The New Regime: Continuing Professional Development

On 27 May 2008 the Legal Profession Act 2008 was passed, although Parts 2–20 of the Act are yet to be proclaimed. This new Act brings with it a new regime of continuing professional development.

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Continuing Professional Development

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President’s Welcome

Craig Colvin SC

The appointment of Justice Robert French as the 12th Chief Justice of the High Court of Australia has been warmly welcomed throughout Australia. His honour is an outstanding judge and jurist held in the highest regard by his judicial colleagues and by the profession. His appointment reinforces the eminence of the High Court and ensures continued public confidence in the court. The Association joined with the Law Society of WA in hosting a reception at the Town Hall to mark the occasion of the appointment of the first Western Australian to the nation’s highest judicial office. The entertaining remarks of his honour are reproduced in this edition. Many members of the Association also attended at the Federal Court on the day of his honour’s welcome as Chief Justice to witness the event by video link. As guest of honour at the annual bar dinner, the Chief Justice’s work as a member of the Federal Court for over 20 years was acknowledged in entertaining speeches by Matt Howard and Justice Siopis.

The appointment of a former member of the Association as Chief Justice has caused us all on this side of the continent to stand a little taller. Given that the High Court is both the constitutional court of a federation of states and the ultimate court of appeal from all courts in the country it is important that its members reflect that character.

Relationally, an important part of the work of the Association is to advocate to ensure that eminence in personal qualities and professional abilities together with independence are maintained as essential criteria for appointment to judicial office.

The Association, through the Australian Bar Association, has publicly supported the recent initiatives by the Commonwealth Attorney General to ensure an open and accountable process for federal judicial appointment designed to ensure the best candidates are appointed as judges.

On a different topic, with the expected introduction of compulsory professional development, the Association has also planned a considerable increase in its education programme for this year. In July the Association conducted a week long Advocacy Training Course for bar readers jointly with the South Australian Bar. There were 12 readers in attendance from WA. The faculty for the course included Ken Martin QC, Patrick O’Neal, Felicity Davis and Judge McCann. The participation of senior members of the bar on a voluntary basis is greatly appreciated and essential to the success of the course.

In August the Association held its first best Practice Forum dealing with Witness Statements. The event was arranged by Kanaga Dharmananda. It was very well received. The Guide to Best Practice discussed at the Forum will soon be published on the Association’s website as a resource for all practitioners.

In November the Association will hold its first CPD Weekend. It will be an opportunity for members to attend an event tailored to the interests of barristers that will enable qualification for most of the annual points requirement under the new CPD system. The event, which is being coordinated by Joshua Thomson, has created a great response. At the time of writing, 72 members have registered.

There are other pressing issues on the Association’s agenda. They include participation in the process for drafting new conduct rules to be published as regulations under the new Legal Practice Act; encouraging a commitment from Government to fund a new court building for the Supreme Court (following the opening of the new District Court Building); reviewing support arrangements for the provision of pro bono services by members; progressing an application under the Professional Standards Act; and ensuring there are chambers available for future growth of the bar.

Congratulations are extended to Justice French on his appointment as Chief Justice of Australia. In 106 years of Federation he will be the first West Australian to hold the highest judicial office in the land. Justice French is highly regarded in all quarters of the legal profession, both as a Judge, and personally. The adage is that all that is required to be a good judge is to be a gentleman. Justice French is both that and an eminent jurist.

Most members of the Association, including those who extended their period of study in pursuit of one or other intellectual interest, must, until the advent of “CPD”, have thought that their days of clearing educational hurdles were long past. No longer: we are now required to amass 10 “CPD” points by March 2009 in order to continue to applying our trade. Having said that, a requirement that those in practice satisfy an on-going legal education requirement, designed to keep them abreast of developments in their areas of practice, is a positive development, even if the appeal of compliance may, on occasion, be less than compelling.

Craig Colvin SC - President

Peter MacMillan - Editor
The New Regime: Continuing Professional Development

On 27 May 2008 the Legal Profession Act 2008 was passed, although Parts 2-20 of the Act are yet to be proclaimed. This new Act brings with it a new regime of continuing professional development (“CPD”), which will require practitioners to annually participate in ongoing legal education. This important development has been contemplated since at least 1999, when the Law Reform Commission recommended that a program of mandatory continuing legal education should be implemented, in the Review of the Civil and Criminal Justice System in Western Australia (paragraph 36.15, recommendation 441). This was followed by the Roper Report in May 2002.

The objective of the CPD programme is to ensure that the profession maintains proper professional, and particularly ethical, standards.

Compliance with the CPD regime will be monitored by means of requiring practitioners to supply a statutory declaration verifying compliance, when renewing practising certificates. As well, compliance audits will take place. The Board’s Policy also states that a failure to comply with the CPD requirements may constitute unsatisfactory conduct, resulting in disciplinary action.

Consistently with the aim to ensure that practitioners are educated about professional and ethical standards, as well as keeping their substantive legal knowledge up to date, CPD points must be obtained across three areas of competency. Practitioners will need to accumulate 10 points across the following competency areas:

(a) Legal Skills and Practice – this area concerns those skills and attributes relevant to or necessary for an individual practitioner’s practice. These may include, for example, compulsory risk management, trust accounting, time management and business skills, cross-cultural training, occupational health and safety, equal opportunity, unlawful discrimination, practical legal skills including advocacy and drafting;

(b) Values – this area concerns ethics and professional responsibility;

(c) Legal Knowledge – this area concerns the substantive law.

Practitioners (including part time practitioners) of more than 5 years post admission experience will be required to obtain at least 2 CPD points from the area of Legal Skills and Practice, and at least 2 CPD points from the Values Area.

CPD points may be accumulated from a variety of activities, and are generally allocated on the basis of 1 CPD point per 60 minutes of activity. Half points can also be earned per thirty minutes of completed activity.

A minimum of 8 CPD points must be accumulated through Group Activities, which means an activity undertaken by 2 or more persons simultaneously, such as a seminar, lecture or workshop. A practitioner who presents a paper or provides teaching can claim 3 CPD points for 60 minutes of a substantive presentation, a practitioner who provides commentary on such a presentation may obtain 2 CPD points, and a practitioner who chairs such a presentation may obtain 1 CPD point. A Group Activity may also include interactive electronic education, such as listening or viewing up to date electronic medium with the opportunity for live commentary or discussion, or using an on-line education program offered by a tertiary institution. If the electronic medium is more than 12 months old, CPD points are earned at the rate of 0.5 points per 60 minutes.

The Legal Practice Board has released a policy on Continuing Professional Development, which will form the basis of the requirements of the Legal Profession Rules governing CPD when these are made under the new Act.

A maximum of 2 CPD points may be accumulated through an Individual Activity. This includes non-interactive electronic education.
A maximum of 5 CPD points may also be obtained for legal publications, at the rate of 1 CPD point per 1,000 words published or in a presented paper, or 1 CPD point for each edition of a legal journal or publication edited.

A maximum of 7 CPD points may be claimed in respect of a single activity. The meaning of what constitutes a "single activity" has not been elaborated, but the Board has said that the teaching of a subject over a semester is a "single activity", so that only a maximum of seven points could be accumulated for this activity. Other examples of a "single activity" include a weekend intensive workshop or conference.

Only CPD activities with quality assured or QA providers will attract CPD points, unless the Board provides approval for specific activities. A QA Provider must apply for approval from the Board, unless deemed to be a provider. Deemed providers include providers who have been approved in any other Australian jurisdiction (although none presently exist), most Courts and some tribunals.

The Western Australian Bar Association has applied for status as a QA Provider, as have a number of large law firms. The Bar Association has identified the need to provide CPD as part of its role. That is because barristers have specialised areas of practice, and require CPD focused upon these areas. Also, the Bar Association realises that many of its members are tremendously busy, and would like to satisfy their CPD requirements as efficiently as possible.

During the first year of the CPD regime, the Bar Association will conduct two main types of CPD activities. The Association is conducting a number of best practice conferences, by invitation to selected members, on areas of topical concern in civil litigation practice and procedure in Western Australia, such as the process of taking and settling witness statements. The purpose of these conferences is to produce publications of wide value to the profession, which may then be used as general reference guides. The guides will emphasise the ethical obligations of lawyers as officers of the court:

(a) to ensure that they are not mere mouthpiece for their clients;
(b) to confine a dispute to the issues of importance that will determine the outcome in a case;
(c) to plead a case for which there is a proper foundation;
(d) to refrain from advancing a case for a collateral purpose;
(e) to provide disclosure of relevant material; and
(f) to present evidence that is frank and free from influence.

The first of these conferences, concerning the Best Practice Forum on Taking and Settling Witness Statements, occurred on Friday 15 August 2008, with attendees including the Chief Justice and senior practitioners, to critique a paper produced by Craig Colvin SC.

The purpose of these conferences is to produce publications of wide value to the profession, which may then be used as general reference guides.

The Bar Association will also be conducting a CPD weekend so that those who attend can accumulate 7 of their CPD points, the maximum allowed for any one event. The CPD weekend is planned as an annual event. This year it will occur close to Perth at the Vines Resort in the Swan Valley. The event will take place from 7:00 pm on Friday 7 November and the lectures and seminars will be completed by 5:30 pm on Saturday 8 November. A book of papers will be produced, containing material presented over the weekend.

There will be a variety of sessions, including the Best Practice Forum on Taking and Settling Witness Statements, occurred on Friday 15 August 2008, with attendees including the Chief Justice and senior practitioners, to critique a paper produced by Craig Colvin SC.

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The closing debate will concern the role of the Crime and Corruption Commission, and will feature Tom Percy QC and Grant Donaldson SC, among others.

The proposed programme is intended to provide those who attend with the minimum number of points across all three areas of competency in which CPD points are required. This will make it easier to "top up" the remaining 3 points from whatever areas interest a practitioner later in the year.

On Saturday night, there will be a meal at Chesters Restaurant nearby. This will provide an opportunity for barristers to review the weekend, and to enjoy each others company socially. After the meal, it will be up to individuals to choose whether to return to the Vines for a further night or head home.

Partners will be welcome throughout the weekend, and it is proposed that a separate programme will be arranged to entertain partners during the day on Saturday while the CPD programme is running.

It will be possible to choose to attend only parts of the programme, but the Bar Association is keen to encourage as many as possible to come for the whole event.
Reception to Mark the Appointment of Chief Justice French

Robert French was on 1 September 2008 sworn in as the twelfth Chief Justice of the High Court of Australia; the first West Australian to hold this office. The following are His Honour’s remarks on the occasion of a reception for him hosted by the Association and the Law Society at the Perth Town Hall on 20 August 2008.

The next issue of the Bar Review will include the Association’s tribute to His Honour and his appointment.

When I told my past and future colleague, Justice Gummow that there was to be a reception for me at the Town Hall he asked whether I was to be pulled up St George’s Terrace in an open chariot. I told him that West Australians and West Australian lawyers are energetic and entrepreneurial and never at a loss for an occasion to celebrate. But while they might be prepared to drag a judge up St George’s Terrace in a tumbrel, they would draw the line at a chariot.

This is said to be an historic occasion – the first time that somebody from Western Australia has been appointed as Chief Justice of the High Court. For me there is still something of an out of body experience about it – the slightly surreal sense that I am watching these things happen to another person.

What is worth celebrating is the vindication by this appointment of the observation, about Perth and Sydney, that ‘one small town is much like another’. Australia’s population is about the size of New York State. It is ridiculous to think of anything other than a national legal profession and a national judiciary. Each of us, wherever we may live and work, has a full opportunity to participate in it. We have an important part to play in the national life and our horizons should be wide enough to accommodate that view. This is well demonstrated by the leading roles that many in the West Australian profession have taken and continue to take on the national stage. My two predecessors from Western Australia on the High Court were in many ways. I was on the Barristers’ Board. We appeared with and against interstate solicitors. In many years ago when it opened its doors to practitioners from interstate. This move showed a degree of confidence and an entrepreneurial and competitive spirit that did not allow us to cling, like another State (which I will not name), to a dingo fence to keep out predatory foreigners. We benefited in many ways. I was on the Barristers’ Board for a number of years and the admission fees we extracted from new entrants, generally members of newly established national firms, was a handsome source of income for the Board. We appeared with and against advocates from the other States and worked with and against interstate solicitors. In some cases we were educated by their experience and skills. In other cases we were reassured that the best in this State could hold their own with the best from anywhere else.

We have of course our own in-house responsibility to develop and maintain standards of excellence. This is done in a number of ways. One of them is through continuing legal education. Another is by the provision of opportunities to practitioners to acquire skills across a variety of areas of practice. There is much to be learned from cross-fertilisation. I hope also that more in the profession will recognise the rewards that flow from the investment in their own skills made by spending more time in interesting or deserving cases than their immediate dollar return may justify. The returns in the long run from what you learn about the law and from enhancing the standing of the profession are great.

I have benefited enormously from having been a member of the legal profession in Western Australia as I continue to be this day.

There are many people, too many to name, who have provided me with opportunities and helped me on the way. It is a delight to be pulled up St George’s Terrace in a tumbrel. Many thanks to the Law Society and the Bar Association for organising the event and for the kind remarks made about me. And I thank you for your attendance.
Chief Justice French and Melissa Forbes

Dudley Stow, Michael Odes QC, His Honour Judge Groves, Craig Colvin SC

Gregory Boyle and John Prior

Nobby Clark, John Staude and Arthur Auguste

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It is with great pleasure that I appear on behalf of the Bar Association on the occasion of this special sitting to mark the opening of the new District Court Building.

On my calculation there are about 204 years of judicial experience shared amongst the members of this court. Most of that judicial expertise is present in this court today. Looking at the bench it is, may I say, a most imposing sight befitting the standing of the court.

I should say that over half the judicial experience resides in the hearts and the minds of the 6 most senior members of the court. So, there is a mix of judicial youth and experience. This we know is the ideal combination for a team with premiership aspirations.

