the most recent proceedings in which AGS has acted, there have been thousands of members in the potential class. The size of the class can raise potential diversity of circumstances of different class members, though they must prove that they are related through common questions which are identified for determination.

The scale of representative actions, as compared with individual actions, affect many procedural steps, including:

1 Commencement of actions

An applicant or plaintiff commencing a class action must meet a number of threshold requirements, including:

- a minimum of 7 persons
- claims arising from similar or related circumstances, and
- a substantial common issue of law or fact.

These threshold requirements mean that an applicant or plaintiff must invest considerable time into ensuring that the matter is suitable for a class action. It is essential if matters are to proceed as class actions that the definition of those who fall within the class is clearly identified and that there are common questions for determination which apply to all of the individual members. If there are not, there is the risk that the proceedings become inefficient or do not resolve the areas in dispute.[3] An applicant or plaintiff (by their legal representatives) must take considerable care in establishing the substantial common issues of law or fact. Failure to do so may mean that the parties to an action that is not suited to being a class action are endlessly distracted with satellite litigation which unnecessarily delays consideration of the real issues in dispute. Further, in the absence of commonality, there is a risk that the Court will order that the proceedings should not continue as a representative proceeding, resulting in significant costs being thrown away.

An inevitable consequence for the Commonwealth of the threshold that must be crossed by an applicant is that once such an action is commenced, an applicant is much less likely to walk away from an action unless compensation has been paid.

2 Discovery and other interlocutory matters

The scale of class actions, and the involvement of at least 7 (and often many, many more) plaintiffs or applicants means that it is often more difficult to resist discovery processes in class actions for documents that do not relate to a specific plaintiff than it is in comparable single party actions.

In actions involving the Commonwealth, Courts will frequently be attracted to the concept of the discovery of documents describing government policies and practices which might inform the issues in dispute. A key priority for the Commonwealth is to restrict discovery to the agency (or agencies) that are directly involved in the issues in dispute. Even then, experience suggests that the sensitivity of discovered material will frequently involve other agencies, particularly when it is necessary to consult with agencies on restricting disclosure of information to avoid prejudice to the public interest in accordance with paragraph 7 of the *Legal Services Directions 2017* (Cth).

In our recent experience, discovery in class actions has involved many hundreds of thousands of documents, with dozens of Commonwealth officers across many agencies involved in searching for, retrieving and assessing documents to be discovered.

Commonwealth lawyers must then assess the documents for relevance, privileges and sensitivity, with a further process of review by subject matter experts in relevant agencies to identify any prejudice to the public interest in the disclosure of documents. Despite the increasing scale of the discovery exercise, our experience is that very few documents are tendered or otherwise relied on in the trial of the ultimate proceeding. For class actions where the issues in dispute are complex, where there are possibly thousands of group members and where damage said to have been suffered by the group may date back

decades, the number of documents that may be discoverable can be very significant. In these cases, it is easy for the process of discovery to become oppressive without careful management[4] – both for the Commonwealth and also, for the applicant or plaintiff, who then has to review the material.

Courts will be reluctant to relieve the Commonwealth of discovery obligations only by reason of the volume of material alone. In many cases, large volumes of material are reviewed and ultimately discovered and produced by the Commonwealth. In these cases, AGS uses electronic document management technology to assist in the discovery process. These technologies can streamline the review process, create efficiencies and have other benefits in document management if the matter proceeds to trial. By way of example, in *Kamasaee*, AGS used document management technology to:

- remove duplicates or near duplicates
- eliminate or reduce the need to review individual documents by the use of visual analytic tools to identify clusters of irrelevant information
- refine searches of repositories which were more likely to hold relevant information.

AGS relies on document management technology to assist with the preparation of documents for trial, including documents containing sensitive information. The parties retained a firm specialising in the conduct of electronic trials to assist with this process.

However, in some cases where the volume of material to be reviewed is oppressive or of limited relevance, orders for discovery can be resisted or, alternatively, limited in their reach. In *Giles*, the Commonwealth successfully resisted the plaintiff's application for discovery on the basis that the scope of documents sought to be discovered would have required the Commonwealth to review in excess of 20,000,000 documents and 3,382,470 files held by the National Archives and the Department of Immigration and Border Protection.[5]

3 Resolution of proceedings

Even the resolution of class actions is unique and complex. In most matters, the parties are able to reach settlement and enter consent orders disposing with the proceedings. This is not so for class actions for a number of reasons. As most class actions are 'significant matters',[6] Commonwealth agencies must ensure approval by the Attorney-General or their delegate before the agency can enter into settlement negotiations. Even once settlement is agreed in principle, the rules of court require the approval by the court of any settlement (including if the settlement involves a discontinuance of the proceeding) to ensure that it is fair and reasonable and in the interests of the group members as a whole.[7]

Courts are very properly protective of the role they have in considering whether to approve the resolution of a class action. It will often be necessary for the parties, including the defendants, to make submissions, often on a confidential basis, on why the settlement is fair and reasonable for the group members as a whole.

The process of matters that run to trial for determination by the Court will also be more complex – in that event, the parties and the Court must have appropriate regard to the common questions that the Court will determine and precisely how the answers to those common questions will inform the assessment of related claims by class members in a way which maximises the utility of the initial trial. Failure to do so will lead to lengthy trials which determine so few common questions that each other group member's claim will face a further lengthy trial.

Pragmatic approach to class actions

Because of the unique nature of class actions and the possibility, if not managed properly, for them to become unwieldy and costly, AGS's experience has been that a pragmatic approach ensures the best outcome for all parties.

Early engagement with your legal team, including counsel, is essential. The priority is to ensure that the team appointed has sufficient experience in managing complex stakeholder relationships and is led by solicitors and counsel who have the ability to ensure a strategic approach which has appropriate regard to the many moving parts in such large-scale matters.

It's also essential that the core team meets on a regular basis to ensure those many moving parts are tracking appropriately at all times as the litigation progresses. Having that common team also allows for the team to be sufficiently flexible to adapt to the emerging needs of a litigation, conversely expanding and contracting as the matter develops at critical points, without losing the overall direction of the matter towards defence through a trial or resolution.

Consideration of interlocutory applications at the early stages of the proceedings, is also important. For example, strike-out applications can assist to refine the issues genuinely in dispute and to ensure unnecessary time and money is not spent on claims which are not tenable as a matter of unnecessary time and money is not spent on claims which are not tenable as a matter of law.[8]

Consideration should also be given at the earliest opportunity to whether the proceedings themselves are properly brought as a class action. This requires a consideration of the definition of the class members, whether there are common issues of fact and law, and also whether the proceedings will provide an efficient and effective means of dealing with the claims of the class members.

Finally, consideration of security for costs application should be given where litigation funders are involved. Security for costs applications raise special issues in class actions. In the Federal Court and Victorian Supreme Court, there is an emphasis on the early and open disclosure of funding proposals. This is important for a number of reasons but also can inform whether an application should be brought, because Courts will be reluctant to impose security just because an applicant or plaintiff has insufficient funds.

In conclusion, the last few years has seen an increase in class actions against the Commonwealth, arising from a variety of circumstances, in both personal injuries and commercial disputes. While there are many challenges, there are advantages to the Commonwealth in class actions, including:

- the costs of a class action will generally be less than litigating multiple related claims
- the resolution of a class action is much more likely to achieve sustained finality of the result and avoid similar issues being re-litigated
- greater coordination of Commonwealth resources in managing large-scale litigation and greater appreciation of risk and the challenges faced by the Commonwealth as a litigant
- streamlining of claims arising from similar circumstances, with assistance of the Court's case management procedures.

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1 Representative actions are also known as class actions or group proceedings. These terms are used interchangeably in this article.

2 The party bringing an action in a representative action in a State Supreme Court is the plaintiff, whereas that party is the applicant in proceedings in the Federal Court. In State Supreme Courts, the plaintiff sues the defendant, whereas the equivalent party in the Federal Court is the respondent. These terms are used interchangeably throughout this article, reflecting AGS's representative action practice experience in both State Supreme Courts and the Federal Court.

3 *AS v MIBP & Anor* [2014] VSC 593.

4 See *Giles v Commonwealth of Australia* [2014] NSWSC 83 and *AS v MIBP & Anor* [2014] VSC 593.

5 *Giles v Commonwealth of Australia* [2014] NSWSC 1531 at [19] per Garling J.

6 In accordance with the description as outlined in paragraph 3.1 of the *Legal Services Directions 2017*.

7 See s 33V of the *Federal Court of Australia Act 1976*, s 33V of the *Supreme Court Act 1986* (Vic).

8 *AS v Minister for Immigration and Border Protection & Anor* [2014] VSC 593; *AS v Minister for Immigration and Border Protection & Anor* [2016] VSC 351.

Securities

Increasing your chances of successfully calling on an unconditional bank security

Unconditional bank guarantees, sometimes described as bank undertakings (both of which we refer to here as 'unconditional bank securities') are a form of security often used in construction contracts and commercial leases.

A hallmark of an unconditional bank security is the ability to convert it into cash on presentation to the relevant bank. While the terms of the security may be unconditional, often the contract or lease will qualify the right of the principal or lessor to call on the security. Recent authority has confirmed the unconditionally of the bank security itself; however, outlier decisions at the Supreme Court level remind us of the need to clearly detail in the contract or lease when the principal or lessor may call on the security.

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A promise to pay, with a contractual overlay

Unconditional bank securities are obtained by contractors or tenants from a bank and are commonly given to a principal or lessor as security for the due performance of the contract or lease. The security is an undertaking by the bank to the principal or lessor that the bank will pay it the amount of the security upon demand, often without consulting the contractor or tenant.

It is important to remember that the terms of a contract or lease may qualify the principal's or lessor's right to call on the unconditional bank security (at least so far as concerns the contractor or tenant). For example, the contract or lease may require the principal or lessor to give 3 days' notice in writing to the contractor or tenant of its intention to have recourse to the security. The contract or lease may also limit when the principal or lessor may call upon the security, even though the security itself may be unconditional.

Often, however, the contract or lease is silent on the question of when a principal or lessor can call on the unconditional bank security – this silence can itself lead to disputes between the parties.

When can a principal or lessor call upon an unconditional bank security?

The conventional rule is that a principal or lessor will not be restrained from calling on a bank security for an alleged breach where the claim is made in good faith.[1] The rule is qualified by 3 exceptions, in that a principal or lessor cannot have recourse to the security if:

- the recourse is fraudulent
- the recourse is unconscionable
- the principal or lessor has promised, either expressly or impliedly, under the contract that they will not call upon the security until it has been objectively determined that it is entitled to payment from the contractor or tenant (ie the contract or lease contains a negative stipulation).[2]

The principal's right to call on an unconditional bank security was firmly established in the Full Federal Court decision of *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458, and it was most recently reaffirmed in the Supreme Court of Western Australia decision of *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] WASC 112. *CPB Contractors* confirmed that a beneficiary of an unconditional bank security can have recourse to it automatically and without having to establish that the existence of the breach is either agreed between the parties or beyond dispute. Provided that none of the above exceptions are triggered, a principal or lessor can approach the issuing bank and have the security paid out without question from the bank or without threat of an injunction from the contractor or tenant. Justice Le Miere, whose decision was upheld on appeal,[3] emphasised that:

> clear words will be required to support a construction which inhibits a beneficiary from calling on a performance guarantee where a breach is alleged in good faith, that is, non-fraudulently.[4]

Generally, the provisions of contracts or leases related to unconditional bank securities are considered to serve 2 purposes:

- to provide security for a valid claim against the contractor or tenant
- to allocate risk between the parties as to who shall be out of pocket pending the resolution of any dispute between them.[5]

Whether the unconditional bank security is intended to serve one, the other or both purposes is a question of construction of the relevant provisions of the contract or lease and the terms of the security itself.[6] It can be critical to establish what the intended purpose of the security is, should a dispute arise between the parties as to when the principal or lessor is entitled to call upon the unconditional bank security.

A court is unlikely to find that a contract contains an implied negative stipulation if the purpose of the unconditional bank security would be defeated by restricting recourse to the security to only those instances where the breach is agreed or indisputable.[7] While each case will depend upon subtleties of the particular contractual provisions, the following factors have been found to be consistent with a finding that the provisions of the contract or lease are intended to both provide security for the principal or lessor and serve the purpose of allocating risk of a dispute to the contractor or tenant:

- where the provision requires the bank security to be an 'unconditional and irrevocable undertaking'[8]
- where the provision requires the bank security to be 'payable on first demand'[9]
- where the provision provides that recourse to the bank security can be at 'any time'[10]
- where the unconditional bank security itself requires payment 'without proof of any breach or any other conditions and notwithstanding any contest or dispute'.[11]

While the recent decision of *CPB Contractors* supports the conventional view on how unconditional bank securities operate, there are other cases which illustrate the difficulties that may arise in the absence of an express provision in a contract relating to what the purpose of the

bank security is, or to the circumstances in which recourse might be had to the bank security. *Walton Construction Pty Ltd v Pines Living Pty Ltd* [2013] ACTSC 237 and *Lucas Stewart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 are both construction contract cases in which the court found that a principal's entitlement to have recourse to a guarantee was conditional upon the objective fact of the contractor's non-compliance. In those cases, it was not enough that the principal asserted it had a claim for breach; that breach had to be agreed or objectively determined before recourse could be had to the guarantee.