The significance of these observations is to note that although the court sits today in new surroundings it brings with it a wealth of past experience in the judges of the court.

Moving into a new home produces many changes. When we moved into our new home I was advised that much of the old furniture had to be replaced because it didn’t go with the new surroundings. I know that your honours chambers have all been fitted out with new furniture conforming to the overall design of the building. I am pleased to see that your honours have all survived the critical eye of the design team and have been allowed into the new building. Might I go so far as to say that the court today looks as though it was built for you.

The work of this court is of great importance to public confidence in our judicial system. It deals with most of the serious criminal cases in this state. It also deals with most of the cases concerning claims by people who have suffered serious personal injury. Some of these cases attract public comment and scrutiny because of their subject matter. Most do not. It is a great credit to members of this court that it deals with a heavy workload of cases in a manner that does not give rise to adverse comment or interest because cases are dealt with fairly, openly, efficiently and with a continuous eye on seeking to make improvements.

These new facilities will greatly enhance the effectiveness of the work of the court and its ability to make ongoing improvements.

It is important that the court has the necessary facilities to enable it to continue that work. Proper buildings for our public institutions are important. This court, in particular must service many and varying requirements in the course of resolving court proceedings, including the requirements of jurors, child witnesses and victims of crime, the need for secure accommodation, video conferencing and facilities for mediation. These diverse requirements are met by this new building.

The Government is to be commended for providing those facilities. It is hoped that similar steps will soon be taken in relation to the Supreme Court facilities.

I have warned my colleagues that they will have to polish up their old arguments if they are to be presented in these new surroundings. Some of them, dare I say, have been part of the furniture at the Central Law Courts. Many of them have managed to find their way to the new building today. Hopefully they will fit in with the new surroundings even though their design is more retro than Court room chic.

Members of the Bar Association look forward to appearing before your honours in these new courts.
Western Australian Bar Association Review

7 - Issue 6, October 2008

The Barrister’s Overview

- The New Act will apply to counsel as well as members of the “Solicitors Branch”
- Costs disclosure is mandatory for barristers
- Agreements with instructors or clients now become offers
- Billing requirements now (under the new Act) affect counsel whereas under the 2003 Act that was never clear

When?
The Legal profession Act 2006 received the required Assent on 27 May 2008.
The Act comes into force on a date to be proclaimed and that date is not clear. It is thought that 1st January 2009 will be the effective date.

The Regulations

Apparently the delay in implementation of the Act is due to the fact that the Regulations “driving the Act” have not yet been drafted. The Regulations, as affecting counsel, will do these things:

- Prescribe the way and content of disclosure both as to:
  - (a) initial disclosure at the outset of the retainer;
  - (b) when billing is undertaken
- Set the default rate of interest which applies to both fees and disbursements without the need for an agreement to that effect. Application of the Model Regulations suggested a rate of 9.25% per annum. Note the billing notice required where interest is claimed which will be discussed later.
- The test for validity of a cost agreement will be more complex than previously and the relevant factors additional to the “usual” tests eg Brown v Talbot & Olivier are set out in s 288(3) of the Act. These factors are, to put in mildly, novel eg professional conduct, conduct of the parties cf with Wachmer v Jaksic [2007] WASC.

Whats New?

- Disclosure is governed by Statute not a Professional Conduct Rate.
- A prescribed form or fact sheet may supply the information required. Disclosure is made to the instructor not the client unless a direct brief is involved (where the same degree of disclosure is required as a “solicitor” (the term is eliminated from the new Act – we are all lawyers)).
- Agreements are made by way of an offer which prescribes the means of acceptance.
- To obtain the protection of the Act agreements must be in writing.
- Agreements need not be signed to show acceptance.
- All accounts must refer to the rights of the paying party again this may be done by a fact information sheet. These requirements must be met by barristers.
- If interest is to be claimed then a notice to that effect must appear on the account setting out the means of calculation ie referring to the rate.
- The test for validity of a cost agreement will be more complex than previously and the relevant factors additional to the “usual” tests eg Brown v Talbot & Olivier are set out in s 288(3) of the Act. These factors are, to put in mildly, novel eg professional conduct, conduct of the parties cf with Wachmer v Jaksic [2007] WASC.

Why are barristers caught?

Duties in the Act are placed on a law practice eg s 260 (relating to disclosure) which in s 3 is defined to include an Australian legal practitioner in sole practice. That definition is wide enough to include barristers. Note, for example, s 282 (1) (c) referring to costs agreements made between law practices on behalf of a client. Disclosure by a barrister is limited to the extent which allows the instructor to disclose to the client: s261(2). That position changes where a direct brief is taken.

Resources

The explanatory Memoranda for the Act is one of the better versions available throughout Australia though some of the explanations is rather lite.

www.austi.edu.au/wa/bilem/pb20007189

A helpful checklist for barristers in relation to the Act can be found at the website of the New South Wales Bar Association:

www.nswbar.asa.au/docs/professionalcosts

The Victoria Bar Association website:

www.vicbar.com.au

Features useful comments on disclosure – Members – Practice – Costs Disclosure including a link to a precedent costs agreement (which needs amendment for this State).

Other papers on the Act

Welcome to the New World: DJ Garnsworthy CPDS (2008)


Law Council of Australia website – National Practice—Further Reading with a link to papers on various law society sites not otherwise available. Be careful of local differences.

Harris Costing has useful and well written papers though note the Victorian Act is not quite the same as the WA Act.
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Paul W Nichols: “A Hat, a Stopwatch and a Gentleman”

‘Urbanus et instructus’

To have effectively worked in one place for over 40 years, is a feat that few lawyers can lay claim to. Paul Whichelo Nichols is one of a select breed who continues to work as a Barrister at the independent bar having commenced his service in 1967. As his curriculum vitae succinctly reads ‘Since 1967, Barrister-at-law, Author’. Understatement and precision with words are defining characteristics of Mr PW Nichols.

Much could be written about the legal achievements of a man who has spent well over half his life practicing the law as a barrister, but in this modern time of computer technology, anyone can ‘Google’ the name of Paul W Nichols and find out all they need to know about his professional achievements, both in the Courts and in the written text.

What is not so easy to discover, is how to explain and understand the enigma of Paul Nichols the man. As he told me early in our interview for this article, “I have always been a little bit of a paradox”. That would have to be, if anything, a gross understatement.

Each day Paul Nichols arrives at Chambers wearing a Lock and Co hat, his current one purchased in London in 1997, but similar to the one he has worn for the better part of his professional life. Attached to the pocket of his jacket is a fob watch. When questioned about the origins of the watch, I expected a story about a quaint antique shop, perhaps in Charing Cross Road in London or some such place, where extraordinary artefacts and relics of bygone eras can be found. Instead he happily told me that it came as a free sample with a Watch Magazine, which incidentally cost him $10.

Perhaps this helps in part to explain a little about the man behind the barrister. A man with all the imagery of an old conservative gentleman from 19th Century London replete with a walking cane and suit from a bygone era. Yet this quaint old English gentleman purchased his first computer in 1974, buying a Dick Smith System 80 pioneer computer. A keen follower of technology ever since, he regularly updated his computers long before it was fashionable for lawyers to take advantage of such technologies and in this way Mr Nichols was well ahead of his time. An intensely conservative and deeply religious man, voting for the party that he likes to describe as the “Tories”, he has long promoted the cause of the aboriginal people and shares a genuine passion and compassion for persons less privileged.

Mr Nichols came from what he terms ‘decayed gentry’, being the son of parents who were from farming families and who later owned a local pub, his father also being a distinguished member of the Australian Air Force. While supporting himself through law school, Mr Nichols worked in his parents’ pub. He reminisces fondly upon a job he held for a time which required him to clear out the draining areas from the local brewery and his reward was to be given a quart of beer, both before and after the job. Interestingly, Mr Nichols looks just as interested and recounts just as fondly his tales of this job as he does when talking about his later achievements as a barrister.

Having worked at Corsers for a relatively short period of time when first commencing legal practice, he quickly found his way to the Bar to practice as a Barrister. Although this is not a career path that would seem particularly unusual these days, it was unusual at that time in particular owing to two factors. The first was that there were at that time only ten or so members of the Bar and so it was by all accounts, a very small and, to some extent, ostracised part of the legal profession. Add to that, Mr Nichols was only 23 years of age, making him considerably younger than any other member of the Bar both then, and even by today’s standards.

He quickly moved into his specialty areas of administrative law and criminal law, working both in prosecution and defence (although he tells me that it is in defence work that his heart truly lies). This again is an apparently contradictory feature of a complex man.

Mr Nichols has long held a great passion for language, research and the practice of the law itself. From his earliest days he was responsible for the provision of reports from all District Court trials as the Western Australian editor of the State Reports. He actively sought to promote...
the publication and dissemination of all manner of noteworthy cases that were going through the Courts, many of which would otherwise have never been known to the boarder legal community. This is a passion that Mr Nichols took with him through to the present day and he is now a major contributor to many legal publications.

Although one can suggest that Mr Nichols would never have lived an ordinary life, his life did take an extraordinary turn on 20 January 1993 when his life was to change forever. Early on a Saturday morning, Mr Nichols, who lived alone, woke up to discover that he had suffered from a severe stroke. He spent most of that day attempting to get an ambulance but was dismissed by the phone operators who assumed he was severely intoxicated. For the better part of the day he lay helpless at his home desperately trying to ring for help.

Eventually a nurse recognised the symptoms and arrangements were made to convey him to Sir Charles Gardiner Hospital and then, ultimately, onward to Royal Perth Rehabilitation Hospital. When asked to recount his experiences during that time, he explained how horrendous the food was and told me a story about the food being the frozen rations from the Fremantle Prison.

In a testament to his character, he did not dwell on this obviously distressing and unhappy period of his life. He explained how horrendous the food was and told me a story about the food being the frozen rations from the Fremantle Prison.

I asked Mr Nichols to tell me about his fondest memories. He reminisced that his happiest times as a Barrister were in the early days when he could talk to all sorts of interesting people and everyone’s door was always open. He made reference to all manner of people with names like Burt and Wickham bandied about freely and fondly.

It was at this time that the computer skills that he had acquired back in 1974, were to prove his life saver. But lest it be thought that this was a man who was bitter about the present and fond of the past, when asked about the biggest change that he had noticed at the Bar, he said that really very little had changed at all. Perhaps he was right as he referred to the early days at the Bar as containing a bunch of men who were all “a strange bunch” and quite happily included himself and told me that you would have to be “a bit mad” to take part in a new venture.

In a testament to his character, he did not dwell on this obviously distressing and unhappy period of his life. But it is in Sir Francis Burt’s final comment about this book, of which Mr Nichols is justifiably proud, where his true abilities are revealed. Sir Francis Burt says “it is a scholarly and learned work, and the author is to be congratulated upon it”. Mr Nichols is indeed both scholarly and learned but, unlike so many modern day lawyers whose obsession is with making more money,
He is more interested
in what others
have to say, than in
espousing his own
point of view.

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elevating their own status and attempting to make their own personal mark in the world, Mr Nichols stands out for many reasons.

He is a man who has shown considerable kindness to many new Barristers who have come to the Bar over the years, myself included. He is more interested in what others have to say, than in espousing his own point of view. He is incorrigible, enjoys making politically incorrect statements, and yet at the same time passionately defends the rights of those who are not able to defend themselves.

I asked Mr Nichols what he would have his epitaph to be and he told me it should read this; “Paul Nichols: 1943 to ‘a long time away’ – an armiger”. A lover of language and in particular the Latin language, he tells me that an ‘armiger’ is a gentleman who bears arms. It would have to be said that the term ‘gentleman’, when intended to be applied to a Barrister, could not more aptly fit anyone in Western Australia than my neighbour at Chambers and this man who

I, and many other greatly admire.

Mr Nichols was asked what he considered to be the cause with which he felt more passionately about than any other. He told me that it was the quest for justice for the helpless. If all who hold a prominent place in our society and in the practice of the law were to share this passion with Mr Nichols, then perhaps we would finally reach a time where lawyers would no longer be seen as people seeking to advance their own interests and fill their own pockets, but rather as a group of dedicated professionals determined to better the lives of others and to change the world for the common good.

Mr Nichols, we congratulate you on achieving over 40 years in this profession. We are inspired by your courage in returning to your work following a debilitating illness. But most of all we join with you, I hope, in ensuring that your quest for justice for the helpless is one day fulfilled.
The ABA's Second Residential Trial Advocacy Course

In late January 2008 forty-two barristers from around Australia gathered in Sydney for an intensive and exhausting Trial Advocacy Course run by the Australian Bar Association.

The venue for our four and a half days of challenge and hard work was the Macquarie Graduate School of Management in northern Sydney, a venue with motel style accommodation, and peaceful gardens which masked the hard work and intense focus of the activities within.

The format of this course was similar to advocacy programs run in the legal profession more generally, with the added challenge of this program being intended for more senior (and thereby skilled) barristers; an added impetus for some if not all!

A couple of weeks before going to Sydney we had all been provided with our brief in the case we were to argue, information about what to expect and substantial information about the case that we would be arguing in mock trial conditions. The organizers had sorted us into groups and within those groups, allocated briefs for the applicant or respondent. We were instructed that the case needed to be ready to proceed on the first day of the course and consequently we should get it up before arrival. That challenge was added to by the need to balance work and home commitments, or in my case, the need to attend at certain ceremonial events the WACA in the week before going to the course.

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In my case, the need to attend at certain ceremonial events the WACA in the week before going to the course. It turns out that many of the Sydney, Melbourne and Brisbane barristers had been on holidays immediately before the start of the course, so their preparation time was probably curtailed by the call of relaxation.

Proceedings opened late in the afternoon on Monday 21st January with a 4.00pm welcome by Stephen Estcourt SC, President of the ABA. Phil Greenwood SC, a senior member of the Sydney bar and one of the main instigators of the course then spoke to us about the course’s content and the expectations of our coaches for the course.