A similar conclusion was reached in *Universal Publishers Pty Ltd v Australian Executor Trustees Ltd* [2013] NSWSC 2021, a commercial lease matter, where the court held that if a tenant could demonstrate that there was a serious question to be tried as to the existence of the breach, then the landlord would be restrained from accessing the guarantee. In each of those cases, it was significant to the courts' reasoning that, upon construing the contract, it appeared the bank security was provided solely as security for performance of the contractor's or tenant's obligations (rather than for the purpose of allocating risk as between the parties). This contradicts the approach established in *Clough* and reaffirmed in *CPB Contractors*.

The inconsistency demonstrated by the different approaches adopted by the courts highlights how important it is for parties to make sure that their intentions are clearly reflected from the outset in their contract or lease provisions dealing with unconditional bank securities.

How to draft your contractual security provisions

Consider amending your contract or lease provisions in the following manner:

- Expressly address the circumstances in which recourse may be had to the unconditional bank security.
- The unconditional bank security should be stated to be 'unconditional and irrevocable'.
- Clarify when recourse may be had to the unconditional bank security, as follows:
  - The principal or lessor may call upon the security 'at any time and without the requirement to provide prior notice' to the contractor or tenant.
  - The security will be 'payable on first demand'.
  - Recourse may be had by the principal or lessor to the security 'in the event of an alleged breach'.

It is preferable for the parties to have the discussion about unconditional bank securities prior to execution of a contract or a lease, and to agree the approach to take at that time, rather than face a lengthy court battle over injunctions and interpretation of the relevant contract or lease provisions at a later date.

[1] *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd* (2008) 249 ALR 458 ('Clough').

[2] *CPB Contractors Pty Ltd v JKC Australian LNG Pty Ltd* [2017] WASC 112 at [68] ('CPB Contractors').

[3] *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] WASCA 123.

[4] Ibid at [70] citing *Clough* at [83].

[5] *Clough* [79].

[6] *CPB Contractors at [70]; Cf Lucas Stewart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 at [43].

[7] *CPB Contractors* at [82].

[8] CPB Contractors at [76]; *Fletcher Constructions Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812.

[9] *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420.

[10] *CPB Contractors* at [77].

[11] *CPB Contractors* at [76]; Clough at [100].

AGS

Technology

Technology-assisted review

Discovery is often the most costly stage of litigation.[1] The mere mention of discovery invokes images of junior lawyers locked away in dimly lit rooms for weeks or months reviewing dusty boxes of documents. Modern discovery is a different species, however, regularly involving the review of millions of electronic documents – a result of the ease by which these records are now generated and stored. The proliferation of email has meant that informal messages that were once relayed verbally now take written form, and the low cost of electronic storage means that these records persist, further complicating discovery.

The rise in electronic communication, together with a burgeoning class action sector and growth in complex litigation, presents a challenge for both practitioners and courts. This environment threatens one of the courts' overriding objectives, being the speedy and efficient administration of justice and resolution of disputes.[2]

Against this background, technology-assisted review (TAR) is a useful tool which, if embraced by the profession, has the potential to significantly reduce the time and cost associated with manual document review, and which may also limit the inconsistencies caused by human error.

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Context

The decision of Vickery J in *McConnell Dowell Constructions (Aust) Pty Ltd v Santam Ltd & Ors*[3] (McConnell Dowell No. 1) illustrates how the volume of discovery in large-scale litigation renders traditional review processes inefficient, costly and unwieldy when compared with TAR.

With the use of TAR in that case, the number of documents identified by the plaintiff as relevant had already been reduced from approximately 4 million to 1,400,000.[4] In approving the use TAR, Vickery J relied upon decisions from other jurisdictions including the United Kingdom, Ireland and the United States.[5] Referring to the English case *Pyrrho Investments Limited v MWB Property Limited*,[6] Vickery J observed that the use of de-duplication had reduced the 17.6 million documents involved down to approximately 3.1 million.[7] His Honour found that the further use of TAR would dramatically reduce the number of documents to be reviewed and, conversely, that a traditional review would be neither cost-effective nor proportionate:

> '... employing a traditional manual discovery process can work to place the cost-benefit of conducting litigation in a large document case at serious risk.'[8]

What is TAR?

Although sometimes considered synonymous with predictive coding, TAR is an umbrella term encompassing all methods in which technology can be deployed to assist with document review (including predictive coding). For example:

- **de-duplication**: the identification and subsequent removal of documents with identical content
- **email threading**: the grouping of emails from the same conversation so that they can be reviewed as one document
- **clustering**: a method where documents with similar words are grouped together
- **near de-duplication**: the grouping of similar, almost identical, documents (similar to clustering)
- **concept searching**: a search method that retrieves results based on the ideas expressed in a document as opposed to traditional Boolean keyword searches.

Predictive coding

Predictive coding uses algorithms that can be trained to analyse and code documents for likely relevance or privilege. It does not obviate the need for human review, which remains important, particularly early on when the algorithm is being trained.

Terminology

Two useful measures of the efficacy of predictive coding are 'recall' and 'precision':

- 'recall' is a measure of how well the algorithm retrieves relevant documents (for example, a 75% recall rate means that 75% of relevant documents are retrieved and 25% are missed)
- 'precision' is a measure of how many irrelevant documents the algorithm retrieves (a 75% precision rate suggests that 25% of documents retrieved are not truly relevant).

'Recall' is said to be a measure of completeness, where 'precision' is a measure of accuracy. Generally, both cannot be achieved at the same time: one must be traded off against the other.[9]

Predictive coding protocols are usually described as falling within 3 categories: simple passive learning (SPL), simple active learning (SAL), and continuous active learning (CAL), in increasing order of complexity.

1. **Simple passive learning**: SPL begins with a randomly selected seed set of documents which are reviewed and coded by a human reviewer as relevant or not relevant (or privileged or not privileged). This coding is then used to train the algorithm to build a scoring system which ranks other documents from the broader population along a spectrum of relevance or privilege (for example, on a scale of –1 to 1, where documents with a value of close to –1 are least likely to be relevant, documents close to 1 most likely to be relevant, and documents clustering around 0 to be most marginal). The documents ranked most likely to be relevant will be evaluated to see how 'stable' the algorithm is. If the results are inadequate, more documents will be introduced to further train the system until the algorithm is sufficiently 'stable'. Human reviewers then review and code those documents ranked by the algorithm above a certain threshold, depending on what recall rate is sought.[10]
2. **Simple active learning**: The SAL protocol differs in that the initial seed set does not begin with a random selection of documents; rather, it begins with documents identified as likely to be relevant (usually by keyword search). Another divergence is that as the algorithm is trained, it pulls documents to the seed set which it is most unsure about rather than randomly (so in the above example, documents closest to a value of 0) for manual review and coding. Once the algorithm is sufficiently robust, the process then proceeds in the same way as SPL.

Both the SPL and SAL protocols are initially iterative but become finite when documents are either selected for human review or excluded. By contrast, CAL (as the name implies) remains iterative.

3. **Contiuous active learning**: The CAL protocol begins, again, with an initial seed set which is coded by a human reviewer and used to generate a ranking system for the whole population of documents. A further sample of the top ranked documents from the whole population is then coded by a human reviewer but, unlike SAL and SPL, once coded these documents are then fed back into the algorithm to re-train and improve it. The process is repeated such that human judgments are continuously fed into the system and the whole population of documents is repeatedly re-ranked.

The CAL protocol has been demonstrated to require less human review to achieve a specified recall rate when compared with SAL or SPL.[11] Consequently, it is now the generally preferred method for predictive coding.

In all cases, ideally, the initial seed sets should be reviewed by a senior lawyer 'who has mastered the issues in the case',[12] to ensure accuracy and consistency.

Judicial acceptance

Jurisdictions outside of Australia have embraced both TAR and predictive coding. In the US case of *Rio Tinto Plc v Vale SA*, Magistrate Judge Peck stated that 'it is now black letter law that where the producing party wants to utilize [TAR] for document review, courts will permit it.'[13]

Within Australia, the Supreme Court of Victoria's Practice Note specifically provides that TAR 'will ordinarily be an accepted method of conducting a reasonable search … when there are a large number of Electronic Documents to be searched and the costs of manually searching the documents may not be reasonable and proportionate.'[14] Even before the Practice Note came into effect, on 2 December 2016, Vickery J delivered the first Australian judgment approving the use of predictive coding for the purpose of carrying out discovery in McConnell Dowell No. 1.

While there is no equivalent Commonwealth practice note (yet), the use of TAR is consistent with the principles which guide the courts in making orders for discovery, being the just and efficient resolution of disputes and ensuring that documents sought and produced in discovery are significantly probative in nature. Recent cases confirm that courts are likely to be receptive to the use of TAR.[15]

How can TAR be used in proceedings?

There are case examples where all parties involved in proceedings have agreed to and collaborated on the use of TAR.[16] In such cases, parties may jointly approve a 'predictive coding protocol' and agree, for example, on the appointment of a joint operator,[17] on the criteria for inclusion of documents, and the target 'recall' rate. Where predictive coding is approached collaboratively, all the parties may even review documents to determine their relevance and thereby contribute to training the algorithm.[18]

Unsurprisingly, there are also decisions where parties have disagreed about using predictive coding and/or TAR, or the proposed method for its use.[19] Courts may also order discovery by TAR whether or not the parties consent to it.[20]

As observed by Vickery J in McConnell Dowell No. 1, TAR does not have to be used by all parties involved in the proceedings: a single party can use the technology for its own review.[21]

Issues in TAR

Efficient use of resources

One of the primary benefits of TAR and predictive coding is cost-effectiveness. As noted above, discovery is one of the most costly aspects of litigation. However, there are some time-consuming aspects of predictive coding, particularly in the development stage (for example, agreeing a protocol and training the algorithm). An assessment should be made in each case whether there is a sufficient volume of documents, and hence that there will be later time-saving, to justify the establishment costs. In addition, there needs to be a large enough seed set (usually, 500–1,000 documents) for the predictive coding algorithm to learn from and to apply to a broader population. A larger seed set inversely correlates with margin of error.

In AGS's experience, as a general proposition, at least 5,000–10,000 electronic documents are required for predictive coding to be worthwhile. However, the Supreme Court of Victoria's Practice Note encourages the more general use of technology for matters where the discovery exercise is likely to be significant, specified as involving volumes of only 500 documents or more.[22] While advanced predictive coding tools may not be cost-effective in these smaller matters, parties can still benefit from the use of other TAR tools, such as email threading and de-duplication.

Inadvertent disclosure

Although each of the SPL, SAL and CAL predictive coding protocols contemplates that all documents produced are reviewed by human reviewers,[23] if there is to be minimal manual review undertaken following the application of TAR, there is a risk of inadvertent disclosure of privileged or confidential material.[24] A protocol agreed between the parties can mitigate against this risk (for example, setting out terms for the return and destruction of documents).

Enhanced quality of the discovery processes

Many of the objections raised in relation to the use of this emerging technology question the reliability and accuracy of the review process; yet, traditional human review is far from perfect. As Fullam J noted in the Irish case of *Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors*,[25] predictive coding is at least as accurate, if not more accurate, than manual review processes in discovery involving numerous documents:

> [Even if] one were to assume that TAR will only be equally as effective, but no more effective, than a manual review, the fact remains that using TAR will still allow for a more expeditious and economical discovery process.[26]

Unlike human reviewers, a computer is consistent, does not tire or grow bored of reviewing documents, does not need rest breaks, and can far more rapidly process records.

In any event, the predictive coding protocols described above do not remove lawyers from the review process – lawyers engage with the technology throughout.

Model litigant obligations

A further compelling rationale specific to Commonwealth agencies for using TAR in discovery relates to our responsibilities as model litigants; specifically, our obligation to act honestly and fairly in handling claims and litigation, including by keeping the costs of litigation to a minimum.[27] Arguably, using a technology like predictive coding, which can minimise delay, reduce costs and enhance the quality of discovery, is consistent with this obligation.

Conclusion

The use of TAR will not always be appropriate – for example, where the document pool includes large numbers of hard copy or handwritten documents, drawings or data sets.[28] However, in the context of litigation involving extensive electronic records, it will become increasingly difficult to justify a decision to rely on traditional manual review given the resulting increased time, expense and the likelihood of inconsistent results.

AGS has been using TAR to assist in document management in a number of our matters. Most recently, the ACCC (with AGS acting) filed applications in the matters of *ACCC v Volkswagen Aktiengesellschaft & Anor* (NSD1462/2016) and *ACCC v Audi Aktiengesellschaft & Anor* (NSD322/2017) seeking orders for the appointment of a referee to inquire into whether predictive coding should be used to streamline future discovery processes in those proceedings, and, if so, what protocol should be adopted.

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1 Federal Court of Australia, Technology and the Court Practice Note (GPN-TECH), [3.2]; see also the comments of the Australian Law Reform Commission, 'Managing justice: A review of the federal civil justice system' (Report 89, 2000) [6.67].

2 Section 37M of the *Federal Court of Australia Act 1976* provides, among other things, that the overarching purpose of the civil practice and procedure provisions (ie the Federal Court Rules 2011 and Federal Court and Federal Circuit Court Regulation 2012) is to facilitate the just resolution of disputes...as quickly, inexpensively and efficiently as possible. Section 37N requires that the parties must conduct the proceeding in a way that is consistent with the overarching purpose.

3 [2016] VSC 734.

4 *McConnell Dowell Constructions (Aust) Pty Ltd v Santam Ltd & Ors* [2016] VSC 734, [3] (Vickery J) (McConnell Dowell No.1).