We were then treated then to demonstration opening addresses from our coaches, showing us just how it should be done.

After that somewhat confronting start, we adjourned for drinks, dinner and some last minute preparation.

On the second day, Tuesday 22 January, we spent time in pairs with a coach undertaking an analysis of the brief, identifying issues and considering, on an issue by issue basis the matters that arose in the case.

That afternoon, to inspire us in advance of the following day’s activities, we were treated to a masterful performance of examination in chief by Ian Temby QC, who effectively showed how to keep a very chatty witness focused. The group then adjourned for drinks, dinner and then more preparation.

Wednesday and Thursday followed a similar structure to Tuesday, with sessions in the morning and afternoon followed by a late afternoon lecture and then a demonstration by one or more of our coaches for the purpose of assisting to prepare for the next day’s work.

On Friday we had the opportunity to do further cross examination and then close the case.

In sessions where we were not presenting ourselves, we acted as the witnesses for the other participants in our groups. This gave us both the opportunity to experience life as a witness and the opportunity to really understand the evidence. It was very interesting talking to other barristers about their feelings of being a witness and many of us agreed that it was one of the more difficult parts of the course. A number of the barristers found the environment as a witness quite intimidating. No doubt this will assist us in our pre-trial preparation in the future.

Each of the performances that each of us had was judged by a judge and witnessed by a coach who then went through the performance privately with the barrister, reviewing on the DVD. This can be an extremely intimidating, although rewarding and very helpful experience. One of the really useful features of this course was the performance coaches who gave us terrific feedback on matters like voice modulation, posture, eye contact and so on. This was really valuable feedback not only because it was personalized but also because the coaches who gave this assistance were experts from fields other than the law and people with expertise that we don’t always have the opportunity to tap into.

One of the most beneficial aspects of the course was the opportunity to work with people from a vast array of backgrounds and experiences and from throughout Australia. The most senior barrister on the course had been in practice for over twenty years and experienced levels ranged down to just a few years at the Bar. The breadth of legal work undertaken by the participants reflects the entire range of legal.

There were four Western Australian barristers at the course, Mark Holler, Linda Black, Tracy Caspersz and myself as well as a large contingent of Western Australia coaches. These were Gail Archer SC, Ken Martin QC, Patrick O’Neal and Chris Shanahan SC. Other notable coaches included Edwin Glasgow QC CBE from the United Kingdom Justice Glen Martin from the Supreme Court of Queensland, Stephen Estcourt SC, Phil Greenwood SC and Ian Temby QC.

At the end of the week we went to Terry Hills Gold Club (on a school bus) for dinner. His Honour the Chief Justice of Australia Murray Gleeson gave an address on the importance of the independent bar and his remarks were both well received and extremely well appreciated.

Following the formalities, some of the participants engaged in acrobatics and singing, well accompanied by Bob Wensley QC who has a magnificent voice.

The majority of us left Sydney on Saturday morning exhausted, invigorated, exhilarated and inspired. It was a terrific opportunity for learning and also to meet and mingle with colleagues from the around the country.
(L-R) Gail Archer SC, Mark Holler, Chris Shanahan SC, Clare Thompson, Ian Temby QC, Ken Martin QC, Patrick O’Neal and Linda Black.

Coaching Faculty and Participants
The Annual Women Lawyers of WA Honours Dinner is always a good night out with great food, wine, company and speeches. This year's dinner on 14 March 2008 was no exception.

Over 140 people, including many barristers, female and male, attended the dinner at The Old Brewery.

WLWA honoured two recent appointments at this dinner – both from the Bar – Her Honour Judge Anette Schoombee who commenced as a District Court Judge on 26 November 2007 and Gail Archer SC who was appointed senior Counsel, also in November last year.

The Woman Lawyer of the Year Awards were also presented. This year's winners were Celia Searle, Woman Lawyer of the Year, Donna Percy, Senior Woman Lawyer of the Year and Kate Davies, Junior Woman Lawyer of the Year.

Women Lawyers sure know how to throw a good party, ably assisted by the barristers on the organising committee – Rebecca Lee (WLWA president), Elspeth Hensler, Elizabeth Needham and Judy Seif.

The following photos illustrate how members of the Bar who attended this Dinner thoroughly enjoyed the night.

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The WA Bar Association's Bar Readers' Course was offered again this year to those joining the independent Bar in this State. This is the fifth year the course has been held.

There are 4 modules to the Bar Readers' Course – Advocacy, Evidence, Ethics and Jurisdiction & Procedure. This year the Advocacy module was run jointly with the South Australian Bar Association with a residential advocacy course held in the Barossa Valley, between 14 and 19 July 2008.

Three other remaining 3 modules of Ethics, Jurisdiction & Procedure and Evidence were organised by WABA and held at Francis Burt Chambers and John Toohey Chambers between 6 May and 12 June 2008.

A total of 19 bar readers completed this Advocacy course, 12 of them from Western Australia. This was an intensive course where bar readers were, in a safe environment, able to practice various aspects of advocacy and experience the challenges and stresses which a barrister experiences before and during a trial.

Before the course, bar readers were expected to prepare for the hearing of two interlocutory applications and a trial based on a hypothetical fact scenario involving a claim for damages by a plaintiff following a motor vehicle accident in the fictitious town of Snuggery. Bar readers attended from 9.00am to 6.00pm each day to hear lectures and observe demonstrations given by the coaches on the presentation of argument in interlocutory applications, opening and closing addresses, examination-in-chief and cross examination. After those demonstrations, bar readers were given the opportunity to perform the same exercise, using materials provided, with their
performance video taped and reviewed by the coaches.

On the last day of the course, bar readers ran a half day trial on the issue of liability, putting into practice all they had learned in the days beforehand. The final day trials were heard by 5 judges - 4 from South Australia, Supreme Court Justices Debelle, Anderson and Bleby and recently retired Supreme Court Justice Mullighan, and from Western Australia, His Honour Judge McCann.

The Ethics, Jurisdiction & Procedure and Evidence modules

A total of 17 bar readers completed these modules. Each module consisted of 6 two hour seminars held on one night per week between 6 May and 12 June 2008.

The programme for each of the Evidence, Ethics and Jurisdiction & Procedure modules is reviewed and updated each year by WABA. This year these modules were reviewed and updated by the Bar Readers’ Course committee of WABA Council comprising Felicity Davis (chair), Ken Martin QC, John Hockley and Joshua Thompson.

There were a number of senior barristers who acted as coordinators for each of the modules, chairing and coordinating the seminars over the 6 weeks they were presented:

Ethics:
Gail Archer SC, Joshua Thomson and Michael Berry

Jurisdiction & Procedure:
Jeremy Allanson SC, Richard Price and Mark Holler

Evidence:
Ken Martin QC, John Hockley and Peter Doherty

The presenters at each seminar of these modules are too numerous to list here but many senior members of the bar, judges and magistrates gave presentations on topics dealing with complex issues and practical problems which arise in each area of practice at the Bar.

Congratulations

Congratulations to all bar readers who successfully completed the modules of the Bar Readers’ Course.

Congratulations to those who were adjudged the best performed bar readers in the 3 WABA modules – Linda Black in Ethics and Katja Levy in Jurisdiction & Procedure and Evidence. Katja also received the Chief Justice’s prize for best performed bar reader overall.

Thanks from the WABA

Advanced courses in professional development like the Bar Readers’ Course do not happen without the support of a number of people and the hard work of many.

LexisNexis has sponsored the Bar Readers’ Course each year since its inception and once again this year sponsored the Ethics, Jurisdiction & Procedure and Evidence modules, as well as the joint SABA & WABA Residential Advocacy Course.

Many thanks go to LexisNexis, and Jim Pitts in particular, for their continuing support of WABA’s education programme.

The Residential Advocacy Course was also sponsored by the Medical Legal Insurance Group, which includes Suncorp, one of the professional indemnity insurers providing insurance for barristers. WABA thanks Suncorp, the Medical Legal Insurance Group and its representative, Peter Steele.

Thanks also go to winemaker O’Leary Walker, who generously provided fine wines for consumption each night of the Residential Advocacy Course.

WABA also thanks the SABA, particularly Ian Robertson and the ABA, particularly Phil Greenwood SC for his co-ordination of the Residential Advocacy Course. We look forward to Phil’s involvement in next year’s course. Thanks also to our coaches for this course and all the judges who judged at the trial on the last day. Their generosity in giving up their time – in the case of Phil Greenwood SC and the coaches, a week of their time – and sharing their knowledge with bar readers is greatly appreciated.

WABA thanks the course coordinators for the Ethics, Jurisdiction & Procedure and Evidence modules and the many judges, magistrates and senior members of the Bar who gave their time and shared their knowledge and experience with our bar readers to present at seminars in these modules. Their willingness and assistance in presenting at module seminars was invaluable to this year’s participants and to the success of the course.

There is a great deal of administrative work required in the running of the Bar Readers’ Course and for her work and her patience in dealing with busy barristers, thanks must go to the WABA’s Executive Officer and Education Coordinator, Debbie Cole.

Bar Readers’ Course 2009

Planning has already commenced for the Bar Readers’ Course modules to be held next year, which will include a residential Advocacy Training Course to be held in Western Australia in July 2009.
One of the exciting developments in law is the increasing awareness of the importance of concepts such as social justice and therapeutic jurisprudence. These developments are challenging the way we view ourselves. They represent an evolution of thought from what existed at around the time of Lord Eldon's famous observation as to the role of advocates.

Lord Eldon, the former Chief Justice of England, was a brilliant jurist. He was also able to capture some of the sentiments of his time. However, it is well to remember Lord Eldon resisted proposals to abolish slavery, end imprisonment for mere civil debt and provide emancipation for Roman Catholics. It is said that he was so resistant to change that he wept while sitting on the woolsack when he learnt that the death penalty would no longer be available for petty larceny.

This is what Lord Eldon said:

“The advocate lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the courts to decide. It is for him to argue. He is merely an officer assisting in the administration of justice and acting under the impression that truth is best discovered by powerful statements on both sides of the question”.

Today lawyers, and indeed judges, often make statements which suggest that they see their role in a very different light. It is not uncommon to read of judges seeing themselves as participating in the process of developing social changes and social justice. In such a context, they clearly do not regard the result as a matter of “indifference to them”. A classic example of such a judge is the former Chief Justice of India the Hon Mr Justice P.N. Bhagwati. His Honour when the Chairperson of the United Nations Human Rights Committee delivered a speech in New Delhi on 3 November 2002 on the topic of “Access to Justice”. On that occasion he said:

“In the beginning when I started social action litigation in India as a Judge in the Supreme Court of India there was criticism from some quarters that entertaining social action litigation and making orders and giving direction for taking affirmative action to make human rights meaningful and effective was going beyond the traditional judicial function… This criticism was repelled by me as unfounded because the law cannot remain static; it has to adapt itself to the needs of the people and to satisfy their hopes and aspirations”.

Many of us engaged in the court system see ourselves as being deeply concerned with the outcome, whether from the perspective of our client’s interest, or in the wider sense being referred to by Justice P.N. Bhagwati. At this level we may even be passionate about the result. Some may well view our passion as being a positive attribute.

Today few people are likely to consider it a sign of judicial weakness if a Judge reveals a personal view or emotion in relation to a case, depending of course on the circumstances.

The concepts of ‘rights to justice’ are not new. They stretch back as far as the Magna Carta and even further. The Magna Carta tells us that “no freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send again him, except by the lawful judgement of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right to justice”.

It is therefore the duty of the judges to mould and develop the law in the right direction by creatively interpreting it so that it fulfils its social purpose and economic mission.
such a statement is something more than indifference to the result.

Would you wish to be represented by somebody who was indifferent as to whether you succeeded or failed? In this context we may wish to ask ourselves whether we are delivering a system worth having if we are seen to be professing it as a worthy attribute in advocates that they are indifferent to the result.

The Hon Mr Justice P.N. Bhagwati also said in the same speech referred to earlier:

“The law is not an antique to be taken down, dusted, admired and put back on the shelf; it is a dynamic instrument fashioned by society for the purpose of eliminating friction and conflict and unless it secures social justice to the people, it will fail in its purpose and some day people will cast it off. It is therefore the duty of the judges to mould and develop the law in the right direction by creatively interpreting it so that it fulfils its social purpose and economic mission. The judges must realize that the law administered by them must become a powerful instrument for ensuring social justice to all and by social justice, I mean justice which is not limited to a fortunate few but which encompasses large sections of have-nots and handicapped, law which brings about equitable distribution of the social material and political resources of the community.”

How should we gauge whether a justice system supplies such an objective? The concepts developed by therapeutic jurisprudence may be a vehicle to assist when making such adjudications.

Therapeutic jurisprudence is based on the concept of assessing not only the legal consequences of a justice system but also the social, psychological and personal ones that may be costly results of the Court process. In such a light it regards the justice system as being a social force that often produces therapeutic or anti-therapeutic consequences. In a speech given by Professor Wexler on ‘Therapeutic Jurisprudence: An Overview’ he made the following observations on the role of therapeutic jurisprudence:

Basiclly, therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviors and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times antitherapeutic consequences are produced. Therapeutic jurisprudence wants us to be aware of this and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.

The concept of therapeutic jurisprudence is enlarged by considering not only the consequences to an individual when coming across a justice system but also collectively the consequences to a sub-class of its people or indeed even to our planet. In this regard, for instance, Aboriginal people may be justified in questioning whether they have inherited a legal system that has dealt with them or their environment in a therapeutic way.

In a learned paper Paul Nichols said that the interface between the Aboriginals and the white Australians justice system has been anti-therapeutic. Nichols suggested that it may be possible to observe in the Aboriginal people, as a consequence of this interface, a cluster of symptoms which may be seen as a form of mass post-traumatic distress syndrome. Considered in this way, Nichols sees the following anti-therapeutic consequences of our justice system to the Aboriginal:

- poor self esteem,
- believing the problems are unsolvable,
- believing they were the cause of the problems,
- reduced legal status, and
- being placed at the bottom of the social spectrum.

The theory that post-traumatic stress syndrome can infect entire families and conceivably cultures is not novel. Sigmund Freud said “If we consider mankind as a whole and substitute for it a single individual we discover it too has developed illusions which are inaccessible to logical criticism and which contradict reality?”

More recently Richard Heinberg in Catastrophe, Collective Trauma, & the Origin of Civilisation postulated that when hunter-gatherers encounter civilized people, they often remarked on how the latter appeared generally to be ‘disconnected, alienated, aggressive, easily frustrated, addictive, and obsessive’. These are the very traits often associated with post traumatic stress syndrome that post-traumatic stress syndrome can infect entire families and conceivably cultures is not novel.
stress syndrome. So whilst it is possible to see the impairment of a culture as a result of its contact with a ‘civilising’ dominant culture Heinberg also argues that it is possible to see in those dominant cultures certain traits of psychic distress. He explains that in order to deal with the concept of mass neurosis we can and are compelled to draw analogies with individual manifestations of psychic distress. In this way, it may be possible to see how such distress may be healed.

Heinberg sees that western civilisation is itself suffering from post-traumatic stress syndrome. He asks:

“Could it be because the population is already numbed to some extent by some ancient trauma, the destructive energy of which has been passed along from generation through abusive child rearing?”

Perhaps not so transparent is the correlation between the role of the litigant in the process of social justice, and this idea that mankind itself suffers a form of post-traumatic stress disorder. As advocates, we play a pivotal role in aiding the other components of the legal system reach a point where they can fairly, and reasonably deliver justice to all. In doing this nothing is lost by us being concerned with the actual results.

We may be able to draw inspiration from Kant’s view that a person is right in doing something if they would be happy to have it done to them, and if they would be happy to live in a world where such an action is commonplace. When this logic is applied to a system of justice, it is easy to see why we as lawyers should not be ‘indifferent’ to the outcomes where such outcomes may impact on human rights and a healthy planet which should, applying Kant’s philosophy be our responsibility and legacy to others.

This and other innovative ways of analysing the role of the advocate are essential for the legal system to progress in the way it deals with issues of social justice. We are all familiar with Alice Minister’s book For Your Own Good (Farrar, Straus, Giroux, 1983) in which she examines the attitudes towards child rearing behaviour which she postulates may have led to Nazism being possible. In her text Minister produces evidence that German parents were taught to bring up their children to suppress crying and feelings. Parents were told to reward stoicism and self-control. Childhood excitement was considered a vice, and “inhibition of life” was extolled as a virtue. In the context of such a childhood, it may be possible to understand why Eichmann SS (head of the Department for Jewish Affairs in the Gestapo from 1941 to 1945 and was chief of operations in the deportation of three million Jews to extermination camps) was able to listen to highly emotional testimony at his trial with no feeling whatsoever, yet blushed when it was pointed out to him that he had forgotten to stand when his verdict was read.

The need for a healthy planet and human rights is surely better served by judges and advocates who do actually care, and perhaps even are passionate about justice, freedoms and responsibilities to our environment.

In such a context I find the remarks of Justice Bhagwati consoling. Locally, here in Perth, on 29 March 2007 the Roman Catholic Archbishop Barry Hickey opened an advocacy centre for the Noongar people (an Aboriginal tribe) called Dawn Day Advocacy Centre. In doing so he said the centre was sponsored by the Catholic Church as a gesture of love towards the Noongar people. It would be surprising if the Noongar people are not happier receiving advocacy services from people motivated in bringing about change than from those indifferent to their plight.

The need for a healthy planet and human rights is surely better served by judges and advocates who do actually care, and perhaps even are passionate about justice, freedoms and responsibilities to our environment. It may be by extolling ‘indifference to the result’ as a virtue, we are in fact contributing to a psychic numbing that will have serious adverse consequences to us and our planet.

2  Ex parte Lloyd (5 November 1822, reported as a note in Ex parte Elsee (1830 Mont.69, at p 70n, at p 72).
3  Democratization of Remedies and Access to Justice, Speech delivered by, Hon ‘ble Mr. Justice N.Bhagwati Chairperson, United Nations Human Rights Committee, (Former Chief Justice of India), First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1 – 3 November 2002.
4  The Magna Carta 1215 para 39.
5  David Wexler is a Lyons Professor of Law and Professor of Psychology at the University of Arizona. He is also a Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico. The Network maintains a website, which includes a comprehensive therapeutic jurisprudence bibliography, at <http://www.law.arizona.edu/upr.info/).
6  http://www.therapeuticjurisprudence.org/
7  Transforming legal processes in court and beyond 3rd International Conference on Therapeutic Jurisprudence 7 June 2006
8  “Does the legal system deal with Aboriginal people in a therapeutic or anti-therapeutic way?”
9  Ibid.
12  http://www.newdawnmagazine.com.au Articles/Origin%20of%20CivilisationP1Shml
I appear this morning on behalf of the Western Australian Bar Association and its Members to warmly welcome the appointment of Justice Neil Walter McKerracher, one of our Association’s most long-standing members.

I am grateful to the President of our Association, Mr Ken Martin QC, for offering me the opportunity to appear on this special occasion.

Recognising Your Honour’s elevation gives me particular pleasure as we have been neighbours on the 16th Floor of Francis Burt Chambers for the last fourteen (14) years.

Indeed, the last two appointments to this Honourable Court, Justices Gilmour and McKerracher have both come from the ranks of the 16th Floor - perhaps it is something in the water.

Whilst it is always difficult to do justice to reflect the character, life and legal career of a new appointee to the Bench within the confines of a welcome speech I have sought expert assistance on this occasion.

Despite Your Honour’s obvious celtic antecedents I have chosen to appeal to the talents of Sir William Shakespeare. Shakespeare neatly divides life into a series of Histories, Comedies and Tragedies.

Life at the Bar certainly draws heavily from each of these wells. I propose to engage each of these perspectives in turn in analysing Your Honour’s career.

Of the three categories, History, Comedy and Tragedy I received an overwhelming number of anecdotes in one category. I would, however, be unwilling to reveal that category and I am sure the discrepancy is entirely unnoticeable from my remarks this morning.

I would like to begin with the historical, before taxing this Court with the comic or tragic.

Historical

One can identify two primary phases in Your Honour’s legal career

- the first, when a partner at Robinson Cox between June 1977 and December 1989, and
- the second, as a member of our Association from January 1990 until October 2007, some 17 and a half years.

It is to the second phase of Your Honour’s legal career that I direct my remarks this morning.

I have chosen a few words that I think convey the measure of Your Honour’s historical contribution to the Bar.

Generosity

My first impression of Your Honour was as the owner of a significant and extensive library collection, a library that was incredibly convenient to those of us on the same floor.

Not only was the library convenient but Your Honour made it readily available - and that access often “saved the day” in the rush to get to Court. One of the unusual features of the McKerracher library was that you could often get some good advice or useful comment on a legal problem as you borrowed a couple of books.

Over time my stops in that library became more frequent and were always rewarding. Of course the down side of Your Honour’s appointment is that I have now had to purchase an enormous number of books.

Indeed I note that at a recent floor lunch to celebrate, sorry commiserate, your Honour’s appointment that was the primary focus of comment.

Your Honour has made a significant and on-going contribution to the Western Australian community, the broader legal profession and our Association in particular.

Many examples of this contribution have been referred to this morning.

However, when one recites a short indicative list of Your Honour’s activities the “telling” weight of your sustained, generous and broad contribution becomes immediately apparent:

Legal

- Senior Sessional Member at the State Administrative Tribunal 2005 – 2007;
- Commissioner in the Supreme Court of Western Australia – 2005;
- Chairman and Deputy Chairman of WA Bar Chambers Limited the company that operates Francis Burt Chambers between 1992 – 2007 with a short break between 2003-2005;
- Member of the Bar Council of our Association in 1994-1995;
During this time it is fair to say that the Commission as Acting Commissioners.

The work of the Corruption and Crime Commission has been extremely busy and the work has generated a wide variety of legal issues.

Your Honour has embraced the challenges that have emerged and you have been a reliable purveyor of advice and assistance drawing upon the legal skills gathered over a lengthy and successful career at the Bar.

It is invariably the case that over the years one must rely on colleagues in a variety of situations.

In more recent times we have shared situations.

It is invariably the case that over the years one must rely on colleagues in a variety of situations.

It is when one considers what Your Honour was attempting to do in any one year coupled with a busy commercial practice at the Bar that the generosity of each additional commitment becomes obvious. There would be few of Your Honour’s colleagues who could match this list.

I should also note that Your Honour’s role as Chairman and Deputy Chairman of WA Bar Chambers, the company that operates Francis Burt Chambers, may not be well understood in the broader community. However Your Honour’s leadership and commitment to maintaining, improving and expanding Francis Burt Chambers over the best part of the last fifteen years leaves a significant and abiding legacy of your time at the independent Bar in this State.

Dedication

Your Honour is well known for your absolute commitment to matters that you are retained in. No doubt this reflects the McKerracher Clan motto which I will not seek to pronounce (Fide et Fortitudine) and which loosely translated from the Latin means Faithful and Strong. Your Honour is a good representative of your Clan and, no doubt, members of this Honourable Court will appreciate these qualities in the years ahead.

Reliability

It is invariably the case that over the years one must rely on colleagues in a variety of situations.

In more recent times we have shared the work of the Corruption and Crime Commission as Acting Commissioners. During this time it is fair to say that the

It is invariably the case that over the years one must rely on colleagues in a variety of situations.

Comedy

Despite the numerous anecdotes that I was provided with, I found none in the class of comedy simpliciter, at least none that seemed to fall directly into this category.

Without commenting on the category into which most anecdotes fell I decided to devote the balance of this speech to “Tragedy”.

Tragedy

Tragedy in Your Honour’s life appears to have moved from your single-minded devotion to duty. Such as the occasion on which you almost single-handedly disband the Law Society Executive by suggesting that it did away with dining out after every meeting.

However there was one anecdote that stood out amongst the others. Indeed when I first heard it I could not immediately classify it into one of Shakespeare’s three categories.

After careful consideration and taking expert advice from those close to Your Honour I decided that it must fall into the third category.

This anecdote displayed Your Honour’s doggedness and determination, however I could not accept and rejected my informant’s use of the word “obsession”.

Many years ago Your Honour was briefed in an appeal during the Advent season with Christmas rapidly approaching.

Apparently a scathingly brilliant appeal point occurred to Your Honour on Christmas Eve - during the night when, “not a creature was stirring not even a mouse”. Waking the next morning and having waited for a while, not unlike a child waiting for his Christmas presents, Your Honour unable to wait any longer decided to share your brilliant point with a colleague.

Your Honour made the call at 6:00 am on Christmas morning no doubt simply to ensure that you didn’t miss your colleague in a welter of Christmas cheer and frivolity, or embarrass him later in the day when enjoying a glass of wine at lunch.

I am reliably informed that Your Honour’s dawn raid worked to a “T” - the good news was that your colleague and his wife were awake - the bad news was that the couple were somewhat distracted at the time of your call. Your Honour’s colleague clearly did not share Your Honour’s dedication. I understand Your Honour has been able to talk his way out of that one: my source was not able to explain how.

On a recent occasion when emailing Your Honour you responded from the balcony of Your Honour’s Grace Town residence indicating that you were sipping a Gin and Tonic and looking out over the bay.

I promised Your Honour on that occasion that I would return the favour at some stage but have been unable to do so, now I may not be able to do so - this welcome speech will have to do.

Conclusion

Undoubtedly the true tragedy this morning is to those of us at the Bar who will miss Your Honour’s camaraderie, assistance and good company on a daily basis. Our loss is this Honourable Court’s gain.

Our members wish Your Honour well in the challenges that lie ahead and look forward to appearing before you in the near future.
Speech to Welcome Judge Anette Margaret Ilse Schoombee

I appear this morning on behalf of the Western Australian Bar Association and its Members to welcome the appointment of Judge Schoombee.

Judge Schoombee began her legal career on a high note in 1976 winning the gold medal for the best final year law student at Stellenbosch University. This is an award that she shares with some notable South African lawyers, including Justice Belinda Van Heerden, a Judge of Appeal in the newly minted Supreme Court of Appeal at Bloemfontein, the highest appeal court in South Africa.

Judge Schoombee was admitted to the South African Supreme Court on 10 February 1978. In the decade that followed her admission Her Honour spent some three of those years lecturing in commercial law at Stellenbosch before leaving academic life to join the Cape Bar.

The Cape Bar is one of ten Bars affiliated to the General Council of the Bar of South Africa, albeit each Bar is an independent association. In this sense the Cape Bar, whilst having different antecedents, is not unlike out own.

Her Honour practised civil, criminal and family law during her time at the Cape Bar, which came to an end in 1986 and she immigrated to Australia in February 1987.

The African connection has stayed with Her Honour despite her new life in Australia, and I note her article regarding the Tanzanian Women Lawyers’ Association in Themis, a publication of the Australian Women Lawyers in March 2004.

In the later nineteen eighties there was something of an antipodean diaspora of lawyers from South Africa to Australia. Some of the Western Australian legal firms were heavily engaged in recruiting South African lawyers, one such firm was Parker & Parker.

No doubt the political instability in South Africa made Australia an attractive proposition for those lawyers seeking a more settled and relatively untroubled existence for themselves and their families.

It would be interesting to consider how those lawyers see their choice to emigrate now, some decades later.

I understand that Her Honour may have trouble explaining what a District Court Judge does to her South African colleagues because there is no regional intermediate court in that jurisdiction.