5 Ibid [18]–[25] (Vickery J); see also, *Pyrrho Investments Limited v MWB Property Limited* [2016] EWHC 256 (Ch); *Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors* [2015] IEHC 175; *Rio Tinto v Vale* 14 Civ 3042 (RMB)(AJP) (2 March 2015).

6 [2016] EWHC 256 (Ch).

7 McConnell Dowell No. 1, [19] (Vickery J).

8 Ibid [6].

9 See *McConnell Dowell Constructors (Aust) Pty Ltd v Santam* [2017] VSC 640 (McConnell Dowell No. 2), [21]–[22] (Vickery J).

10 Deciding a recall rate involves balancing the desirability of completeness against the burden of work, where a recall rate only 5% higher, for example, may correlate with substantially more effort, time and expense.

11 Grossman M. and Cormack G., 'Comments on "The implications of rule 26(g) on the use of technology-assisted review" ', 7 Federal Courts Law Review 286, 297 (2014).

12 *Pyrrho Investments Limited v MWB Property Limited* [2016] EWHC 256 (Ch) at [20].

13 1:14-cv-3042 (SDNY March 2, 2015).

14 Supreme Court of Victoria Practice Note, [8.7].

15 There has not yet been any case at the Commonwealth level expressly approving the use of TAR; but, for example, in *Money Max Int Pty as Trustee for the Goldie Superannuation Fund v QBE Insurance Group Limited* Murphy J ordered the Respondent, who had used TAR for the purpose of giving discovery, to provide a report detailing the methods it had applied.

16 See for example, McConnell Dowell No.1 and No. 2.

17 The Supreme Court of Victoria Practice Note defines joint operator at paragraph [3.1] as 'a person, organisation or firm experienced in the use of technology assisted review and with access to the necessary software to manage electronic discovery for the parties'.

18 See the case management order 'Protocol relating to the production of Electronically Stored Information ("ESI") issued in *In Re: Actos (Pioglitazone) Products Liability Litigation*', No. 6:11-md-2299 (WDLa July 27 2012), and McConnell Dowell No. 2.

19 See US case law, for example: *Global Aerospace Inc. v Landow Aviation*, LP, No. 61040 (Loudoun County, Va. Ct. Apr. 23, 2012); *Monique da Silva Moore, et al v Publicis Groupe SA & MSL Group*, No. 11 Civ. 1279 (ALC) (AJP) (SDNY Feb. 24, 2012).

20 Supreme Court of Victoria Practice Note, [8.7].

21 McConnell Dowell No. 1, [31].

22 Supreme Court of Victoria Practice Note, [8.3].

23 The risk with each of these protocols is instead that relevant documents are not reviewed and not discovered (which can but minimised to some extent with QA processes and setting a higher recall rate).

24 See for example, the High Court decision relating to inadvertent disclosure involving electronic methods of discovery and legal professional privilege in *Expense Reduction Analysts Group v Armstrong Strategic Management and Marketing* (2013) 250 CLR 303. This decision did not involve predictive coding.

25 [2015] IEHC 175.

26 Ibid, [66]–[67].

27 *Legal Services Directions 2017* (Cth), app B, cl 2(e).

28 Erick Gunawan and Tom Pritchards, 'Technology assisted review', *Technology and the Law* (June 2017) < https://www.liv.asn.au/getattachment/Professional-Practice/Areas-of-Law/Technology-and-theLaw/Resources/20170606_LP_TechnologyAndTheLaw_TAR_FINAL.pdf.aspx>.

Constitution s 44

Disqualified senators

In early 2017 the High Court, sitting as the Court of Disputed Returns, held 2 persons elected as senators in 2016 to be disqualified from being chosen or sitting as senators. The first was Rodney Culleton, disqualified pursuant to s 44(ii) of the Constitution on the basis that at the time of his nomination and election he had been convicted, and was subject to be sentenced, for an offence punishable by imprisonment for at least 1 year. The second was Robert Day, disqualified pursuant to s 44(v) of the Constitution on the basis that he had a pecuniary interest in an agreement with the Public Service of the Commonwealth.

AGS acted for the Attorney-General, who was joined as a party in each of the proceedings.

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Re Culleton (No 2) [2017] HCA 4

The Culleton case concerned a discrete legal question: whether a conviction, subsequently annulled, operated to disqualify a person under s 44(ii) of the Constitution. Section 44(ii) disqualifies from being chosen, or sitting, any person who *'... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment of one year or longer'.*

The joint judgment of Kiefel CJ, Bell, Gageler and Keane JJ held that, properly construed, the *Crimes (Appeal and Review) Act 2001* (NSW), pursuant to which Mr Culleton's conviction was annulled, operated with prospective effect only. It did not retrospectively annul his conviction and remove his disqualification under s 44(ii). Their Honours did not consider whether a retrospective annulment of a conviction could remove a disqualification. Only Nettle J dealt with this issue, holding that retrospective annulment would not remove a s 44(ii) disqualification: the need for certainty in the electoral process required that s 44(ii) be engaged by a conviction in fact, even if later annulled.

Re Day (No 2) [2017] HCA 14

The Day case concerned complex factual and legal questions. Mr Day wished to establish his electorate office at premises at 77 Fullarton Road, Kent Town, South Australia owned by a corporation which was the trustee of a discretionary trust known as 'the Day Family Trust'. Mr Day was 1 of the beneficiaries of that trust.

From late 2013, Mr Day believed that the Commonwealth was unwilling to take a lease of part of the Fullarton Road property for use as his electorate office so long as an entity in which he had an interest owned the freehold. Accordingly, in April 2014 B&B Day sold the Fullarton Road property to another company, Fullarton Investments Pty Ltd. Fullarton Investments was also a trustee company, being the trustee of a discretionary trust known as 'the Fullarton Road Trust'. The sole director of this trustee company (Mrs Smith) was the wife of a business associate of Mr Day (Mr Smith). B&B Day was one of the beneficiaries of the Fullarton Road Trust.

The nominal purchase price for the sale of the Fullarton Road property was $2.1 million. No money actually changed hands. Instead, B&B Day and Fullarton Investments executed a document that acknowledged the provision of a 'vendor finance' loan by B&B Day to Fullarton Investments in the sum of $2.1 million. Under an arrangement between Mr Day, Mr Smith and Mrs Smith, Fullarton Investments 'would simply hold the Fullarton Road property and collect rent on a regular basis'. That rent would then 'pass back to the Day Family Trust'.

Eventually, on 1 December 2015, a lease of the Fullarton Road property was entered into between Fullarton Investments and the Commonwealth. Pursuant to the lease, on 26 February 2016 Fullarton Investments nominated a bank account in the name of 'Fullarton Nominees' for receipt of rent. Fullarton Nominees was a business name owned by Mr Day and the bank account was his. As it turned out, the Commonwealth did not in fact pay any rent under the lease.

At all relevant times there was a loan facility provided by the National Australia Bank (NAB) to B&B Day and other companies with which Mr Day was associated. This loan facility was secured by a mortgage over the Fullarton Road property (even after the sale to Fullarton Investments) and by a guarantee and indemnity given by Mr Day and his wife.

The Court unanimously held that Mr Day was ineligible to have been elected at the 2016 election by reason of s 44(v) of the Constitution, which disqualifies any person who has '... any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons'. All members of the Court held that the fact that Mr Day was the owner of the bank account nominated as the recipient of the rental monies for the lease with the Commonwealth was sufficient to engage s 44(v) (with Gageler J and Nettle and Gordon JJ holding that a disqualifying interest in the lease also arose because Mr Day was exposed in other ways to the possibility of a financial gain or loss from the performance or breach of the lease).

All 7 Justices, in 4 separate sets of reasons, held that s 44(v) has a wide purpose and operation, declining to follow an earlier decision of former Chief Justice Barwick in *Re Webster* (1975) 132 CLR 270 in which his Honour held that s 44(v) had the limited purpose of preventing the influence of parliamentarians by the executive. All 7 Justices expressed the view that part of the purpose of s 44(v) is to protect against the personal interest of a parliamentarian influencing the exercise of their public duties. In 3 separate sets of reasons, Kiefel CJ, Bell and Edelman JJ and Gageler J and Keane J also suggested, with some variation, that despite the provision's breadth, it would not cover certain routine agreements for benefits provided by the Commonwealth that were available to the community generally.

Filling the vacancies

In each case the Court ordered a special count of the Senate ballot papers as if Mr Culleton and Mr Day were removed and their preferences distributed to the next preferenced candidates accordingly.

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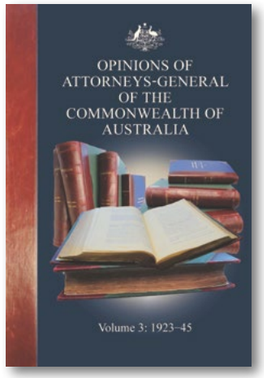

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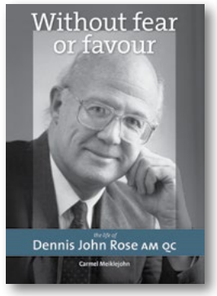

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AGS news

On Friday 25 August 2017, Chris Behrens was presented with the Government Law Award of the ACT Law Society. As only the third recipient since the award's establishment in 2015, Chris is recognised for his leadership, legal expertise and commitment to serving the Commonwealth, as well as his community involvement.

'This is a tremendous accolade for Chris and a fitting recognition of his many achievements and contributions over a distinguished career,' said the Australian Government Solicitor, Michael Kingston.

Christopher Behrens wins ACT Law Society Government Law Award 2017

Below is an extract from the ACT Law Society media release:

The President of the ACT Law Society, Sarah Avery, awarded the 2017 Government Law Award to Chris Behrens. The Award recognises the achievements of outstanding lawyers working in or for government.

Chris Behrens is a Senior Executive Lawyer working for the Australian Government Solicitor as a commercial litigation specialist. He has almost 30 years post-admission experience.

Chris leads AGS Dispute Resolution's Civil Claims team, comprising approximately 50 lawyers dispersed nationally in AGS offices in Adelaide, Brisbane, Melbourne, Perth, Sydney and Canberra. In the last 2 years, he has overseen growth of about 40% in the volume of the team's work, with commensurate growth in the complexity and diversity of matters.

Chris's skills as a leader, manager, supervisor, mentor and capacity builder mean he has been able to attract, develop, and retain excellent staff.

He has been responsible for several significant legal projects, including in the last 2 years, representing the Commonwealth in the landmark Federal Court class action brought by residents of Williamtown about PFAS firefighting foams contamination, tenancy agreements over land at the site of the proposed Second Sydney Airport, and claims arising from the early closure of the Home Insulation Program.

He delivers internal training to AGS lawyers on commercial litigation topics, including a very well-received seminar on contract termination. He is well-regarded in the department as a supervisor and mentor, and is always willing to share his expertise, and to guide junior lawyers, helping them find solutions and develop their knowledge, skills, and confidence. ■

Image courtesy of the High Court of Australia

The first sitting of the Federal Court of Australia in 1977

Image courtesy of the Federal Court of Australia

Sir Francis Gerard Brennan AC KBE GBS (1928–) was a foundation Judge of the Federal Court of Australia in 1977. He was also the first President of the Administrative Review Council and the inaugural President of the Administrative Appeals Tribunal. He was appointed a Justice of the High Court of Australia in 1981, and later became its 10th Chief Justice, serving from 1995 to 1998. AGS thanks him for his permission to publish this reflection on the creation of the Federal Court.

Creation of the Federal Court: *A reflection*

This article is the text of a speech the Hon Sir Gerard Brennan AC KBE GBS delivered on the 40th Anniversary of the Federal Court of Australia at the Law Courts Building in Queens Square, Sydney, on 6 February 2017. It has also since been published in the *Australian Law Journal*, Vol 91, Pt 6.

Creation of the Federal Court[1] – A reflection[2]

The Constitution provides[3] that the Parliament can invest Commonwealth judicial power in the Supreme Courts of the States, as well as in the High Court and in federal courts.

In the early days of the Federation it would have been economically and practically impossible to create federal courts exercising broad federal jurisdiction and the 'autocthonous expedient'[4] of vesting the general body of federal jurisdiction in the Supreme Courts of the States became the norm.

Some matters were reserved for the exclusive jurisdiction of the High Court and the Commonwealth Court of Conciliation and Arbitration was created in 1904.[5] The volume of litigation was modest at the beginning of the 20th century, so the High Court was able to exercise the original jurisdiction vested in it, either by the Constitution or by laws enacted by the Parliament, without impairing its ability to exercise its appellate and constitutional jurisdictions.

State Courts had sufficient capacity to accept jurisdiction vested in them by federal laws without impairing their ability to dispose of cases under State law.

Until the 1960s, lawyers regarded the Australian judicial hierarchy as substantially linear, with the High Court at the apex directly above the court systems of the States and Territories.

In 1963, Paul Toose QC and Maurice Byers QC revived professional interest in the idea of a federal superior court exercising jurisdiction under federal law.[6] At the Thirteenth Australian Legal Convention, they pointed out that increases in both the volume and complexity of litigation were imposing a heavy burden on the Justices of the High Court in both original jurisdiction and appellate matters and a heavy burden on State Courts exercising federal jurisdiction. In several areas, the vesting of federal jurisdiction in State or Territory Courts seemed to the authors to be inappropriate.