Since arriving in Australia Her Honour has specialised in commercial and insurance litigation. No doubt this grew out of Her Honour’s early academic interest in commercial law and her practice as a Senior Associate and ultimately Litigation and Insurance Partner at Parker & Parker, which merged with Freehills in 1996.

At the WA Independent Bar since July 1999 Her Honour has spent some 8 and a half years at Francis Burt Chambers. During that time she has, as has been noted, served - alongside Tony Siopis SC as he then was now Justice Siopis in the Federal Court - as a Counsel Assisting the Royal Commission into the Finance Broking Industry in 2001-2002, and also as a Commissioner in this Court for periods in 2005 and 2006.

During her tenancy at Francis Burt Chambers Her Honour was a director of the company that operates our Chambers.

In that capacity Her Honour sought to make facilities more accessible and was one of those responsible for the re-naming of “the Mess” the “Common Room”, and the removal of the bar that used to dominate the room – albeit providing Members with a physical prop at the end of a busy day.

The reformation of the “Common Room” has of course continued and it is currently being refurbished – there was a suggestion that now Her Honour has been appointed the old “bar” could be brought out of storage.

I believe, however, that we are more likely to get structures that whilst they provide physical support at the end of the day are more in the nature of “tables”, albeit tables upon which drinks may be served.

Her Honour’s commitment to Women Lawyers of WA is well known having served as a Committee Member, Vice President and ultimately President in 2004-2006. Judge Schoombee was a director of the national body, Australian Women Lawyers in 2004.

Her Honour has participated in a number of mentoring schemes both for young lawyers and female law students.

Our members wish Your Honour well in your new life on the Bench, and in meeting the challenges that lie ahead in this very busy jurisdiction.
Appointment of Judge Christopher Stevenson

It is a pleasure, on behalf of the Western Australian Bar Association, to attend this morning and to offer the congratulations of the Association to your Honour, on the occasion of your most welcome appointment to the Court.

At the outset I acknowledge the kindness of the new President of the Bar Association Mr Craig Colvin SC in allowing me the honour of speaking on its behalf this morning.

May I also echo the warm tributes which have been paid to your Honour by the learned Solicitor General and the President of the Law Society. Those tributes are thoroughly deserved and entirely appropriate.

Speaking from the perspective of the Bar Association, can I say that you have been one of our most valued colleagues since you left the secure environment of partnership at Mallesons in 2003 and joined the independent Bar. You enjoyed the considerable advantage of coming to the Bar with a well established reputation in Perth for competence in all areas of general commercial law, but in particular, in the areas of native title and mining law. You had also made a lasting contribution towards progressive dispute resolution through LEADR and the regular training courses which are conducted and your university teaching at UWA as a visiting fellow on that subject.

I had the opportunity to get to know your Honour well in England during 1981/1982, when we were both studying at London University to complete the LLM. We were mutually enrolled in commercial insurance and restitution.

It was during the course of completing the London LLM that we were able to embark upon a mutual skiing holiday to the French Alps and there in the beautiful scenery of the 3 valleys at Meribel, I learnt to my peril that you possessed phenomenal natural skiing abilities having been introduced to the subject from childhood. This was a revelation, given that you had been born and raised in the Australian bush at Kellerberrin. On day 1, when you surreptitiously tried to introduce me to a mogul field on a black slope, I seriously doubted whether I’d ever return in one piece to Western Australia.

Your complete dedication to any task at hand led to a successful reputation as a most sought after private mediator. You established in Perth an enviable reputation both as an extremely fair, but innovative mediator. What impressed many was the fact that you regarded an attainment of a settlement as a personal challenge every time and you spared no efforts in your endeavours to bring the parties together. If this meant early starts, working through lunch, working late or even working to midnight in order to keep the parties talking you willingly shouldered that burden. Again, always with a minimum of fuss.

I’ve known your Honour for a long time as a close friend and a person that I have the utmost respect for as being someone of complete integrity and reliability.

What impressed many was the fact that you regarded an attainment of a settlement as a personal challenge every time and you spared no efforts in your endeavours to bring the parties together.

Whilst at the Bar you have also made a lasting and most appreciated contribution to the West Australian Bar Association, as a member of Bar Council since late 2004, serving first, as Secretary in 2005 and then as a most able and reliable Treasurer during 2006 and 2007.

The Bar Association is sorry to be losing your comradeship and all round expertise, but the Bar’s loss is the community’s gain. Notwithstanding an assiduously cultivated laid back outward image, which you strive strenuously to convey, I have an insider’s perspective, which establishes beyond any shadow of a doubt that you are and have always been an extremely dedicated individual who takes all your obligations very seriously indeed.

I’ve known your Honour for a long time as a close friend and a person that I have the utmost respect for as being someone of complete integrity and reliability.

I have seen at firsthand, how important it was to you to discharge that role at personal cost. A couple of years ago I think, you arrived at a dinner at the Hyatt to celebrate the Australian cricket team being in town for the first test against Pakistan at 10.00pm, just in time for dessert. The reason, which everyone at dinner readily accepted, was...
that the parties to your all-day mediation had been close to settlement and so you had been keeping them going on until they successfully crossed the “finish” line. It is that same unshakeable dedication to the task that saw you excel in first class cricket and some other dangerous sports, like paragliding, circumnavigation of Australia as a member of the Defence Air Force Reserve and as an extreme conditions wind surfer. I think it will only be a short time before you persuade the Chief Judge to introduce some challenging abseiling activities up the side of the new building – just to keep you occupied during lunch or intervals.

I am also in no doubt whatsoever as to the source of your values in terms of such a high sense of responsibility and a thoroughly reliable disposition – a value system that has seen you take up this judicial position – really at the peak of a flourishing career at the commercial Bar.

I had the pleasure of being present (with my then fiancé) at your family’s home in Kellerberrin in 1983 over the New Year’s break. Your father, the late Dr Derek Stevenson, was the Kellerberrin region’s local doctor. Approximately 30 seconds after grace had been completed at the start of the evening meal, the telephone rang. It was an emergency call from someone needing an urgent appendectomy. The immediate and drilled response of the whole Stevenson family to another emergency, was to an outsider, a most impressive sight to behold. Within about 15 seconds the family was transformed from a state of relaxation towards a state of extreme preparedness – as your father dashed off, medical bag packed and car warmed-up at the ready to discharge his indispensable duties to the community one more time. I don’t think he re-appeared for the remainder of that whole evening. But I was privileged to witness a close family seamlessly manage what was obviously a regular occurrence. There is no doubt that the selfless lifetime example of the country doctor, ever at the call and ever responsive to the unrelenting health needs of a rural community is your abiding cultural influence. Dr Derek Stevenson was a hugely respected member of the Kellerberrin community and were he here today, I have no doubt that he would join your mother Rosemary, in celebrating their immense pride in your own achievements, and now your own embarkation upon a life of professional service to the community, mirroring his own contributions.

Apart from your love of extreme sports, dedication to work and love of the land, I know that your family plays the paramount role in your life. Your wonderful children Georgina, Richard and Harry are all extremely proud of you, as is your saintly wife Evelyn, ever ready at hand to provide medical attention in the event of your extreme sporting endeavours generating adverse repercussions.

Jeremy Allanson SC

Jeremy was born in Western Australia in May 1953. He obtained a B. Juris (Hons) in 1975 and LLB (Hons) in 1980 at the University of Western Australia. He also obtained his Master of Laws from UWA. He was admitted to practice in the High Court and Western Australia in 1981. He was a senior tutor in Law at UWA in 1978 – 1979, before working as an associate to the Hon Justice Sir Ronald Wilson in the High Court of Australia.

From 1981 – 1994, Jeremy was a legal officer with the Crown Law Department, attaining the role of Senior Assistant Crown Solicitor. He joined the Independent Bar in 1994, practicing in a range of areas, but specialising in administrative law and taxation.

While at University, Jeremy found inspiration in his uncle, Eric Edwards, whom he confesses was a little intellectually daunting. In practice, he recounts that he was extremely fortunate to have worked with people of the calibre of Clyde Langoulant and Peter Panegyres (Crown Solicitors), the late Hon Justice Sir Ronald Wilson (as his Honour’s Associate in the High Court), and Ron Davies QC (who provided him with guidance and intensive court room training).

On joining the Independent Bar, Jeremy acknowledges that he was helped by many senior members with Chris Zelestis QC and the Hon Justice Eric Heenan QC, and Greg Davies QC and Helen Symon SC of the Melbourne bar, being singled out for particular mention.

While at University, Jeremy found inspiration in his uncle, Eric Edwards, whom he confesses was a little intellectually daunting.
Mr Theo Lampropoulos SC

Theo Lampropoulos was born in Greece. He obtained the degrees B. Juris in 1976 and LLB (Hons) in 1978 at the University of Western Australia, taking the HCF Keall Prize for best final year law student in 1978 (as well as the Butterworths prize in procedure and conveyancing). He was admitted to practice in Western Australia on 21 December 1979, having completed his articles with the State Crown Solicitor.

Theo was a legal officer and then Assistant Crown Counsel with the State Crown Solicitor from 1979 – 1987 (during which time he obtained concentrated civil and criminal advocacy experience in superior courts), and was in-house Counsel at Downing & Downing from 1987 – 1988. He joined the Independent Bar in 1988. His main areas of practice include insurance law, medical negligence, products liability, occupier’s and employer’s liability, motor vehicle claims, disability insurance, disciplinary tribunals, commercial disputes and wills/inheritance issues.

Theo feels he has been very fortunate to have worked with numerous talented lawyers, both at the State Crown, and the Bar. Many of them have gone on to become Judges in various courts. In his early years at the State Crown, Kevin Parker, Michael Murray, John McKechnie (as they then were), and Ron Davies QC had the greatest influence upon Theo’s career.

At the Bar, Chris Zelestis QC has provided valuable guidance, and Theo came under the spell of WS Martin (as he then was) whilst they were neighbours in chambers. (It seems that spell has become rather more potent and pervasive in the last couple of years). Theo also received interesting views on the law and life from Eric Heenan, and Andrew Stavrianou (as they then were), and continues to receive such views from David Clyne.

Theo has already noticed a change in his style of practice (which he finds energising).

Mr Peter van Hattem SC

Peter was born in Western Australia in August 1957. He obtained a B. Juris (Hons) in 1979 and LLB (Hons) in 1980 at the University of Western Australia, and was awarded numerous prizes, including the Frank Edward Parsons Memorial Prize for Law in 1979. He then obtained his Master of Laws (LLM) in 1992 from UWA. He was admitted to practice in Western Australia in 1980, in the High Court in 1984, New South Wales in 1985, the Northern Territory in 1990 and Queensland in 1993.

Peter completed articles with Muir Williams Nicholson & Co and was a solicitor with the firm from 1981 - 1982, before working as an associate to the Hon Justice Sir Ronald Wilson in the High Court of Australia from 1982 - 1984.

He joined Freehill Hollingdale & Page in 1984, becoming a partner in 1985 where he remained until he joined the Independent Bar in 2003. His principal areas of practice have included general commercial dispute resolution, public law, resources law and native title and Aboriginal heritage matters.

Peter counts himself lucky to have had some outstanding contemporaries on the way through.

Peter describes himself as having been extremely fortunate to have been taught or mentored by many ‘outstanding people’ including the late Bill Dickinson (headmaster of Scotch College), Guenter Trietel (of Oxford University), Peter Johnston and Richard Harding (of the University of Western Australia) and the late Hon Sir Ronald Wilson, The Hon David Malcolm QC, The Hon Robert Anderson QC, The Hon Kerry White QC, The Hon Robert Nicholson, Robert Meadows QC, Barry Johnston, Bruno Camarri and John Syminton.

He counts himself lucky to have had ‘some outstanding contemporaries on the way through, whose ranks now include judges, magistrates, politicians, some truly exceptional lawyers, and some beautiful human beings’. Peter stresses that ‘none of these classes should be taken as mutually exclusive’.

Theo was admitted to practice in Western Australia on 21 December 1979, having completed his articles with the State Crown Solicitor.
Ms Gail Archer SC

Ms Archer obtained a B. Juris (1987) and LLB (1988) at the University of Western Australia, being awarded the Jurisprudence Prize in 1988. She then obtained an LLM from UWA in 1997. She was admitted to practice in 1990.

She completed articles with the Crown Solicitor’s Office and joined the state Director of Public Prosecutions office in 1993, remaining there until 2002. From January 2002 till mid 2004, Ms Archer was Principal Counsel of Legal Aid WA, before joining the Bar in 2004.

The majority of her work involves commercial and civil litigation, vocational regulation and industrial relations.

She has sat as a Commissioner of the District Court in 2005 and 2006, and in 2007 was appointed to the Medical Board of Western Australia. In April 2008 she was appointed as Acting Commissioner of the Corruption and Crime Commission for a term of 3 years.

Gail has a keen interest in mentoring those within the profession, and has taught forensic advocacy at the ABA's Residential Advocacy Course (Sydney (2007), at the University of Western Australia (from 2002 onwards), Murdoch University (2007) and at the Legal Aid Commissions of WA, NSW and Victoria.

Gail speaks fondly of her late father, who she describes as her role model, who instilled in her a strong work ethic and the importance of service to the public. She also sees him as a man, unique for his time, who was completely ‘gender blind’.

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The factual basis of these decisions is the use of ‘scenarios’ (analogy, novel scientific evidence) and whether or not that use which included lying, deceit and subterfuge should lead to exclusion of confessions to murder. Legal argument was centred on the principles concerned with inducements by persons in authority, voluntariness of confessions, and in Clarke exclusion on grounds of public policy arising out of illegal or improper behaviour. What is significant is that the police used scenarios to obtain evidence that they could not obtain by traditionally accepted means. That is, the Victorian police were unable to prove the appellants had committed various independent murders so they imported a technique from Canada known as ‘scenarios’. Then, the police acting as criminals solicited and tricked the appellants (Tofilau, Marks, Hill and Clarke) into joining a criminal gang composed of undercover police officers on condition they revealed past criminality. The confessions were a pre-condition to membership and were encouraged on the understanding that the gang had access to a corrupt senior police officer who could insure immunity from pending prosecution. The appellants fell for the deception, were subsequently convicted and were unsuccessful in their High Court appeal.

The favour of the judgement is summed up by Callinan, Heydon and Crennan JJ who said “…undercover police officers participated with Hill in 19 “scenarios” involving various types of apparent illegality and impropriety in order to gain his confidence”. And later on, “These submissions (those of the Appellant) should be rejected. The police officers committed no crimes or civil wrongs or other illegalities…In the circumstances, the means employed, while deceitful, cannot be described as ‘improper’. In contrast Kirby J stated in his dissenting judgement, “This Court should not authorise such operations as within the common law where they derogate so seriously from basic individual common law rights which it is normally the province of courts to defend and uphold”.

In fact, a majority of the present High Court of Australia accept that certain dubious police behaviour may be acceptable in certain circumstances. Gleeson CJ acknowledges police use of subterfuge and deception, while Gummow and Hayne JJ recognise inappropriate police action and the conflict between admitting evidence and/or ‘disciplining police or controlling investigative methods’. This recognition of illegal and/or improper police behaviour has a long history. And in the continuing tension between the application of the rule of law and the need to convict persons charged with serious criminal offences this judgement favours those seeking admission of evidence obtained in circumstances where authorities have not followed established procedures.

For practical purposes this note will focus on three issues:

**Persons in authority**

The appellants submitted undercover police officers were ‘persons in authority’ triggering grounds for exclusion of confessions because the offers of future immunity from prosecution amounted to an inducement. There was subsumed in this the fear of pending prosecution implicit in the respective scenarios. This issue can be simply dealt with by saying it failed because the appellants did not know they were confessing to police (not unlike a covert listening device). That is, the court noted the critical element is the perception of the accused at the time of making their confession. Or put another way, the appellants perceived the undercover police officers to be criminal gang members, not police. Except in Kirby J’s judgement arguments about what would or should have happened if the police had for example been in uniform failed. Therefore, the appellants did not need the protection afforded to citizens under pressure from the uniquely coercive power of the state. As for the assertion that gang members could exercise influence over a person in authority (the corrupt senior police officer) also failed because not only did this not alter the relationship between the appellants and the gang members, but anybody could make such a representation.

**Voluntariness of confessions**

All appellants relied upon the rule of common law that evidence of a confession (including admissions) may not be used against an accused person unless the confession is voluntary. Voluntary implies free choice and pre-supposes knowledge of a right to silence. In this case all four appellants began by seeking mandatory exclusion with one (Clarke) shifting to discretionary exclusion. The Chief Justice suggested history, as in R v Swaffield, was against discretionary exclusion on the grounds of subterfuge and deception which might explain why all appellants initially avoided discretionary exclusion principles. His Honour also set out the many circumstances in which confessions or admissions are made which courts accept as voluntary notwithstanding the use of deception and subterfuge, as in covert surveillance.

The key to this issue was the analysis of the doctrine of basal voluntariness. Basal voluntariness means the confession must be made voluntarily before evidence may be given of it. The starting point was the test originating with Dixon J in McDermott v The King and in particular the statement “…a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man’s will.” After extensive analyses Callinan, Heydon and Crennan JJ found subsequent application of this test by Dixon J to be of no assistance to the appellants. Overall, Dixon J had a
more limited view of voluntariness than suggested by the appellants. Dixon J had distinguished clearly between induced and non-induced confessions and subject to a hint in argument in the case of *Marks* the appellants had not sought to take advantage of the application of the basal voluntariness rule to mentally disordered persons.

The problem for the appellants was twofold. Firstly, they told their story to the gang and then, secondly, most repeated all or part as formal records of interview. Glesson CJ commented immediately that the confessions "were made in circumstances that supported rather than cast doubt upon their reliability". The appellants argued that the initial telling was involuntary thus tainting everything that followed. The majority held that to be involuntary the facts of each appellants case needed to demonstrate their respective wills, their ability to think and act voluntarily, of their own free will, was overcome by the actions of undercover police. In this they failed on the facts. For example, Callinan, Heydon and Crennan JJ noted the undercover "police were at times importunate...insistent that each appellant confess his guilt... by their questioning applied pressure".

Their Honours went on to focus on the element of 'persistent' and whether this overborne the respective wills of each appellant. In regard to *Tofilau* submissions that police conduct involved 'trickery, deception, sustained pressure and interrogation' and was 'sophisticated, elaborate, extreme, protracted, extensive and persistent' was not considered sufficient in the circumstances to raise basal involuntariness. With *Marks*, their Honours noted the trial judge found 'that the gang boss told him three times that he did not have to speak about the homicide, that he could walk away and that he had freedom to remain silent nullified by the absence of choice'. With *Hill* they cited the trial judge who said "...the only inducement for him to remain and to continue talking to the police was a hope of gain or reward which they offered him".

In response to appellant counsels assertion that he could walk away and that he did not have to speak about the homicide, Clarke had a free choice in deciding to speak. In overstating the progress of police investigations police told Clarke there was DNA evidence linking him to the murder when they had no such evidence.

In contrast, Kirby J focused on the build-up of fear in the minds of appellants as they were confronted with a potential successful prosecution for murder notwithstanding the actual lack of existing evidence to sustain a conviction. This fear was enhanced by suggestions that fresh evidence existed when these suggestions were untrue. This fear analysis needs to be read in conjunction with His Honours finding that earlier decisions on persons in authority were overly narrow.

**Use of scenarios to obtain evidence**

Glesson CJ did not consider the use of scenarios raised any "novel problem requiring reconsideration of established legal principle". While Gummow and Hayne JJ outlined the history of each appellant they noted "again it is not necessary to describe the scenarios notwithstanding submissions that the scenario technique was 'improper', "no crime was committed in the course of the various scenarios". This approach was followed by Callinan, Heydon and Crennan JJ who, despite analysing scenarios by reference to denial of rights, absence of choice, freedom to remain silent nullified by deception, deception and manipulation and duress, concluded there was nothing in the actions of undercover police that posed any difficulties. They did however qualify their judgement with; "Nothing said above should be taken as a warrant for any undiscriminating reception of evidence gathered by police officers operating covertly". This qualification could imply their Honours may have had a tinge of concern about the use of scenarios or similar novel evidence gathering techniques, but in the end their qualification is unlikely to carry any weight with police forces in Australia.

In contrast to the majority Kirby J approached the use of the scenario technique by reference to the use of 'fear' and 'hope' as inducements. His Honour saw scenarios as "a new problem ... for evaluation under the common law" and "scenario evidence a new development in policing". In this he stands alone on the High Court. The distinguishing feature of Kirby J's judgement lies in his insistence that prior judicial authorities need to be carefully scrutinised before they are applied to a new circumstance. He noted."This Court should be more discerning in eliciting the applicable principle".

The applicable principle Kirby J refers to require a focus on the principles of basal voluntariness on a case by case basis and not the historical weight of precedent which can cloud analysis resulting in failure to give adequate weight to new factual circumstances (scenarios). This focus is grounded in a proper interpretation of the conversations that lead to the confessional statements. Looking at the respective judgements in this case this highlights a difference in approach and interpretation. While judges are usually guided by respective counsel, in the end precedent will weigh heavily on decision making and the weight of precedent in this case encourages a global balancing approach rather than Kirby J's focus on those elements that go to the fundamentals of basal voluntariness in the factual circumstances of, in this matter, the
use of scenarios. Unlike his fellow judges Kirby J found the existing view of these conversations "a serious mischaracterisation" that failed to adequately take account of the use of the scenarios to build-up a fear that struck at the ability of each appellant to exercise free-will\textsuperscript{32}. It followed that the confessional statements were obtained in circumstances that "offended the common law principle of basal involuntariness"\textsuperscript{39}. His Honour found that the use of scenarios in these cases infringed basic common law rights and it was the duty of courts to uphold such rights\textsuperscript{44}.

**Conclusion**

_Tofilau and Oths_ provides a detailed insight into two different approaches to what should have been a relatively straightforward analysis of the admissibility of confessional statements obtained in novel circumstances. The majority judgements can not be seen as limiting or cautioning the future use of novel investigative techniques that may infringe a citizens traditional common law rights.

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\textsuperscript{1} Tofilau and Oths (2007) 81 ALJR 1688 at 234 per Callinan, Heydon and Crennan JJ.

\textsuperscript{2} Tofilau and Oths at 359 per Callinan, Heydon and Crennan JJ.

\textsuperscript{3} Tofilau and Oths at 209 per Kirby J.

\textsuperscript{4} For example the use of the 'scenario technique' in _Tofilau and Oths_ to trick appellants into confessing to unsolved murders. The success of the scenario technique depended on undercover police deceiving and lying to the appellants.

\textsuperscript{5} Tofilau and Oths at 4, 5 per Glesson CJ.

\textsuperscript{6} Tofilau and Oths at 4 per Gummow and Hayne JJ.

\textsuperscript{7} Tofilau and Oths at 68 per Gummow and Hayne JJ.


\textsuperscript{9} See on unlawful police behaviour: Bunning v Cross (1978)141 CLR 54, when the High Court of Australia indicated that competing public policy requirements on one hand must be balanced with the police task of convicting criminals, while not giving judicial approval to police who behave unlawfully.

\textsuperscript{10} Tofilau and Oths at 13 per Glesson CJ; at 249 – 267, 323 per Callinan, Heydon and Crennan JJ.

\textsuperscript{11} Tofilau and Oths per Kirby J at 346 (3) for policy bypassing ordinary police obligations to warn a suspect, 146 (5) for type of entrapment, 146 (6) for agents of thestate who deliberately set about pretending to perform illegal and improper acts..., 164 (7) for repairing the evidentiary gap in the prosecution case, 176 for no sense in limiting persons in authority to those whom an accused knows.

\textsuperscript{12} Tofilau and Oths at 12 citing with approval the Supreme Court of Canada, Abelia J in Grandinetti [2005] 1 SCR 27 at [35] per Glesson CJ; at 309 – 310 re appellants adopting the minority judgement of Conrad JA in Grandinetti per Callinan, Heydon and Crennan JJ. Contrast with Kirby J at 185 – 187 who adopted the views of Conrad AJ. In essence Conrad AJ said the trial judge should have determined whether the accused believed that the recipient (of the admission) could influence the prosecution and whether that belief was reasonable, a subjective belief. And later, if undercover police pretend to associate themselves with the police in such a way as to make it reasonable for an accused to believe...the officers can be persons in authority.

\textsuperscript{13} Tofilau and Oths at 13 per Glesson CJ.

\textsuperscript{14} Tofilau and Oths at 2 per Glesson CJ.

\textsuperscript{15} Tofilau and Oths at 3 per Glesson CJ; at 31, 65 per Gummow and Hayne JJ.

\textsuperscript{16} (1998) 192 CLR 159.

\textsuperscript{17} Tofilau and Oths at 3 per Glesson CJ.

\textsuperscript{18} Tofilau and Oths at 5 per Glesson CJ.

\textsuperscript{19} Of interest were Callinan, Heydon and Crennan JJ at 325 who noted that this doctrine did not require a 'person in authority' to exercise free-will

\textsuperscript{20} Tofilau and Oths at 47 per Gummow and Hayne JJ.

\textsuperscript{21} (1948) 76 CLR 501.

\textsuperscript{22} McDermott v The King at 512 cited in _Tofilau and Oths_ at 327 per Callinan, Heydon and Crennan JJ.

\textsuperscript{23} Tofilau and Oths at 55 – 64 per Gummow and Hayne JJ.

\textsuperscript{24} Tofilau and Oths at 332 per Callinan, Heydon and Crennan JJ.

\textsuperscript{25} Tofilau and Oths at 335 per Callinan, Heydon and Crennan JJ.

\textsuperscript{26} Tofilau and Oths at 339 per Callinan, Heydon and Crennan JJ.

\textsuperscript{27} For example, Tofilau and Oths at 77, 222 – 223 and formal admissions at 77 – 78, 224; Marks at 85, 229; Hill at 91, 234 with formal admissions at 234; Clarke at 103 – 105 with formal admissions at 106, 239.

\textsuperscript{28} Tofilau and Oths at 1 per Glesson CJ.

\textsuperscript{29} Tofilau and Oths at 19, 20 – 21 per Glesson CJ, at 22, 31, 70 – 108 per Gummow and Hayne JJ, at 376 – 389 per Callinan, Heydon and Crennan JJ.

\textsuperscript{30} Tofilau and Oths at 376 per Callinan, Heydon and Crennan JJ.

\textsuperscript{31} Tofilau and Oths at 378 per Callinan, Heydon and Crennan JJ.

\textsuperscript{32} Tofilau and Oths at 379 per Callinan, Heydon and Crennan JJ.

\textsuperscript{33} Tofilau and Oths at 382 per Callinan, Heydon and Crennan JJ.

\textsuperscript{34} Tofilau and Oths at 383 per Callinan, Heydon and Crennan JJ.

\textsuperscript{35} Tofilau and Oths at 384 per Callinan, Heydon and Crennan JJ.

\textsuperscript{36} Tofilau and Oths at 375 per Callinan, Heydon and Crennan JJ.

\textsuperscript{37} Tofilau and Oths at 375 per Callinan, Heydon and Crennan JJ.

\textsuperscript{38} Tofilau and Oths at 190 per Kirby J.

\textsuperscript{39} Tofilau and Oths at 5 per Glesson CJ.

\textsuperscript{40} Tofilau and Oths at 92 per Gummow and Hayne JJ.

\textsuperscript{41} Tofilau and Oths at 113 per Gummow and Hayne JJ.