The solution they proposed was the creation of a new federal court, taking over the jurisdiction of the Federal Court of Bankruptcy, the Commonwealth Industrial Court, the Supreme Courts of the Territories (other than Papua New Guinea), and the federal jurisdiction conferred on the Supreme Courts of the States. It would be invested with the same original jurisdiction as the original jurisdiction vested in the High Court under s 75 and s 76 of the Constitution. The authors suggested that the new court should have appellate jurisdiction in these matters, thus providing an intermediate appellate court immediately below the High Court.

The purposes of the proposal were relief of the burden of work in both the High Court's original and appellate cases, relief of the federal workload of State and Territory Courts and federal responsibility for the judicial administration of federal laws, eliminating some anomalies in the differing administrations of some federal laws such as matrimonial causes and bankruptcy.

[1] This reflection relates to a period ending 2 years after the Federal Court commenced to exercise its jurisdiction, namely February 1979. A masterly essay covering the first 30 years of the Court (on which I have drawn gratefully) is Chief Justice Black's 'The Federal Court of Australia: The first 30 Years' in (2008) 31 MULR 1.

[2] Although this is a personal reflection, I am indebted to Justice Mortimer, a former Associate, whose interest, research and analysis have contributed greatly to this paper, especially the biography of Sir Nigel Bowen. She and I acknowledge the assistance of her Associate Glyn Ayres (whose research capacities reflect those of his judge).

[3] Section 71.

[4] *R v Kirby; Ex parte Boilermakers' Society of Australia* (Boilermakers' case) (1956) 94 CLR 254.

[5] *Commonwealth Conciliation and Arbitration Act 1904*.

[6] 'The necessity for a New Federal Court' (1963) 36 ALJ 308.

> A FURTHER CHANGE OF GOVERNMENT SAW A RESOLUTION OF THE CONTROVERSY BY THEN ATTORNEY-GENERAL ELLICOTT IN 1976. HE PROPOSED THE CREATION OF THE FEDERAL COURT OF AUSTRALIA.

A proposal for a new court had already been raised for consideration by the Government, as the Solicitor-General, Sir Kenneth Bailey, revealed. On 11 December 1962, Cabinet gave approval to the Attorney-General, Sir Garfield Barwick, to proceed with the drafting of a Bill to create a new court, though no decision to proceed was then taken. Mr EG (Gough) Whitlam, as deputy leader of the Opposition, affirmed to the Convention his support for the solution proposed by Toose and Byers. Although it seemed that there would be political agreement about the creation of a new court, there were differing views about the purpose of the court and about the size and jurisdiction of the court to be created.

Sir Garfield Barwick, shortly before his appointment as Chief Justice, acknowledged a general professional consensus that a new federal court would have real utility. 'But,' he wrote,[7] 'many of those who share this conclusion reach it for different, and to some extent conflicting, reasons which lead to flatly divergent views as to the jurisdiction that the new court should exercise, and therefore as to its optimum size and the nature of its organization'. Sir Garfield rejected the busy lists of the State Courts as a justification for reversing the investiture of State Courts with federal jurisdiction unless the relevant law had a 'special element', 'a distinct and separate character', such as bankruptcy and industrial law. But he favoured measures, including the creation of a new federal court to deal with such 'special' matters and to entertain appeals from Territory Courts. That would relieve the High Court of some of its work.

The proposal did not produce any Parliamentary response until Mr Nigel Bowen, then Attorney-General, made a ministerial statement in May 1967. He announced that a Commonwealth Superior Court would be created incorporating the Bankruptcy Court and the Commonwealth Industrial Court and with additional original jurisdiction in taxation, Commonwealth employees compensation, industrial property, the matters specified in s 75(iii) and (iv) and s 76(i), (iii) and (iv) of the Constitution, and such other matters as the Parliament might specify. The main purpose of this proposal was to relieve the pressure of original jurisdiction work of the High Court.

However, Mr Bowen said that 'the provision of an entire system of Federal courts would be uneconomic' and the Government proposed to establish 'a relatively small new federal court of quality and standing'. There would be only 4 new judges required. The proposal reflected the Barwick suggestion that the Superior Court should deal only with matters having a 'distinct and separate character'.

In 1969 Bowen introduced a Bill for the creation of the court but it lapsed when the Parliament was dissolved for a general election. In December 1971, Chief Justice Barwick raised with Prime Minister McMahon (and confirmed in a letter to the Attorney-General, Senator Ivor Greenwood, in January 1972) the 'more than burdensome' work of the High Court in original jurisdiction matters and the desirability of transferring jurisdiction in taxation and industrial property to the Supreme Courts.

However, no action was taken to relieve the High Court until 1973 when the Treasurer in the new Government, Mr Crean, introduced the *Income Tax Assessment Bill (No 3)* to vest in State Courts the jurisdiction of single High Court justices in income tax appeals.

In October 1972, Senator Greenwood had announced[8] that the proposal for a new federal court would not be proceeded with. With the change of government, the new Attorney-General, Senator Lionel Murphy, introduced a Bill to establish a Superior Court of Australia. The main purpose of this Bill was to vest exclusively in the new court all federal jurisdiction invested under ss 75 and 76 of the Constitution, subject to some exceptions.[9] The new court would also subsume the existing federal courts and the Supreme Courts of the Territories. It would be vested with new federal jurisdiction in administrative and trade practices matters. An internal appeal from single judges was to be available. It was to be organised on a district basis with a chief judge for each district and there were to be 6 divisions of the court, the judges being assigned to the respective divisions. It was foreseen that the work of the new court could lighten the workload of the High Court but High Court relief – the chief purpose of all Coalition proposals – was not advanced as the purpose of the court's creation.

The Bill excited opposition, not least because the Supreme Courts were to be stripped of considerable federal jurisdiction. The Bill failed to pass the Senate either before or after the double dissolution of 1974.

The main grounds of objection were stated by Mr RJ (Bob) Ellicott in his second reading speech in the House of Representatives in July 1974. He drew attention to 'the grand design to which this Court is to be constructed' making it 'ultimately the largest court in the country' exercising 'tremendous power over our citizens'. He thought the new court would be unnecessarily divisive, as federal jurisdiction could be exercised appropriately by State Courts or by the existing Australian Industrial Court. 'The proposed court', he said, 'would degrade the Supreme Courts, stripping them of their existing jurisdiction.' He was troubled by future growth of federal jurisdiction, asking, 'What will be left of the great common law courts of the States of this country? They will be nothing but property courts with an inferior status.'

A further change of government saw a resolution of the controversy by then Attorney-General Ellicott in 1976. He proposed the creation of the Federal Court of Australia.

There had been some changes in the judicial scene since 1973. The Family Court of Australia had been created and was to exercise an exclusive jurisdiction under the *Family Law Act 1974*. Two major non-judicial tribunals had been established under the *Trade Practices Act 1975* and the *Administrative Appeals Tribunal Act 1975*, each presided over by a federal judge dealing with matters in which points of law might arise and require determination by a court. Further development of federal administrative law was expected.

The Attorney-General, conscious of the need to preserve the status of the State Supreme Courts, proposed that the High Court's original jurisdiction in taxation and industrial property should be taken from the High Court and vested exclusively in the Supreme Courts of the States and Territories. This gave effect to a policy that State Courts should be the trial courts in federal as well as State matters and should administer the general body of Commonwealth criminal law. There was to be no diminution in the original jurisdiction of the State and Territory Supreme Courts. The Territory Supreme Courts were to be maintained.

The jurisdictions of the Australian Industrial Court and the Federal Court of Bankruptcy were to be transferred to the Federal Court and that Court was to have jurisdiction under the Trade Practices Act and under the Administrative Appeals Tribunal Act – jurisdiction which hitherto had been vested in the Australian Industrial Court. The work of the Bankruptcy Court and the Australian Industrial Court was to continue uninterrupted in the Federal Court. The Federal Court was to have appellate jurisdiction from decisions of single judges of that Court, of the Territory Courts and of the State Courts in taxation and industrial property matters. This was to divert Territory appeals from the High Court to the Federal Court and to ensure uniformity of interpretation in taxation and industrial property law.

The *Federal Court of Australia Act 1976* (the FCA Act), supplemented by the *Federal Court of Australia (Consequential Provisions) Act 1976*, received the Royal assent on 9 December 1976. In a 1977 article[10] designed to explain the complex series of 1976 laws, the Attorney-General described the key features of the restructuring of federal jurisdiction and indicated some future developments that were imminent, particularly in administrative law.

To complete the establishment of the Court, many administrative matters called for attention: judges, registrars and support staff had to be appointed, rules of practice and procedure had to be promulgated and the workload organised.

The Attorney-General's Department marshalled its distinguished team of bureaucrats – Sir Clarrie Harders, Messrs Frank Mahoney, Trevor Bennett and Lindsay Curtis. They met in

7 'The Australian Judicial System: The proposed New Federal Superior Court' (1964) 1 Fed L Rev 1.

8 Commonwealth, *Parliamentary Debates,* Senate, 27 October 1972.

9 Superior Court of Australia Bill, cl 37.

10 'The exercise of federal jurisdiction – a revision of the federal judicial structure' [1977] 1 *Criminal Law Journal* 1.

November 1976. Few departmental records of the period survive but there is a note that the appellate work was expected to be 'greater than that of the existing Bankruptcy and Industrial Courts combined'. Registry services were to be provided chiefly by the Bankruptcy registry,[11] then within the Department of Business and Consumer Affairs. Carmel Meiklejohn records:

> Creation of the Federal Court precipitated a tussle over the Registrars in Bankruptcy between the two departments ... The Bankruptcy Branch at this time was severely short-staffed and allocation of staff and resources across the public service generally tight ... It was subsequently negotiated that the Bankruptcy Branch would provide registry facilities for the Federal Court – which had jurisdiction for bankruptcy, industrial law, trade practices and administrative appeals – and for other bodies. By 1978 these included the Administrative Appeals, Trade Practices, Copyright and Courts Martial Appeals tribunals.[12]

The Court's first Registrar was Bernard Foley, who remained with the Court until October 1977. He was followed by Jim Howard, who was in office until the end of 1995. He supervised the expansion of registry services during years when the work of the Court increased greatly. In addition to staff, arrangements had to be made for premises, libraries, the general incidents of court administration and finance.

Appointment of the Chief Judge

The pivotal appointment was, of course, the appointment of a Chief Judge. I imagine that the Attorney, Mr Ellicott, had no difficulty in nominating Sir Nigel Bowen. Ellicott had read with Bowen and they had worked closely together at the Bar. Ellicott had been appointed Commonwealth Solicitor-General (1969–73) when Bowen was Attorney-General. At the time of Bowen's appointment, he was Chief Judge in Equity in the Supreme Court of New South Wales. He had been a successful barrister, politician, minister and judge. There were few, if any, who could match either his experience or his reputation.

On 26 May 1911, Nigel Bowen was born in a log cabin in British Columbia, Canada. Shortly afterwards, his family moved to New South Wales. A stint farming sheep in Gunnedah was brought to an end by drought, and the family finally settled in Sydney.[13] Bowen was educated at The King's School in Parramatta and won a scholarship to the University of Sydney, where he graduated in arts and law. He played first-grade cricket and rugby.[14] He was also a keen – though less adept – boxer. He competed in the finals of the University's Novice Boxing Championships but was 'soundly thrashed', first tasting fame when his 'battered and bleeding face ... was featured on the front page of the Sydney papers'.[15]

He had greater success at the Bar. He entered the profession in the middle of the Great Depression, one of only 3 barristers admitted in New South Wales in 1936.[16] However, he quickly established a practice which was interrupted by the outbreak of World War II. He enlisted with the Second AIF.[17] He rose to the rank of captain and served in New Guinea, where his company included Corporal Ninian Stephen.[18]

He resumed practice in 1946, took silk in 1953, and over the next decade developed an extensive High Court practice.[19] During this time, he led a number of juniors who would later be his colleagues on the Federal Court. Bowen was editor of the *Australian Law Journal*[20] and served as Vice President of the Law Council of Australia[21] and Chairman of the New South Wales Bar Council,[22] expressing an underlying political interest that came to the fore in 1964 when he entered the Commonwealth Parliament as member for Parramatta.[23] He subsequently became a prominent political figure, serving as Attorney-General,[24] Minister for Education and Science[25] and Minister for Foreign Affairs.[26] His maiden question in the House of Representatives concerned the establishment of a federal court.[27] As Attorney-General, he shaped the Australian system of justice, introducing the Bill that became the *Privy Council (Limitation of Appeals) Act 1968* (Cth)[28] as well as a Bill which, though discontinued, paved the way for the FCA Act.[29]

11 In Melbourne, the Industrial Registry would service the Industrial Division of the Court.

12 Meiklejohn, Carmel, *Officially receiving: 80 years of Australian bankruptcy administration*, manuscript as at 30 September 2009, Attorney-General's Department Library, 2010.

13 Bob Ellicott, 'Tribute to Sir Nigel Bowen AC, KBE' (1995) 69 *Australian Law Journal* 143, 144.

14 Ibid.

15 Alex Chernov, 'Farewell sitting for the Hon the Chief Justice' (30 November 1990) 6.

16 Barry O'Keefe, 'Farewell sitting for the Hon the Chief Justice' (30 November 1990) 10.

17 Bob Ellicott, 'Tribute to Sir Nigel Bowen AC, KBE' (1995) 69 *Australian Law Journal* 143, 144.

18 Ibid.

19 Ibid 144–5.

20 1946–58.

21 1957–60.

22 1959–61.

23 The seat of Parramatta was previously held by Sir Garfield Barwick, who vacated it when he was appointed to the High Court.

24 14 December 1967 – 12 November 1969; 22 March 1971 – 2 August 1971.