\textsuperscript{42} Tofilau and Oths at 341 – 344 per Callinan, Heydon and Crennan JJ.

\textsuperscript{43} Tofilau and Oths at 345 per Callinan, Heydon and Crennan JJ.

\textsuperscript{44} Tofilau and Oths at 346 per Callinan, Heydon and Crennan JJ.

\textsuperscript{45} Tofilau and Oths at 347 – 363 per Callinan, Heydon and Crennan JJ.

\textsuperscript{46} Tofilau and Oths at 364 – 373 per Callinan, Heydon and Crennan JJ.

\textsuperscript{47} Tofilau and Oths at 416 per Callinan, Heydon and Crennan JJ.

\textsuperscript{48} Tofilau and Oths at 416 per Callinan, Heydon and Crennan JJ.

\textsuperscript{49} Tofilau and Oths at 130 per Kirby J.

\textsuperscript{50} Tofilau and Oths at 134 per Kirby J.

\textsuperscript{51} Tofilau and Oths at 134 per Kirby J.

\textsuperscript{52} Tofilau and Oths at 197 per Kirby J.

\textsuperscript{53} Tofilau and Oths at 204 per Kirby J.

\textsuperscript{54} Tofilau and Oths at 202 per Kirby J.
Introduction

It is a common feature of local government legislation that the power of a local authority to collect rates from land is subject to certain exemptions. For example, Section 6.26 of the Local Government Act (WA) provides, so far as relevant:

Rateable land

(1) Except as provided in this section all land within a district is rateable land.

(2) The following land is not rateable land -

(a) land which is the property of the Crown and -

(i) is being used or held for a public purpose; ... [or]

(g) land used exclusively for charitable purposes;

...

(6) Land does not cease to be used exclusively for a purpose mentioned in subsection (2) merely because it is used occasionally for another purpose which is of a charitable, benevolent, religious or public nature.

Similar provisions apply in various jurisdictions. Attention is drawn to the Western Australian provision because it was the subject of a recent case in Western Australia dealing with the issue of when land is used exclusively for charitable purposes. The discussion below compares the way the State Administrative Tribunal and the Court of Appeal analysed the issue and further explores the issue by reference to a Federal Court decision concerning exemption of a charity from income tax.

YUNGNGORA

In Shire of Derby -West Kimberley v Yungngora Association Inc the Court of Appeal of Western Australia overturned a decision of the State Administrative Tribunal that a pastoral lease held by an association for the benefit of Aboriginal people was used exclusively for charitable purposes.

The Yungngora Association Inc ("Yungngora") is an association endorsed as an income tax exempt charitable entity by the Commonwealth Commissioner of Taxation. It holds the Noonkanbah pastoral lease for the benefit of its members, a community of approximately 350 Aboriginal people. The pastoral lease covers an area of 169,791 hectares and adjoins a 260 hectare freehold parcel held by Yungngora. Yungngora has constructed on an area which straddles the freehold and the pastoral lease 43 houses, primary school, high school and TAFE facilities, a community store and a diabetic care clinic. The pastoral lease carries approximately 3,500 head of cattle and is operated as a pastoral enterprise by Noonkanbah Rural Enterprises Pty Ltd ("NRE"), a company controlled by the office-holders of Yungngora. NRE employs and trains 10 Aboriginal community members and an additional 10 during mustering and pays them with Commonwealth funds provided under the Community Development Employment Programme. NRE had a $403,192 gross income in 2005 but runs at a loss. It sources its supplies through the community store even though it could purchase items more cheaply elsewhere. It provides meat to the community, grades roads used by the community, owns, fuels and maintains vehicles which are used 70% of the time for non-pastoral community purposes and has contributed to the local diabetes treatment programme, native title claim and feasibility studies for other uses of the land for the benefit of the community. NRE has a 5 year plan to develop a sustainable pastoral enterprise but any surplus will be for the use of Yungngora.

The Tribunal made the following observation -

the current ownership and use of the subject land is informed by the fact that over some decades successive State, but more particularly Commonwealth, governments and their agencies have to varying degrees (and with varying degrees of cooperation with each other) facilitated and funded - both directly and indirectly - a policy objective of building up the collective economic, social and 'traditional' position of Aboriginals associated with the subject land.

The further fact that such policy objectives are in part manifested (or perhaps even mandated) in 'business' enterprises and in the associated contractual and corporate arrangements referred to above, does not detract from this clearly established history.

Indeed, it seems clear that every relevant fact concerning the use of the subject land can be ultimately derived from or is connected to the broad policy objectives just identified, objectives also embraced by the Yungngora community itself. Likewise, the motivations of those pursuing such policy objectives cannot be entirely ignored: it includes the recognition and attempted amelioration of what may be characterised as the ‘notorious plight of Aboriginal people’ ...
In determining the purpose or purposes for which land is used, the focus must be on what is done on the land, not on what use is made, or is going to be made, of what is done on or derived from the land: see Moon v London County Council [1931] AC 151; Nunawading Shire v Adult Deaf & Dumb Society of Victoria [1921] HCA 6; (1921) 29 CLR 98.

I consider, with respect, that the Tribunal fell into error by focussing on the benefits the pastoral enterprise enabled the Association to provide to the members of the community, rather than on the use to which the Land was actually put.

Thus the Tribunal referred (at [47]) to the Land being used 'as part of a general scheme to improve the economic position, social condition and traditional ties for the benefit of relevant Aboriginals' and (at [51]) to a purpose of the pastoral enterprise being to provide assistance and opportunities to assist the members of the community to become economically independent and to assist activities such as the pursuit of land rights, the preservation of traditional culture, and self-determination. I should say, with respect, that it is not apparent how the carrying on of the pastoral enterprise on the Land would itself assist in the pursuit of land rights, the preservation of traditional culture, or self-determination, aside from providing the Association with the economic means to assist in the maintenance of the community and facilitate the pursuit of those activities by the community.

The Tribunal concluded that the Land was used exclusively for charitable purposes because the purpose of the Association in holding and operating the pastoral lease was directed, not to a separate profit-making operation as an end in itself, but rather, it was 'the most direct or outward manifestation of all of the charitable purposes that we have identified: namely those related to the social, economic and “traditional” advancement of a relevant group, currently in need, by their use of that lease (and the consequent use of the subject land). Such is the clear direction of the history of the place over the last 30 years or so, which we have drawn attention to at the commencement of these reasons. The returning of land to the traditional owners - a very poor group by Australian standards - represented in large degree by the applicant holding and exploiting the extant pastoral lease is the key to the proper characterisation of the true purpose of the pastoral operation.

By contrast, in the Court of Appeal, Newnes AJA, with whom the other members of the Court of Appeal agreed, held* that -

As we understand the judgment [in Nunawading] the Court decided that the land was not being used exclusively for charitable purposes because it was also being used for another collateral purpose. We do not understand the judgment as deciding that land is not used exclusively for charitable purposes where the charity derives some subsidiary and incidental benefit flowing from the carrying out of that use. In the Nunawading Case the Court found that the society was carrying on upon the land as a distinct purpose the business of growing and selling flowers.

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in the evidence to suggest that the appellant is carrying on the farming activities to a greater extent than is reasonably necessary to achieve the above purpose or that under the cloak of this purpose it is really engaged in carrying on the business of a farmer for the purposes of gain (169).

Newnes AJA interpreted that passage as follows –

Dixon, Williams and Webb JJ concluded that the proper test for determining whether land is used exclusively for charitable purposes is that if land is used for a dual purpose, then it is not used exclusively for charitable purposes although one of the purposes is charitable. But if the use of the land for a charitable purpose produces a profitable by-product as a mere incident of that use, the exclusiveness of the charitable purpose is not thereby destroyed.

That interpretation led him to the conclusion in respect of the land held by Yungngora that –

any charitable purposes for which the Land is used involve much the lesser part of the activities conducted on the Land. The ‘whole character and atmosphere of the place’ is of a commercial enterprise rather than a charitable use, involving a use of the Land for the distinct purpose of carrying on a pastoral business.

It would have been open for him to take into account the fact that the State Administrative Tribunal, as the primary fact finder, concluded, in the same way that the magistrate did in the Salvation Army Case, that Yungnora had a sole object in carrying on pastoral activities on the land, i.e., the social, economic and ‘traditional’ advancement of Aboriginals associated with the land and that there was in this case no dual purpose for which the land was being used.

WORD

An apparent contrast can be found between the approach in the Yungngora case and the decision of Sundberg J in Commissioner of Taxation v Word Investments Ltd. That was a case involving a company (“Word”) established to provide financial support to Wycliffe Bible Translators Australia ("Wycliffe"), one of 56 members of an international organization. Wycliffe had been endorsed as an Income Exempt Charity under the Income Tax Assessment Act 1997. The issue was whether Word was entitled to the same endorsement.

Sundberg J referred to the case of Ryde Municipal Council v Macquarie University, in which the High Court by majority of 3–2 held that a ‘market’ at Macquarie University consisting of retail and business premises let out to banks and shops for the benefit of students and staff was entitled to rating exemption under the relevant statute. The reason was that the enterprises run at the market were desirable for the functioning of the university and a use of the site for the purposes of the university. Sundberg J noted that in that case the commercial activity was not a purpose of the university but was merely incidental to the carrying out of the purpose, the land on which it was conducted would still be used exclusively for charitable purposes.

He provided some insight into why different results may be reached in rating cases from those involving exemption from income tax.

An apparent contrast can be found between the approach in the Yungngora case and the decision of Sundberg J in Commissioner of Taxation v Word Investments Ltd.
school; 699 students receiving instruction when the bill was filed. Though the restaurant is also operated upon the same premises it is used in connection with the school and as an outlet for food cooked by the students, some of whom act in the capacity of waitresses. The restaurant also furnishes practical training for some of the students studying that branch of work. No part of any of the property was used for any purpose except in connection with and for the benefit and advancement of the school. We are of opinion appellant is a charitable organization and the property here involved is actually and exclusively used for the charitable purpose for which appellant was organized and is therefore exempt from taxation ...”

Sunberg J’s principle conclusion was that –

the making of a profit through trade or business is not necessarily inconsistent with a charitable purpose and that the true question to be asked is the purpose of the making of the profit. If the purpose is commercial then the exclusive purpose of the organisation is not charitable; if the purpose is selfless then it may be.

However, the turning point in the Yungngora Case was in drawing the line between whether the land is the subject of a single use which is charitable or the subject of dual uses, one of which is not charitable.

So it can be anticipated that there will soon be some further elucidation of the law on this issue.

A Full Bench of the Federal Court in Commissioner of Taxation v Word Investments Limited confirmed the reasoning of Sundberg J. However, on 23 May 2008 the High Court granted special leave to the Commissioner of Taxation to appeal that decision in order to test the question of where the line is to be drawn in modern social circumstances as to when engagement in a commercial enterprise takes an institution beyond its charitable purpose. So it can be anticipated that there will soon be some further elucidation of the law on this issue.

CONCLUSION

It is difficult to discern any substantive difference between the situation in the Yungngora Case and the circumstances in cases cited in the Word Case. Perhaps it is merely, as Sundberg J suggests in his reasons in the Word Case, the difference between a focus on the activities of the organisation versus a focus on the use to which property is put. However, the turning point in the

1 Similar case note by same author published in (2008) 14 LGLJ 8 at 11
2 [2007] WASCA 233 [6 November 2007]
3 Yungngora Association Inc and Shire of Derby-West Kimberley [2006] WASAT 378 At [18]-[21].
4 At [60]-[62].
5 At [74].
6 [1952] HCA 4; (1952) 85 CLR 159.
7 At [76].
8 [2006] FCA 1414 (3 November 2006).
9 At [38].
11 see [1978] HCA 58; (1978) 139 CLR 633 at 643–644 per Gibbs ACJ and at 650 per Stephen J (with whom Murphy J concurred).
12 At [39].
13 He also, at [39], referred to Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation [1952] HCA 4; (1952) 85 CLR 159 and at [40] to Commissioners of Taxation v Trustees of St Mark’s Glebe Society Ltd v Glasgow Corporation [1967] UKHL 3; (1968) AC 138.
14 Until [1952] HCA 4; (1952) 85 CLR 159 at 672.
15 At [36].
18 Allsop and Jessop JJ in separate reasons and Stone J agreeing with Allsop J’s reason.
19 [2008] HCA Trans 201.
Introduction

The State Administrative tribunal has had occasion to consider the appropriateness of the setting of licence fees for trading in public places in two different cases in recent times and has arrived at two different conclusions. This case-note examines the reasons for those decisions with a view to identifying the bases for the distinction between them.

Broome Camels Case: Bird & Anor and Shire of Broome & Anor

The Shire of Broome, acting on the advice of consultants, resolved to issue 3 trading licences for the conduct of camel tours on Cable Beach by a tender process. The Shire called for tenders and received eight tenders from six camel tour operators who had previously held licences from the Shire to conduct camel tours. The selection criteria which the Shire had resolved upon, among other essential criteria, specified that a 50% weighting should be placed on the price offered by any other tenderer and far exceeded the fee previously paid for such a licence. The Council identified three preferred tenderers but concluded that it had no alternative but to give all three licences to Red Sun Camels because of the price criterion. That effectively put all other previous licence holders out of business.

The two unsuccessful preferred tenderers, Bird and Casley, applied to the State Administrative Tribunal (“SAT”) to set aside the Shire's decision. The application was made pursuant to s 9.7 of the Local Government Act 1995 (WA) (“LG Act”), which provides that a person affected by a decision may apply to the SAT for a review of the decision. Section 9.1 limits the application of the provision to decisions of a local government under that Act or notices given as to whether the local government will grant, renew, vary or cancel an authorization under (among other things) a local law. “Authorisation” is defined in s 9.2 as meaning “a licence, permit, approval, or other means of authorising a person to do anything.”