25 12 November 1969 – 22 March 71.

26 2 August 1971 – 5 December 1972.

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 October 1964, 2462. The question was addressed to the Attorney-General: 'At the last Australian Legal Convention, held in Hobart, an announcement was made on behalf of Sir Garfield Barwick that Cabinet had authorised him to design a new Federal superior court. I ask the Attorney-General whether he is pursuing this matter. If so, when may we expect a bill to be brought before this House?'.

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 March 1968, 568.

29 Commonwealth Superior Court Bill 1968; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 1968, 3142.

As Minister for Foreign Affairs, he played a leading role in galvanising international opinion against the testing of nuclear weapons in the Pacific.[30] He led a delegation that met with representatives of the People's Republic of China in Paris when the question of officially recognising the People's Republic was under discussion in Australia.[31] And he drafted the first piece of legislation responding to a foreign corporate takeover. As Justice Faulks tells it,

> [t]his was in the days before Australia had entered the legislative field to control foreign takeovers. ... The time available to prepare the legislation was very limited and the problems involved in moving into an unchartered territory were endless. ... [W]hile pessimists were saying it couldn't be done, Sir Nigel was asked when the legislation would be ready. His calm reply was: 'We attend to difficult matters with expedition. The impossible takes a little longer.'[32]

After leaving politics, Bowen J spent 4 years first as a judge of the New South Wales Court of Appeal and then as Chief Judge in Equity.[33] He later said that, when he was approached to be the first Chief Judge of the Federal Court, he 'was doubtful about accepting': the Court's 'proposed jurisdiction did not seem to be very appealing'.[34] Ellicott knew that he could not take Sir Nigel's acceptance for granted, so he 'took him to the splendid and spacious Chief Judge's chambers on the 21st floor [of the new Law Courts Building] and showed him the view'.[35] We can be glad that it didn't disappoint. Bowen's appointment was very well received by the profession. It was a firm indication that the Federal Court was to be a court of high standing.

Appointment of the judges

There were 19 foundation judges, including the Chief Judge. Those available were sworn in in Court 21A of the Law Courts Building in Sydney on 7 February 1977. With the exception of Keely J, who was appointed from the Victorian Bar to assist the Industrial Division of the Court, all the judges were members of existing courts. Six judges were resident members of the Supreme Courts of one or other of the mainland Territories,[36] 2 were judges of the Bankruptcy Court[37] and 9 were judges of the Australian Industrial Court.[38]

At that time, of course, all federal judges had life tenure, but the Attorney-General imposed an age limit on appointment of Industrial Court judges to the Federal Court. Two members of the Industrial Court (Dunphy and Joske JJ) exceeded the age limit and were not appointed. A third – the redoubtable Reginald Smithers J – protesting truthfully that his judicial capacities were undiminished by age – was appointed.

Twelve judges had been appointed to the General Division of the Court, 3 to the Industrial Division and the remainder had general commissions to sit in either division, but the Chief Judge could transfer a judge to another division if listing requirements made it desirable to do so. However, some of the judges were engaged in duties which precluded them from participating full-time in the work of the Federal Court. Sir Edward Woodward was Director General of Security; Northrop J was President of the Trade Practices Tribunal and I was President of the Administrative Appeals Tribunal and the Administrative Review Council.

In the first 2 years, additional judges were appointed. Deane J, then a recently appointed member of the Equity Division of the Supreme Court of New South Wales, was appointed as a judge of the Federal Court and President of the Trade Practices Tribunal. Northrop J became a Deputy President. Toohey J was appointed a Judge of the Northern Territory Supreme Court and of the Federal Court. Toohey J who had been a leading counsel in Western Australia and who had a vast experience of Aborigines in legal proceedings was appointed as the inaugural Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976*. McGregor J, a leading member of the NSW Bar, replaced Fox J when the latter became the Ambassador at Large for nuclear non-proliferation and safeguards. Gallop J, a leader of the ACT Bar, succeeded Ward J who died in November 1977. In 1978, 3 other distinguished leaders of the Bar were appointed: Fisher J from South Australia, Davies J from Victoria (who became a Deputy President of the AAT), and Lockhart J from NSW. After 2 years, the Court had been accepted as a court of high standing and the judges were, I think, regarded as lawyers of quality, well capable of discharging efficiently the functions of both primary and appellate judges.

30 Commonwealth, *Parliamentary Debates*, Senate, 10 October 1994, 1314 (Senator Hill); the Hon Michael Duffy MP, 'Farewell sitting for the Hon the Chief Justice' (30 November 1990) 3.

31 Commonwealth, *Parliamentary Debates*, Senate, 10 October 1994, 1314 (Senator Hill); Bob Ellicott, 'Tribute to Sir Nigel Bowen AC, KBE' (1995) 69 *Australian Law Journal* 143, 145.

32 'Sir Nigel Bowen's service to the law and legal profession marked' (1988) 23(9) *Australian Law News* 25, 25.

33 Bob Ellicott, 'Tribute to Sir Nigel Bowen AC, KBE' (1995) 69 *Australian Law Journal* 143, 146.

34 Sir Nigel Bowen, 'Farewell sitting for the Hon the Chief Justice' (30 November 1990) 15.

35 Bob Ellicott, 'Tribute to Sir Nigel Bowen AC, KBE' (1995) 69 *Australian Law Journal* 143, 146.

36 Fox, Blackburn and Connor JJ came from the ACT and Forster, Muirhead and Ward JJ came from the Northern Territory.

37 Riley and Charles Sweeney JJ.

38 Smithers, Nimmo, Woodward, Franki, JB Sweeney, Evatt, St John, Northrop, Brennan JJ.

Court facilities

At the first judges meeting on the afternoon of the swearing-in ceremony, the support facilities of the new court were discussed. The Chief Judge reported on the accommodation then available. In Sydney, court rooms and judges' chambers were available. In Melbourne, the High Court Building at 450 Little Bourke Street offered court space when the High Court was not sitting in Melbourne and another court room was available in the Industrial Court Building at 451 Little Bourke Street for sittings of the Industrial Division. The Industrial Court chambers were retained in 451 Little Bourke Street and 3 new sets of chambers were to be constructed in 450 Little Bourke Street. Accommodation and library facilities in other State capitals were less adequate, but they sufficed for the time being. Territory Courts were available for use by the Federal Court.

Practice and procedure

As Chief Judge, Bowen was 'responsible for the orderly and expeditious discharge of the business of the Court'.[39] The Chief Judge devoted vision and energy in discharging that responsibility. He had a draft set of rules prepared and submitted to the first Judges meeting. These were gazetted,[40] followed by an amendment to cover matters arising under the *Administrative Appeals Tribunal Act 1975*, and ultimately a comprehensive set covering all matters coming before the Court. The Chief was intent on making the procedure as simple and expeditious as possible. An applicant's case was to be stated as part of the initiating process and was to be followed by judicial management of the matter. Cases were not to be allowed to linger until the parties decided to proceed. Under the influence of the industrial judges, the party seeking relief was to be termed 'the applicant', not the plaintiff.

The first judges meeting resolved that, for the time being, the Chief Judge should 'take care of the listing of cases'. The Chief Judge also took care of the listing of the judges who should sit on cases. This was a necessary function but it was not free from tension. The Chief Judge was anxious to ensure that the judges were allocated to sit on cases appropriate to their experience. I don't know if it was a general practice, but I remember that he called me in to inquire into my past professional experience and, feeling that I was not well equipped for the industrial jurisdiction, he did not list me to sit in industrial cases unless I was sitting with JB Sweeney and Evatt JJ – 2 very experienced industrial judges.

Sir Nigel's first Associate, now Richard White J of the NSW Supreme Court, reports that the Chief Judge kept a large sheet on which the names of the available judges would be listed and then allocated to the pending cases. But his allocation was not mere office work. I remember sitting with Deane and Fisher JJ in a Full Court in 21A when the Chief Judge unostentatiously made his entrance into the public gallery. I had not known a Chief Justice to visit a sitting court before and I wondered whether we should acknowledge his presence. After hurried and quiet consultation, we decided not to do so. After all, he was merely doing the rounds to see whether his judges were able to do the job! We must have passed muster for we were pleased oftentimes to be listed to sit together again. From time to time, a judge regretted not being listed to sit on a particular case, but overall the judges accepted the Chief's listing as appropriate.

Reaction to the Court's creation

The reaction of Mr FT Burt QC (as he was in 1963) to the Toose–Byers proposal of a new federal court was that 'it would inevitably and seriously reduce the status of the State Supreme Courts' and that was a concern that affected the debate in the following years. Another concern was the risk of a dual system of courts creating confusing and complex jurisdictional disputes. The American system was cited as a warning. Then, as the judicial membership of the new court was drawn chiefly from the judges of the Industrial Court, there was scepticism about the capacity of the Federal Court effectively to administer its jurisdiction. The jurisdiction of the Federal Court was to extend to areas that were thought to be outside the experience of the Industrial Court and more highly technical than industrial law.

The controversy sparked some feeling. Some comments in the profession were opposed to the creation of the Federal Court, were dismissive of its utility and reflected an element of antipathy towards it. But those sentiments had no apparent effect on the counsel briefed to appear in many of the significant early cases.[41] In the first 2 years, the silks appearing in the Court included

> THE RANGE AND IMPORTANCE OF THE CASES IN WHICH THE STATE SUPREME COURTS HAVE JURISDICTION HAS BEEN INCREASED. THIS SHOULD ENHANCE RATHER THAN DETRACT FROM THEIR STATUS.

no fewer than 24 future judges of the Court. Presumably they were satisfied that the Court was achieving the high judicial standard anticipated by the Chief Judge in the swearing in ceremony in February 1977:

> This Court has no history and, as yet, no tradition. At least it has some fine examples. It is my hope that the Court will quickly establish itself as a court of high standing in the eyes of the profession and of the public. It will be the earnest endeavour of the members of this bench to ensure that it does so.

In December 1977 the Chief Judge explained[42] the rationale for the establishment of the Federal Court, its jurisdiction and workload, and its important and necessary role as 'the primary arbiter in respect of a wide range of matters arising from regulation by the Commonwealth Parliament on an Australia-wide basis of business conduct, the administration of government and the conduct of employer and employee organizations in industrial relations'.

Nevertheless, the concern about the dual system of courts persisted. Even after the Federal Court had commenced its work, the desirability of its continued existence was challenged. In the August 1978 edition of the *Australian Law Journal*, the Chief Justice of New South Wales, Sir Laurence Street, fearful of a system of dual courts, wrote:

> 'I do not assent to the suggestion that it is too late to turn back –... The system of justice is too precious an inheritance to become a pawn in a power struggle between Commonwealth and State. There is no room here for the empire builders to gratify their desires.'

In January 1979, 2 years after the Court commenced, when its work was available for the profession and the public to evaluate, Sir Nigel delivered a paper 'Federal and State court relationships' at the Supreme and Federal Court Judges' Conference in Brisbane.[43] He pointed out that, for the last 70 years, there had been a dual judicial system in which the same issues could be litigated either in the High Court or in the courts of the States, yet 'no significant conflict [had] occurred'. Experience had shown that there were some areas of Australia-wide significance where federal court jurisdiction was desirable. He instanced matters in industrial, trade practices, bankruptcy and family law. He recalled that when, as Attorney-General, he proposed the 1968 Superior Court Bill, he was 'conscious of the need to avoid, as far as possible, creating a new court which would produce new conflict of jurisdiction problems beyond those which already existed'. He explained that the original jurisdiction of the High Court in income tax, patent and trade mark matters had been transferred to State Supreme Courts but, to ensure uniformity in application of the law, appellate jurisdiction had been vested in the Federal Court. Thus, 'the range and importance of the cases in which the State Supreme Courts have jurisdiction has been increased. This should enhance rather than detract from their status'.

He commented that the Federal Court was the appropriate repository of jurisdiction in matters of Commonwealth administrative law and appeals from the Territories. His scholarly analysis of the Court's jurisdiction and its constitutional utility was a convincing response to the arguments against the Court's existence. Sir Nigel's conclusion commanded general assent. He said:

> It is in the best interests of the community in general, of the law, and of the judiciary itself, both State and Federal, that we as judges do all in our power to enhance and defend the standing and reputation of all courts and of those who serve upon them. If we seek to diminish one another it is inevitable that we shall ourselves be diminished.

This was not mere rhetoric; it was the voice of a man who was familiar with the Constitution, with government and public affairs, a statement by a lawyer of the highest calibre.

39 *Federal Court Act 1976*, s 15.

40 SR20 of 1977.

41 For example, *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144; *R v Trade Practices Tribunal; Ex parte Tooheys Ltd* (1977) 31 FLR 1; *Re Tooth & Co Ltd* (No 2) (1978) 34 FLR 112; *Parish v World Series Cricket Pty Ltd* (1977) 16 ALR 172; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (No 2) (1978) 32 FLR 420; *Federal Coke Co Pty Ltd v Commissioner of Taxation* (Cth) (1977) 34 FLR 375; *Adamson v Western Australian National Football League* (1978) 20 ALR 191.

42 *Sydney Law Review*, Vol 8 No 2.

43 (1979) 53 ALJ 806.

The ethos of the Court

The judges of the Court in its early years were conscious of the transformation that the Federal Court might make in the Australian judiciary. On the one hand, there was an obvious need for a court ensuring that the laws of the national Parliament were given a uniform interpretation and were efficiently applied nationally; on the other, the overlapping of jurisdictions applicable to some justiciable controversies raised some nice legal problems. It was a time for reflective analysis, adequate research and clear enunciation of principle. The judges knew that the reputation of the Court and its attractiveness to future appointees of ability depended on the assessment of their judicial work.

The listing procedures were designed to ensure no undue delay in disposing of the Court's lists and the judges decided – in part by force of their Chief's example, in part by their own experience and temperament – to be a court where courtesy was the hallmark and Socratic dialogue between Bench and Bar did not go beyond quiet discussion. This was not the atmosphere of hearings in some courts at the time.

The judges met regularly and a warm collegial spirit was engendered. Personal relationships grew, facilitating cooperation. Draft judgments were circulated among the judges hearing appeals and were returned with corrections or suggestions that were happily received. It was an enjoyable and stimulating environment – and we were all aware of our good fortune in being members of a new court that had new problems for us to address in the company of colleagues whom we respected. I think the satisfaction of repelling some of the arguments that had been raised against the existence of the Court encouraged the judges in their work.

There were features of life on the Federal Court that distinguished that Court from most others: a stimulating variety of work with different groups of judicial colleagues and frequency of travel. From the beginning, the Court exercised original jurisdiction in bankruptcy, industrial law, trade practices, and appeals from, or judicial supervision of, federal Tribunals.[44] Its appellate jurisdiction extended to general appeals from the Supreme Courts of the Territories, from single judges of the Federal Court and from single judges of State Supreme Courts exercising federal jurisdiction in industrial property and taxation.[45]

Apart from sitting in the Federal Court, several judges held appointments to the Supreme Courts of the ACT and the Northern Territory, the Administrative Appeals Tribunal, the Trade Practices Tribunal and the Insurance Tribunal. There may have been others. That work provided an interesting smorgasbord of cases adding to the judicial experience. It was fascinating to sit in a tax appeal one day, in crime or contract the day after, and then with actuaries or retired bureaucrats or airline pilots the day after that. In the Tribunals the presiding judge might sit with expert lay members of the Tribunal and this, I discovered, offered an education in fields outside the usual pastures of judicial interest.

Because judges were needed to sit in different jurisdictions in different capitals, they travelled frequently. Judicial mobility facilitated the task of the Chief Judge in the listing of cases. Although this added to the workload, the Federal Court judges had the advantage of meeting, and evaluating the work of, the judges and profession throughout Australia. Most of the Federal Court judges were socially gregarious and enjoyed the contacts with other judges and the profession. And there was pleasure in visiting unfamiliar places. I remember a joyful photo of a Full Court of judges – Lockhart, Gallop and myself – sitting in our swimmers on a log at Berry Springs (before crocodiles migrated there). The Federal Court was a happy Court.

The growth in Federal Court jurisdiction and its implications

The Federal Court has always been a busy court. Although the workload cannot be estimated merely by the number of judgments delivered, the increases in the number of delivered judgments is some indication of a substantial workload, much attributable to increases in jurisdiction. The number of judgments increased from slightly more than 200 in 1977–78 to approximately 1,700 in recent years, after a peak of 2,330 in 2007. The present appellate jurisdiction of the Court extends to appeals from judgments of the Federal Circuit Court (other than Family Law and Child Support judgments).[46] Additional original jurisdiction specifically invested includes tax[47] and industrial property[48] appeals at first instance, appeals on questions of law from decisions of the Trade Practices Tribunal regarding access to declared services,[49] applications under the *Native Title Act 1993*,[50] and applications[51] and some appeals[52] under the Corporations legislation. Two statutes invested the Court with broad areas of jurisdiction. The first was the *Administrative Decisions (Judicial Review) Act 1977*, which came into force only on 1 October 1980 and gave the Court jurisdiction to review judicially decisions made under a federal enactment. Section 39B of the *Judiciary Act 1903*, inserted on 20 December 1983,[53] gave the Court the same jurisdiction as that vested in the High Court by s 75(v) of the Constitution. Section 39B has been subsequently amended[54] to invest the Court with jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

A Full Court held in *Transport Workers' Union of Australia v Lee*[55] that para (c) 'operates according to its terms as a general conferral of jurisdiction' and 'stands in contrast to the prior history of limited Act by Act conferral of jurisdiction upon the Federal Court.'

Matters arising under most Commonwealth laws are now within the jurisdiction of the Federal Court. However, s 39B also makes provision for complementary jurisdiction to be exercised by the Family Court or State courts in matters outside Federal Court jurisdiction.

The Constitution and federal legislation have precluded the existence of any national court of general jurisdiction. State Courts are territorially limited and their jurisdiction does not extend to vast areas of social activity now governed by federal law. Nor does the High Court possess unlimited original jurisdiction. It could not exercise its original jurisdiction without impairing its capacity to perform its key function of determining appeals and constitutional matters.

The Federal Court's jurisdiction is Australia-wide and, although it cannot be invested with State jurisdiction,[56] its jurisdiction extends to determining matters which, having a substantial federal element, also involve issues governed by common law or by State laws.[57] It cannot be classified as a court of general jurisdiction but it is a court of very broad jurisdiction.

In an age when national borders are of diminishing significance in trade and commerce, it is inevitable that the ascertainment of the rights and liabilities of persons, both natural and corporate, engaged in international trade or commerce and the peaceful resolution of their controversies will present an increasing demand for judicial services. Those services may take different forms: national courts, international courts, arbitrations and mediations. Whatever the appropriate steps might be, it is essential that Australia should have available the judicial services needed for the nation's trade and commerce.

This will place further demands on the Federal Court. It is the Australian court which is best suited in structure and procedure to assume jurisdiction on matters involving Australia's international trade or, indeed, any of Australia's external affairs. For example, as a court vested with jurisdiction in respect of actions *in rem* under the *Admiralty Act 1988*,[58] its procedures facilitate the arrest of a ship anywhere in Australia, at any hour of the day or night. It may need additional government support, not only financial; it may have to develop a cadre of non-judicial officers to assist the Court or the parties and to advise on available procedures; it may have to reach agreements with other tribunals to facilitate the obtaining of evidence or the enforcement of orders. The history of the Federal Court from its commencement has shown that its comparative youth gives it the freedom to innovate, that its commitment to scholarship, integrity and courtesy commends it to counsel and litigants and that its internal relations ensure efficient and cooperative disposition of its work. The Court is well placed for the challenges of the times. ■

44 The Court did not have jurisdiction to hear appeals on questions of law from decisions of the Trade Practices Tribunal, but under s 163A of the Trade Practices Act, which had been enacted on 31 August 1976, the Court had jurisdiction to make orders 'by way of, or in the nature of, prohibition, certiorari or mandamus', and declarations, 'in relation to the validity of any act or thing done, proposed to be done or purporting to have been done' under the Act, including decisions of the Tribunal.

45 FCA Act, s 24(1).

46 Ibid.

47 Section 14ZZ of the *Taxation Administration Act 1953* inserted by s 112 of the *Taxation Laws Amendment Act (No 3) 1991*. This jurisdiction is now exclusive to the Federal Court: *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*, s 4.

48 *Patents Act 1990*, s 154; *Trade Marks Act 1995*. This jurisdiction is now exclusive to the Federal Court: *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*, s 5, Schedule.

49 *Competition Policy Reform Act 1995*, s 59, inserting s 44ZR in the *Trade Practices Act 1974*.

50 *Native Title Act 1993*, s 81.

51 *Corporations Act 2001*, s 1337B.

52 *Corporations Act 2001*, ss 1135, 1321.

53 *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983* (Cth), ss 2(1), 3, Sch 1.

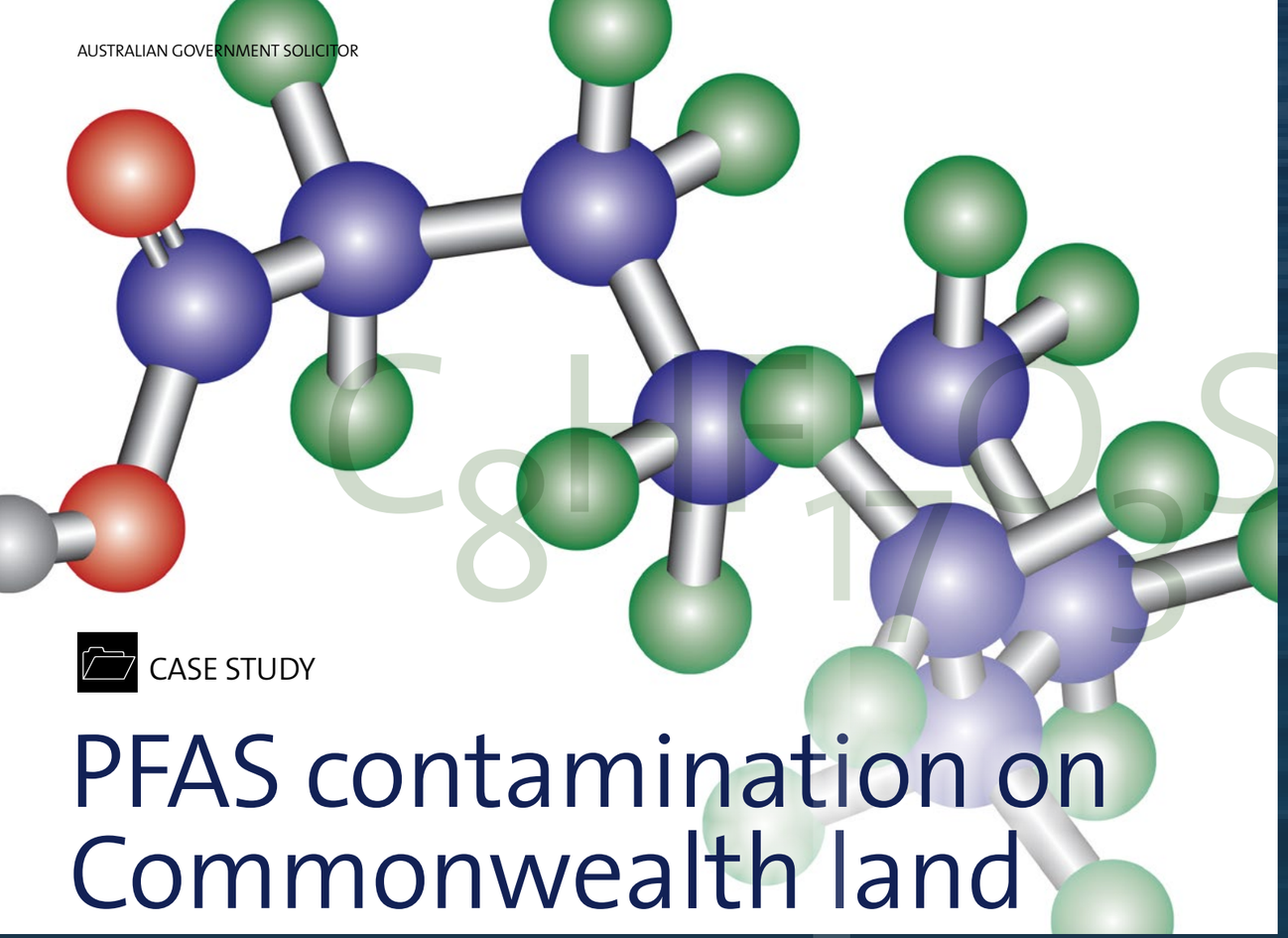
54 *Law and Justice Legislation Amendment Act 1997* (Cth), ss 2(1), 3, Sch 11, Item 1; *Law and Justice Amendment Act 1999* (Cth), s 2(1), 3, Sch 10, Item 1.

55 (1998) 84 FCR 60, 67.

56 *Re Wakim* (1999) 198 CLR 511.

57 *Fencott v Muller* (1983) 152 CLR 570.

58 Section 10.



CASE STUDY

PFAS contamination on Commonwealth land

Communities potentially affected by PFAS contamination are concerned about what it means for their health and livelihood.

PFAS have been detected on and surrounding some Commonwealth sites, such as Defence properties and a number of federally leased airports across Australia. AGS has been working with the Defence Special Counsel Team and numerous federal agencies to address community concerns.

This is not only a Commonwealth concern, as PFAS are also known to be present in a large number of State-controlled and private areas as well.

So what are PFAS?

PFAS, or per- and poly-fluoroalkyl substances, are a group of manufactured chemicals that have been widely used, globally, since the 1950s in the manufacture of household and industrial products that resist heat, stains, grease and water. Because they are heat-resistant, as well as film-forming in water, some have also been used as very effective ingredients in fire-fighting foams, as well as non-stick cookware, fabric, furniture and carpet stain protection, and even food packaging.

While we know these chemicals can persist in humans, animals and the environment, there is currently no consistent evidence that PFAS are harmful to human health. However, the possibility cannot be excluded. Therefore, as a precaution, the Government recommends that exposure be reduced wherever possible while research into any potential health effects continues.

The Australian Government has been working to reduce the use of certain PFAS since 2002.

A documentary about the issues aired on ABC TV's *Four Corners* on Monday 9 October 2017.

Legal challenges

Defence Legal's Defence Special Counsel Team, led by Defence Special Counsel Michael Lysewycz, has as one of its projects, management of legal aspects of contamination, including all issues to do with PFAS. So, the demands on the team are enormous.

The community at Williamtown, near Newcastle in New South Wales, and the community in Oakey, Queensland, have commenced class actions against the Commonwealth.

Michael's Defence team is working with AGS Dispute Resolution lawyers, led by Senior Executive Lawyer **Chris Behrens**, on the Williamtown class action.

'While Defence have taken the lead – and Defence Legal in particular have been active in response to the litigation and getting other agencies involved,' Chris said, 'the policy response has been shared between Environment, Health and, more recently, the Department of the Prime Minister and Cabinet, who have created a Taskforce to examine response options.'

AGS has also had a central role in assisting Defence with PFAS contamination issues since 2016.

The Defence Estate and Infrastructure Group is heavily involved in remediation at the sites, testing soil samples and negotiating with people in the local community.

Managing 40 years of Commonwealth records

Chris explains some of the complexity involved in the case: 'We've been grappling with the collection of Commonwealth records on PFAS, some of which have been around for 40 years in archives and seeking records of about 15 agencies across the Commonwealth. The documents have to be found, reviewed and assessed to be added into the database, which currently numbers more than a million documents,' he said. 'It's a massive project.'

'We have been able to use the assistance of artificial intelligence and predictive coding to identify the usefulness of some documents, but there is no escaping the need for a large team of reviewers, including external barristers and a team of 20 from AGS Dispute Resolution.'

The AGS litigation team has strategy meetings with Defence weekly. They recently attended a site inspection at RAAF Base Williamtown, along with counsel and our Defence instructors.

'We have a close working relationship with the Office of Defence Special Counsel team of 5 or 6 lawyers and paralegals who instruct the AGS litigation team of 5 Dispute Resolution lawyers – but don't forget our 20 reviewers as well,' said Chris.

Numerous advices

There has also been a team of lawyers from AGS's Office of General Counsel (OGC) involved since the first approach by Defence Legal in late 2015 when questions about PFAS contamination were just emerging.

OGC's Deputy General Counsel **Damian Page** and acting Senior General Counsel **Helen Chisholm** have led the OGC team's response. Senior General Counsel **Greg Prutej** advised on lands acquisition and Senior General Counsel **Olivia Abbott** has been assisting the PFAS Taskforce with advice on options for the government response. Outposted Senior General Counsel **Hilary Manson** has been working with the Department of Transport and Infrastructure, specifically on the airport issues in relation to PFAS contamination.

'Defence has been on the front line for complaints from residents. But, broadly, our role has been to advise on what the Commonwealth can do, in terms of a government response,' Damian said. 'Our advice has centred on the application of State environmental pollution laws to the Commonwealth, in particular, Defence bases and Defence land, as well as Commonwealth-owned airports.'

'There's been a lot of advices about it, including what we called "the Survey", where with Defence we identified a whole lot of State laws that were relevant to PFAS pollution and then needed to advise on whether they applied to the Commonwealth. That involved essentially 2 elements: whether the provisions applied in their terms, as a matter of statutory interpretation; or whether they were prevented from applying for constitutional reasons, such as being inconsistent with Commonwealth law.'

'Another aspect is whether there needs to be legislative authority for a Commonwealth response,' he said.

Certain issues have required advice to be obtained from the Solicitor-General, where AGS briefed the Solicitor-General on Defence's and Transport's behalf.

Damian agrees that there has been an easy relationship with the Office of Defence Special Counsel team. 'It's worked very well as a model for obtaining legal advice and providing assistance in developing the options. Defence got us involved early and we've provided high priority to their needs.' ■

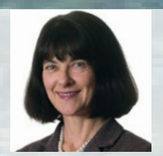
Chris Behrens

Damian Page

Helen Chisholm

Greg Prutej

Olivia Abbott



Hilary Manson

AGS Pro Bono Services

AGS's commitment to pro bono legal services around Australia has continued to grow, since our signing up to the Australian Pro Bono Centre's Aspirational Target in November 2008. Our commitment to undertake pro bono legal work is also reflected in our Reconciliation Action Plan.

Geetha Nair
National Manager
Pro Bono Services

We give our pro bono work the same care and attention as our fee-earning work. Our pro bono initiatives reflect careful judgment in managing our obligation to serve the Government, our commercial considerations and our desire to make a substantial and sustainable contribution to improving access to justice.

The quality and value of our pro bono work was recognised when we won the Excellence in Corporate Social Responsibility Award for our 2013–14 pro bono program at the Australian Corporate Lawyers Association Lawyer of the Year Awards in 2014. AGS was also a finalist with the Arts Law Centre of Australia for the 2012 Pro Bono Partnership Award, presented by the Law and Justice Foundation NSW.

Our National Manager of Pro Bono Services, **Geetha Nair**, was 1 of 6 finalists in the Burgess Paluch Pro Bono Award, one of the awards presented by the Australian *Lawyers Weekly*. Geetha also won the 2015 Arts Law Award from the Arts Law Centre of Australia for the contribution that she and AGS made in assisting Arts Law Centre clients.

AGS lawyers – Kate Brophy, Roxanne Lorenz, Holly Ritson and Rachel Chua at the Arts Law Pro Bono Award 2017

Most recently, in May 2017, Senior Executive Lawyer **Rachel Chua** of AGS Commercial received the Arts Law Pro Bono Award from the Hon Justice Margaret Beazley AO, President of the Arts Law Centre of Australia, in recognition of her significant contribution in undertaking intellectual property work for Arts Law clients.

It's what we do

AGS's support for access to justice through the pro bono program is a natural consequence of its acknowledgment of the professional responsibility lawyers owe to the community. We also recognise the potential of a successful pro bono program to enhance AGS's attractiveness as an employer, to increase job satisfaction and retention rates, and to develop the skills and confidence of our lawyers.

Our pro bono program is focused on enhancing access to justice for disadvantaged people and disadvantaged communities, including legal training in Australia and Asia–Pacific countries.

The main areas of AGS pro bono work are:

- providing lawyers on secondment with public interest clearing houses, community legal centres or other non-profit organisations
- legal work for non-profit organisations in areas of law which are unlikely to give rise to disputes between our pro bono client and Commonwealth government agencies, such as commercial and employment law, and law reform on issues of public interest
- legal training or developing fact sheets for community legal centres and other non-profit organisations on issues affecting disadvantaged communities
- projects involving legal advice to, assistance to, or training for, overseas organisations and governments.

The program is an extension of our work in supporting the public interest, and provides opportunities for our lawyers to be engaged in work that supports the broader community, and meets our commitment to supporting those in need.

What makes us unique

AGS's pro bono program is of a different nature to programs run by private law firms. AGS can only undertake pro bono work that involves acting for a person or body for whom AGS can act in accordance with its functions and powers as provided for under its enabling legislation, the *Judiciary Act 1903* – for example, where the services relate to Commonwealth law or to activities in the Territories, or are connected with foreign governments or overseas matters, or where the Commonwealth has power to make laws in relation to the subject matter of the pro bono services.

As a government entity and being part of the Commonwealth, AGS does not undertake pro bono work in any matter against a Commonwealth agency or where there is an unacceptable potential for conflict of interest for government clients.

Despite these limitations, we have developed an extensive pro bono program, which covers a diverse range of clients all across Australia and also internationally.

The Director of the National Pro Bono Resource Centre, John Corker, described AGS as 'leading government lawyers in developing this [pro bono] culture'. AGS's pro bono policy has been posted to the Centre's website, at the request of Mr Corker, as an example to facilitate the development of similar policies by government agencies.

OUR NATIONAL AND INTERNATIONAL COMMITMENT

We undertake a range of projects and participate in programs nationally and internationally, drawing on the skills and interests of our lawyers in each office.

Secondment program

Our pro bono initiatives include placing lawyers with public interest clearing houses, community legal centres and not-for-profit organisations. These secondments, some of which have been running for over 5 years, have been with organisations all over Australia and have included JusticeConnect, the Darwin Community Legal Service, the Consumer Law Action Centre (VIC), the Public Interest Advocacy Centre (NSW), LawRight (formerly the QLD Public Interest Clearing House), JusticeNet (SA), the Disability Discrimination Legal Service (VIC), the Consumer Law Centre of the ACT, the Financial Rights Centre (NSW); the Welfare Rights and Legal Centre (ACT), Street Law (ACT), the Women's Legal Centre (ACT), the Arts Law Centre of Australia, the Pro Bono Clearing House (TAS), Law Access (WA), the Employment Law Centre of WA Incorporated, Consumer Credit Legal Services (WA); the Tenants Union (ACT); Advocacy for Inclusion; and the Australia Pro Bono Centre.

Our placements have provided an added 'hands-on' resource to these organisations, which operate with a limited number of lawyers and resource constraints. The pro bono assistance provided by AGS through these placements has in turn facilitated increased access to justice for some of the most disadvantaged and marginalised members of the community, as added cases are able to be managed, and advice and educational resources are made available to the community.

Morris Averill, Donna Robinson and Delwyn Everard

In early 2011, AGS partnered with the Darwin Community Legal Service to establish the Credit and Debt Legal Service, NT's only specialist provider of free legal advice on credit and debt issues. AGS has until recently continued to assist with management and delivery of this service with the placement of its lawyers with the service. The service provides specialist legal advice for people affected by debt or credit problems, including debt-recovery, mortgages and repossessions, loans or credit cards, unsecured loans and credit reporting, in recognition of the social problems arising out of credit and debt matters.

In 2010, AGS helped establish Street Law, an outreach legal service in the ACT for people who are homeless or at risk of becoming homeless. Street Law provides free legal advice, representation, education and referral to some of Canberra's most vulnerable and disenfranchised persons. AGS continues to support the program by providing graduate lawyers on a regular basis to work with the service through community-based centres.

An example of the impact of our assistance is our work with Law Access WA, who administer the Law Access Pro Bono Scheme. The Scheme is a 'last resort' mechanism for those in the community who are unable to obtain assistance through other avenues such as Legal Aid and community legal centres. In 2012, Geetha Nair approached Law Access to discuss possible pro bono assistance (noting that no other law firm had, at that time, secondees assisting the Scheme), as a result of which placement arrangements were entered into and have continued since then.

We have had a long-standing relationship with the Arts Law Centre of Australia, a national community legal centre that provides legal assistance to Australian artists and arts organisations across all art forms. Its specialised Artists in Black program delivers targeted legal service to Aboriginal and Torres Straits Islander artists nationally. Our lawyers who have been placed with Arts Law have worked on a range of issues which also covered the Artists in Black program. One of our lawyers, **Donna Robinson**, travelled to Central Australia with lawyers from Arts Law to assist in their wills project. This is a project under which Arts Law drafts wills for Indigenous visual artists in remote and regional areas of Australia.

Donna Robinson

Sydney

We have 2 other Sydney-based lawyers who have been undertaking secondments on a full-time basis – **Julianne Tiglao** at the Australian Pro Bono Centre and **Danielle Hobday** at the Public Interest Advocacy Centre.

One of our Sydney-based lawyers, **Roxanne Lorenz**, has been doing a full-time placement with Arts Law since November 2016.

Arts Law is the national community legal centre providing advice to artists and arts organisations, including musicians, visual artists, authors, game developers and filmmakers. Clients commonly seek advice to protect their intellectual property interests, minimise risk and negotiate commercial arrangements.

With only a small team (around 5 full-time equivalent lawyers and a few administrative staff) at Arts Law, the addition of a full-time lawyer through the AGS pro bono secondment program has had a huge impact on the delivery of their services.

It is very fulfilling to assist individuals and organisations that otherwise may not have access to legal advice. I am fortunate to provide legal and commercial advice to clients who represent a diverse cross-section of the community, both culturally and in terms of the legal issues they present. It is incredibly enriching and rewarding work.

Roxanne Lorenz
Solicitor, Arts Law

I have worked on a variety of tasks at the Australian Pro Bono Centre, ranging from project work to legal research. I assisted in the preparation of a submission to the Standing Committee on Social Policy and Legal Affairs Inquiry into a better family law system to support and protect those affected by family violence, and a submission to the Law Council of Australia's Justice Project.

I also conducted legal research on a wide range of topics, such as government provisions regarding pro bono in tender arrangements for legal services in the Commonwealth, Victorian, New South Wales and South Australian governments; social enterprises in the Australian and international context; and the pro bono efforts of various law firms and organisations.

In addition to policy and project work, I also coordinated and supervised UNSW law student interns at the Centre and assisted in administering the Centre's National Professional Indemnity Insurance Scheme.

By being directly involved in the Centre's project and research work, I developed stronger written and oral communication skills, and further developed my legal research skills.

Working at the Centre has also provided me with a deeper insight into the vast network of pro bono partnerships across Australia and the impact their pro bono legal work has on improving access to justice, particularly for marginalised and/or socially disadvantaged people.

Julianne Tiglao
Policy and Project Officer, Australian Pro Bono Centre

My pro bono work has been divided between the Indigenous Justice Project and the Homeless Persons' Legal Service. In the Indigenous Justice Project, I work with Aboriginal and Torres Strait Islander people who have encountered issues with the NSW Police or policing. I have also been working on a racial discrimination and vilification matter for a group of Aboriginal women.

My practice within the Homeless Persons Legal Service includes a range of community partnerships and engaging with homeless people mainly within the Sydney area. This includes, but is not limited to, dealing with fines, investigating complaints against police and/or assisting people to make complaints.

Pro bono work is invaluable to non-profit community legal centres who assist the most vulnerable people within our society. I have learnt a lot from my time at PIAC, specifically how hard it is for people to navigate the system once they fall victim to living on the fringes of society. Working within this environment has allowed me to develop my skills as a solicitor, especially in terms of dealing with vulnerable and mentally ill clients, which is a less common experience in a corporate/government setting.

Danielle Hobday
Solicitor, Public Interest Advocacy Centre Ltd

Perth

We have a well-established relationship with the Employment Law Centre in WA and assist with our lawyers filling in a much-needed gap where demand for services is high but there are limited resources.

I work at the Employment Law Centre of WA (ELC) 1 day a fortnight. Along with ELC's small group of lawyers, paralegals and volunteers, I provide advice, in person and over its advice line, to WA employees in the areas of unfair dismissal, adverse action, unlawful termination, underpayment of entitlements, breach of contract, bullying, equal opportunity and occupational safety and health. ELC provides advice relating to both the State and Federal employment laws.

During my time at ELC I have learnt how difficult and overwhelming it can be for vulnerable employees to understand and navigate through the sometimes complex legal procedures in the employment law sphere. I have also seen how some people are badly treated by their employers and the difficulties they face in seeking justified remedies for their circumstances. The experience has allowed me to develop skills in delivering legal services to non-legal clients.

Solene Yik Long
Senior Lawyer

I have been at Consumer Credit Legal Service WA (CCLSWA) for 4 years and attend 1 day a week. CCLSWA provides free legal advice and representation to consumers in WA in the areas of credit, banking and finance: https://cclswa.org.au/;

I have learnt that there are a lot of consumers out there who don't know their rights and CCLSWA provides an invaluable service in educating consumers of their rights, including providing options for redress if appropriate, so that banks, credit companies, retailers etc do not unfairly take advantage of those consumers to their detriment. I do a variety of work – for example, research, drafting/settling letters to regulators and supervising the volunteers. It has helped my professional development as I am interacting with and supervising different paralegals and volunteers so I am learning different ways to manage different personalities; I am improving my letter writing and research skills; and I am also getting exposure to different areas of law. It has helped CCLSWA as they are a not-for-profit organisation and rely heavily on volunteers to do the bulk of their work.

Carla Kovacevic
Senior Lawyer

Melbourne

I attend at the office of the Consumer Action Law Centre (CALC) in Melbourne a few times each week to assist with property and commercial law aspects and also more general research in connection with the various projects it is involved with.

I have learnt how law reform is driven by organisations such as CALC. My knowledge of consumer protection regimes and legislation has increased, and my understanding of how legal vehicles can be exploited has also been expanded. The skillset I brought to the various projects was very valuable to this client, as their resident lawyers have different strengths.

Publication of a report relating to vendor terms contracts was a rewarding moment. I had been a significant contributor to the legal analysis which made its way into that report for more than a year.

Robert Cole
Senior Lawyer

Our graduates

All **our graduates** are required to do pro bono secondments as part of their graduate year with AGS. This is to ensure that our lawyers are instilled, from the start of their career, with a sense of the need to undertake such work. It is clear from the comments below from our graduates, that many regard their pro bono secondment as a beneficial experience.

I thoroughly enjoyed my pro bono placement [at the Financial Rights Centre, NSW]. It was great working with a really varied group of people and doing some interesting work that had a direct impact on people.

Joshua Beale
Graduate Lawyer

I completed my pro bono placement at Disability Discrimination Legal Service (DDLS) in Melbourne.

I found the experience both rewarding and challenging.

From a professional development perspective, taking calls from prospective clients provided a good opportunity to speak to clients but this was challenging as my knowledge of the relevant legislation was limited. Developing good relationships with the staff at DDLS was particularly rewarding.

James Singh
Graduate Lawyer

I really enjoyed my pro bono experience [with Consumer Action Law Centre (CALC), VIC]. The tasks I worked on were interesting and diverse. I found the people who work at CALC to be talented, passionate and supportive.

Susannah Madden
Graduate Lawyer

I am finding the pro bono placement really beneficial from both a professional perspective and also for the contribution I am able to make to Consumer Credit Legal Service WA's (CCLSWA) clients. The staff at CCLSWA are supportive and I find the client contact particularly beneficial. It has been a good complement to my work at AGS and I am grateful for the opportunity to use my skills to help disadvantaged individuals.

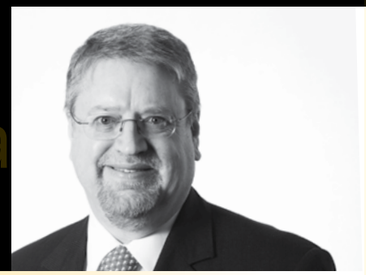
Sara Anicic
Graduate Lawyer

AGS Pro Bono Services

Legal advice/work for not-for-profit/charitable organisations

AGS offers a range of pro bono legal services to not-for-profit organisations and charitable organisations in areas that harmonise with our role as lawyers to government, such as commercial, governance and privacy advice, and drafting of employment contracts. This ensures that the resources of these organisations can be freed up and be better directed to delivering their charitable and community objectives in helping those who are disadvantaged. Organisations AGS has assisted and continues to assist include UN Women Australia, CARE Australia, ChildFund Australia, Suicide Prevention Australia, the Fred Hollows Foundation, Hear For You (which specialises in services for youth with a hearing impairment) and Project Independence.

Canberra



Tony Beal, Deputy General Counsel, AGS Commercial, who has undertaken significant commercial work for UN Women and the Fred Hollows Foundation, shared the following insights:

> Helping Fred Hollows has allowed me to get a full understanding of the complexity of arrangements and challenges in the many steps between receiving a donation and the final step of someone having their sight restored in a remote location. In the process I have learnt a lot about international law, drafting contractual arrangements that are designed to apply across many jurisdictions and translating the requirements of complex grant agreements from governments into much simpler plain English funding agreements between Fred Hollows and the many partner organisations in foreign countries that perform vital 'on the ground' work on its behalf.
>
> My work for UN Women, on the other hand, revolves around fundraising, sponsorships and events management. There is a lot more 'hustle' in this work than there is in the way government goes about things and, believe me, corporate sponsors don't sponsor events out of the goodness of their heart alone. It is a great opportunity to understand the importance of narrative in persuading people and to look for creative approaches to get to 'yes'.

Tony Beal
Deputy General Counsel

Rachel Chua, Senior Executive Lawyer, AGS Commercial, who received the Arts Law Pro Bono Award in 2017, made the following comments:

> I have really enjoyed assisting artists, writers, musicians, performers and Indigenous organisations as a volunteer lawyer with Arts Law. It has also been rewarding helping other not-for-profit or charitable organisations such as ChildFund Australia and Hear For You.
>
> I have had the privilege of working for these clients on a wide range of interesting intellectual property and related commercial matters. It is a testament to AGS's commitment to its pro bono program that AGS lawyers are able to contribute in such a meaningful way to assisting these clients with their legal issues.

Rachel Chua
Senior Executive Lawyer

Chairman of Project Independence Glenn Keys (left) presenting OGC's Counsel Alex Kunzelmann and Senior General Counsel Genevieve Ebbeck with a certificate of appreciation for the pro bono legal advice they provided

We provided advice to Project Independence, a Canberra-based charity supporting people with disabilities, on whether a proposed housing project complied with the requirements of the UN Convention on the Rights of Persons with Disabilities.

LawHelp – assisting not-for-profit Indigenous corporations

One of our proudest achievements is assisting with the establishment of the LawHelp Pro Bono Referral Scheme. LawHelp is a scheme developed by AGS and the Registrar of Indigenous Corporations to match up pro bono providers with not-for-profit corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* that require legal help.

The scheme offers help to remote and regional corporations which, for a number of reasons and through no fault of their own, cannot access legal assistance.

Through LawHelp, AGS has provided pro bono legal advice to a large number of Indigenous corporations all across Australia, many in rural areas.

AGS also worked in collaboration with ORIC to develop templates and guides aimed at assisting Indigenous corporations to better manage their obligations as employers. Our National Pro Bono Manager is also a member of the LawHelp assessment panel.

Training and legal resources for community legal centres

The community and non-profit legal sector also play a vital role in ensuring access to free advice and legal information for a wide range of the Australian public. Community legal education in the sector is crucial to service delivery and AGS is proud to be able to support these organisations, either though presenting at sessions to the community or, alternatively, drafting resources directed to educating the community about specific legal issues or assisting lawyers at community legal centres.

Our work includes working with the Women's Legal Centre in the ACT to develop and draft kits to guide self-represented litigants in matters involving care and protection orders. These kits, which are couched in clear, easy-to-understand language, are designed to assist those in the community who do not have the capacity to pay for legal assistance but need to navigate the relevant court processes and to 'demystify' those processes but provide sufficient details on matters, such as how to complete the relevant forms and the nature of the evidence required to support the necessary applications.

Lawyers in our national civil claims team drafted an 'Application to stay a warrant for eviction in the ACT Supreme Court' kit for solicitors working with the Welfare Rights Legal Centre's Street Law program. The kit includes material about the legal test that needs to be satisfied to succeed with a stay application in the ACT Supreme Court, and pro forma Supreme Court forms and affidavits covering the stay application and appeal, including some guidance notes about the process.

Another example was our advice to the Consumer Law Centre (ACT) on the key principles of a particular decision concerning the validity of guarantees and its possible application. The advice assisted the Centre's Principal Lawyer to advise clients about their rights and obligations in terms of specific loan contracts.

Lawyers in our employment and debt-recovery teams worked with the Self Representation Program of JusticeConnect on a pro bono basis, to provide assistance to draft fact sheets on bankruptcy, court practice and procedures, and Fair Work matters. These fact sheets are designed to explain in clear terms some of the key principles to better equip self-represented litigants to understand their rights and obligations and how the relevant court process works.

Asia–Pacific

Asia–Pacific

Helen Curtis

Justin Hyland

Elena Arduca

AGS has also provided legal education to lawyers of community legal centres. It is critical for these organisations to provide core services in an effective and efficient way. Training and staff development for both staff and volunteers in the sector is crucial to service delivery. An organisation's ability to provide this training may be affected by budgetary constraints and large staff turnover, hence legal training on a pro bono basis is essential to help develop the appropriate skill-sets.

AGS's national competition and consumer law team developed and delivered training to staff of community legal centres in NSW and QLD on changes in consumer law, working in conjunction with the ACCC. The training supported community legal centres to help people who cannot afford legal assistance with consumer law problems, particularly unfair contract terms.

Our Training Services team delivered training in the areas of statutory interpretation, the model litigant principles and the principles of the compensation for detriment caused by defective administration scheme, to staff of community legal centres in the ACT and in NSW.

International pro bono

AGS's pro bono program also extends internationally with particular focus on assisting Australia's important partners in the Asia–Pacific region.

Papua New Guinea (PNG)

Our international pro bono work includes well-established training courses for lawyers of the PNG Department of Justice and Attorney General (DJAG). The topics covered include legal reasoning; advice-writing and commercial arrangements. Senior Executive Lawyers, **Helen Curtis** (AGS Commercial) and **Justin Hyland** (AGS Dispute Resolution) presented training in December 2016 for the DJAG. Justin, together with **Elena Arduca**, another Senior Executive Lawyer in AGS Dispute Resolution, did a further week's training in September 2017.

On their last day, the State Solicitor arranged a meeting with them to thank them both and AGS and the Attorney-General's Department (AGD) for the training we have been presenting over many years now. He stressed how highly valued the training is and the use that is made of results from courses such as advice-writing in assessing the progress of lawyers in the Office of State Solicitor.

AGS also developed a very important innovative pro bono partnership with the FemiliPNG Project, which runs a Case Management Centre based in Lae. The FemiliPNG is a local non-government organisation established to assist survivors of family and sexual violence to access the services they need. AGS provided pro bono assistance on employment contracts and governance issues, which was invaluable to the FemiliPNG Project during its start-up phase when it needed time-critical advice crucial for the operations of the organisation.

AGD's Pacific Legal Policy Champions Program and Pacific Legal Policy Twinning Program

AGS also supports AGD's Pacific Legal Policy Champions Program, which brings 6–8 lawyers from various Pacific countries (eg Vanuatu, PNG, Solomon Islands, Fiji) to Canberra for a legal policy development course. The department's Pacific Legal Policy Twinning Program involves about 4 lawyers visiting for a few months to work on a legal policy project.

AGS delivered a 1-day legal reasoning course for the Twinning Program lawyers in early November 2016 and in 2017 has run 2-day courses in April and October on legal reasoning and advice-writing.

Nauru

In 2016 AGS provided administrative law training for judges of the Nauruan Supreme Court, as well as the Secretary and lawyers in the Department of Justice of Nauru under the auspices of the International Association of Refugee Law Judges (IARLJ)

South-East Asia

AGS has also collaborated with Bridges Across Borders, South-East Asia Community Legal Education Initiative Australia and a number of other legal firms to draft modules covering ethics, access to justice and pro bono to be used as part of the university curriculum in South-East Asian countries. **Geetha Nair** and **Tim Moe** of our Training team drafted the modules on 'How and why do pro bono?' and on aspects of the duties of lawyers. We delivered the pro bono modules in Vietnam and received excellent feedback. These modules have also been delivered in Myanmar, Laos, Cambodia and Thailand and will continue to be promoted in the South-East Asian region.

If you are interested to learn more about AGS's pro bono program, please contact Geetha Nair, National Manager, Pro Bono Services at geetha.nair@ags.gov.au ■

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☐ ***Last week in Parliament*** summarises key events in Parliament's previous sitting week.

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These **forums** also constitute office approved continuing legal education. Events are held annually unless noted.

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☐ **Administrative Law Forum**

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☐ **Employment Law Forum**

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☐ ***Commercial notes*** aims to keep you informed on significant developments in commercial law relating to Commonwealth activities.

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