The Council had adopted a policy in relation to the issue of the licence. The Policy specified that tenders would be invited “pursuant s 6.16(2)(a) of the LG Act, and assessed as “applications for a trading licence under Part 5 of the Local Law”.

Section 6.16(2)(a) of the LG Act permits the Council to impose a fee or charge for:

“providing the use of, or allowing admission to, any property or facility wholly or partly owned, controlled, managed or maintained by the local government.”

Section 6.17(1) of the LG Act states that in setting a fee or charge, a local government “is required to take into consideration” the following factors -

“(a) the cost to the local government of providing the service or goods;
(b) the importance of the service or goods to the community; and
(c) the price at which the service or goods could be provided by an alternative provider.”

The SAT found that the local authority was at best, confused in its approach by suggesting, on the one hand, that the tenders would be treated as trading licence applications under the Local Law, and then indicating, on the other hand, that they would also result in Licence Agreements for the use of property controlled and managed by the local government. The relevant commercial activities on Cable Beach needed to be authorised in the manner provided for by the Trading Local Law. However, the Shire was proposing that applicants should be invited to state the licence fee they were prepared to pay in the event the Council approved their application for a trading licence. The SAT concluded that it was not open to the Council under the Trading Local Law or the LG Act to attempt to “generate a resource” through a local law licensing process and a statutory fee imposition process. As the SAT found, the process adopted by the local authority wrongly assumed that a licence is property belonging to the local government that it is at liberty to sell to the highest bidder.

However, the Shire was proposing that applicants should be invited to state the licence fee they were prepared to pay in the event the Council approved their application for a trading licence.

The Shire of Broome, acting on the advice of consultants, resolved to issue 3 trading licences for the conduct of camel tours on Cable Beach by a tender process.

Section 6.16(2)(d) of the LG Act is the provision authorising the imposition of a fee by a local government for “receiving an application for approval, granting an approval, making an inspection and issuing a licence...” Under s 6.17(3)(b), a licence fee or charge under s 6.16(2)(d) is limited to “the cost of providing the service”. The SAT noted that because of this latter limitation on setting a licence fee under s 6.16(2)(d), and the desire of the Shire to “generate a resource”, the Council chose...
to adopt the tender pathway to the setting of a licence fee and placed reliance on the fee-setting power contained in s 6.16(2)(a) of the LG Act.

The President of the SAT, Barker J expressed the view that:

any fee or charge imposed under s 6.16(2) (a) must bear a proper relationship to the “use” of the relevant property provided for, or the “admission” to the relevant property allowed, and the fee provision cannot simply be used to create a revenue stream unrelated to ownership, control, management or maintenance issues arising from such use or admission. The SAT also held that s 6.16(2)(a) of the LG Act applied to the setting of a fee under s 6.16(2)(a) on the basis that, properly construed, all the fees and charges that a local government may impose under s 6.16 are in respect of the provision of “services” and that, if a fee can be set in the circumstances of this case under s 6.16(2)(a), then the Shire by “providing for the use of, or admission to” Cable Beach, on the basis it is property controlled, managed or maintained by the local government, is properly to be characterised as a “service”.

The SAT concluded that the service being provided was the use of or access to Cable Beach by an operator of a proposed camel tour. The SAT allowed that the provision of this service may be important to the community, as it may, in broad terms, directly benefit the local economy. The SAT emphasized that the “service” is not the receipt of a “licence fee” by the Shire and that this factor suggested that the local government should not charge a fee which is too high and so likely to dissuade a person from offering to provide a service from which the local economy might benefit.

Claremont Showgrounds Case: Minchin and Ors and Town of Claremont

The Minchin case related to the fees for licences to operate stalls at a craft fair being held over three days at the Claremont Showgrounds, property owned by the Royal Agricultural Society. 

The 121 applicants for review had each had issued to them a licence to trade in a public place under a Town of Claremont Trading in Public Places local law. The local law required that an application for a licence be accompanied by the fee which had been adopted by the Town as part of its budget processes.

The Town had adopted a 2006/2007 annual budget, in which under a “Health” heading, it had set a stallholders licence application fee of $85 plus a $30 daily fee for the duration of the licence; and under a “Trading in public places” and “Display of Goods on Private Property” it had set a “Licence Application Fee” of $50 and a “Short Term Licence Fee” of $10. The first-named applicant, on behalf of 204 licence applicants, under protest and after tendering the fee under the “Trading in public places” heading, paid the fee under the Health heading, as demanded by the Town, which amounted to a total sum of $35,405. It was the case that the Royal Agricultural Society held a single Trading in Public Places licence valid to 31 December 2007 relating to trading at the show-grounds, but the Town had given notice on 10 January 2006 that (outside the annual RAC Show and concerts) it would no longer allow the RAS to hold a licence on behalf of individual stallholders trading at the showgrounds.

The applicants made an application pursuant to section 9.7 of the LG Act for review of the decision of the local government to grant the licences subject to the condition that they pay the fees demanded.

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The applicants made an application pursuant to section 9.7 of the LG Act for review of the decision of the local government to grant the licences subject to the condition that they pay the fees demanded. They argued that the Town had demanded fees which –

(a) were not determined in accordance with the limitations imposed by 6.16(2)(a) and 6.17(1)(a) to (c) of the LG Act;
(b) exceeded the reasonable cost recovery for service, contrary to s 6.16(1) of the LG Act; and
(c) were based upon the wrong item under its budget, i.e., an item under the health provisions which applied to the sale of food.

There was no evidence available that the Town, when setting the relevant fees in its budget had engaged in any process of deliberation to arrive at a determination which took into account the matters set out in section 6.16 and 6.17 of the LG Act.

Deputy President Chaney determined that he would determine and a preliminary issue whether the SAT had jurisdiction to determine the applications. He characterized the first two grounds for complaint as a complaint about a decision to adopt the budgetary item which set the fee. He held that –

the requirement that that charge be paid before a licence will issue is not a “decision” for the purposes of cl 19 of the TIPP local law, or s 9.1(1) of the LG Act. That is because cl 7 of the TIPP local law requires the fee to accompany an application, and cl 8 requires the licensee to pay the sum determined and that no licence is valid until the fees and charges have been paid. The decision-maker is thus precluded from issuing a licence unless the fee that has been previously determined is paid. There is no decision to be made as to whether or not to require payment, because the local law makes payment a prerequisite to the grant of a licence (subject only to the exemption provision found in cl 15, which is not relevant for present purposes).

He concluded that “there is no provision in the LG Act which enables a person to seek review before this Tribunal of decisions made in the process of adoption of a budget”.

He, thus, held that the Tribunal has no jurisdiction to review whether the fees charged exceeded the reasonable costs recovery as required by s 6.16(1) or were otherwise determined in accordance with the requirements of s 6.17(1)(a)(2)(c) of the LG Act, or in accordance with the requirements of 45A of the Interpretation Act 1984 (W A). The Deputy President did not accept the applicants’ submission that “the setting
of a fee as part of the budgetary process is inextricably interwoven with the application of a fee when granting a licence” or the contention that the whole of that process must comply with the provisions of Pt 6 of the LG Act.\(^\text{18}\)

He noted that the applicants accepted that the imposition of fees when adopting an annual budget does not “by itself comprise a decision which affects any person”.\(^\text{19}\)

He held that:

The decision to adopt the budget is a separate decision, taken in the context of an overall budgetary process. The decision as to whether or not to issue a licence under the TIPP local law is a separate decision having regard to the requirements and considerations identified in the TIPP local law. In the absence of a statutory provision conferring upon the Tribunal the jurisdiction to review decisions taken by local governments in adopting their annual budgets, the Tribunal lacks the jurisdictions to review those decisions.\(^\text{20}\)

### What I have found to be susceptible to review

**is a decision to require the payment of an incorrect fee before a licence would be issued.**

However, when it came to the issue of whether the correct fee was one charged under the “Health” heading or one charged under the “Trading in public places” heading, the Deputy President reached the following conclusion:

what I have found to be susceptible to review is a decision to require the payment of an incorrect fee before a licence would be issued. As I have indicated, that requirement, if one were made, would be tantamount to a refusal to grant a licence upon tender of the correct fee. In my view, that decision would be reviewable notwithstanding that, under threat of significant penalties, the incorrect fee demanded was paid in order to secure a licence. The fact that that licence was subsequently acted upon to its full extent would not, in my view, deprive the applicants of a right to have the erroneous decision reviewed. The scope of the Tribunal’s powers under s 29(3) of the State Administrative Tribunal Act 2004 (WA)\(^\text{21}\) is such that an effective remedy could be granted to the applicants in the event that they had been improperly charged a fee in excess of the fee properly identified in the adopted budget.\(^\text{22}\)

### Concluding Comment

It is undoubtedly correct that a decision of a local authority in relation to the adoption of its budget is not reviewable per se, because it does not comprise a decision to grant an authorization, within the terms of s 9.1 of the LG Act. However, as Deputy President Chaney in Minchin concluded, it is within the jurisdiction of the SAT to review a decision as to what is the correct fee to be paid upon the issue of a particular licence. Minchin and Bird are distinguishable on the basis that there was no fee set by the local government in the circumstances being considered by the SAT in Bird and so it was not open to raise the jurisdictional question raised in Minchin where a budget had been adopted which imposed a fee applicable to the authorization. However, Justice Barker in Bird was clearly of the view that in order to determine whether the correct fee had been imposed in the granting of a particular licence the question to be asked was whether that fee had been set in accordance with the requirement of s 6.17 of the LG Act, which included a requirement that the local government take into account the criteria set out in that provision, such as the cost of providing the service. Justice Barker’s view appears to be inconsistent with the preliminary decision of Judge Chaney that the SAT has no jurisdiction to consider whether a determination of the fee has been made in accordance with s 6.17 of the LG Act, but only whether the correct budget item has been applied when requiring a particular fee to be paid for a licence.

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\(^1\) It is easier for a camel to go through the eye of a needle, than for a rich man to enter the kingdom of heaven: Mathew ch. 19, v. 24; Luke ch. 18, v. 24

\(^2\) [2006] WASAT 338 (22 November 2006)

\(^3\) At [71].

\(^4\) SAT at [72].

\(^5\) At [73].

\(^6\) At [74].

\(^7\) See SAT at [79].

\(^8\) See SAT at [81].

\(^9\) At [90].

\(^10\) At [92].

\(^11\) At [94].

\(^12\) At [96].

\(^13\) [2008] WASAT 78.

\(^14\) At [32].

\(^15\) At [31].

\(^16\) At [33].

\(^17\) At [38]. Section s 45A of the Interpretation Act 1984 (WA) provided that

\(^18\) (1) A power conferred by a written law to prescribe or impose a fee for a licence includes power to prescribe or impose a fee that will allow recovery of expenditure that is relevant to the scheme or system under which the licence is issued.

\(^19\) (2) Expenditure is not relevant for the purposes of subsection (1) unless it has been or is to be incurred –

\(^20\) (a) in the establishment or administration of the scheme or system under which the licence is issued; or

\(^21\) (b) in respect of matters to which the licence relates.

\(^22\) (3) The reference in subsection (1) to a fee for a licence includes reference to a fee for, or in relation to, the issue of a licence and a fee payable on an application for the issue of a licence.

\(^23\) At [33].

\(^24\) At [33].

\(^25\) At [33].

\(^26\) Under that section the SAT has power to affirm vary or set aside the decision under review

\(^27\) At [40].
As the Chief Justice of Western Australia, Hon. Wayne Martin in the Foreword and the authors in the Preface note, this work fills an important gap in Australian legal literature. There is no comparable work in English legal literature adopting the same approach. Uniquely it addresses the process of construing or interpreting commercial contracts in four sections:

- General Principles in the construction and interpretation of commercial contracts;
- Contractual clauses creating specific obligations;
- Standard clauses in commercial contracts;
- Remedy clauses.

The authors, Joshua Thompson, Leigh Warnick and Ken Martin QC all have extensive experience in, and continue to practice in, commercial law. They have adopted what they describe as a collegiate approach to authoring the work, allocating individual responsibility for various chapters and noting the individual responsible at the head of each chapter. That will provide a convenient indicator to members of the profession as to whom they might approach if any extrapolation upon what is written on the topic is required. However, the thoroughness with which each topic is addressed makes it unlikely that that will be necessary.

The authors have divided the book into parts dealing with particular types of clauses because, as they say in the Preface, they know from their experience that it is often the way problems are solved at a practical level. They have provided a convenient way of accessing the case law and commentary on the interpretation of common clauses in commercial contracts.

Part 1 deals with the objective nature of the construction process, techniques used to ascertain or deduce the meaning of terms and the materials which may be taken into account in doing so. Special treatment is given to contracts embodied in deeds and the Australian statutes governing them.

Part 2 deals with the creation of debt and money obligations, rise and fall provisions, take or pay clauses (with particular reference to such clauses in US natural gas contracts), third party benefit clauses (with particular reference to the Albazer principle), indemnity clauses, consent clauses, option and pre-emption clauses, subject to contract clauses, the High Court’s seminal decision in Masters v Cameron, which sets out three classes of potential relationships, and the controversial fourth class attributable to McLelland J in Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd.

Part 3 deals with the following standard clauses:
- Good faith clauses
- Essential and non-essential time stipulations
- Force majeure clauses
- Expert and alternative dispute resolution clauses
- Choice of law and of forum clauses.

Part 4 covers remedy clauses, with specific treatment of:
- Termination clauses,
- Penalty and forfeiture clauses,
- Exclusion of liability and exclusive remedy clauses,
- Consequential loss clauses, and
- Severance clauses.

This work provides an extensive digest of Australian and English case law which has addressed the multitude of issues arising under commercial contracts. It contains informative detailed discussion of how the judiciary has approached the task of interpreting particular clauses in particular cases.

The work has been published in a loose leaf format and is available on-line. Such forms of publication have been adopted by the publishers in recognition of the impact of frequently occurring decisions in this area and the need to regularly revise and update the service. Legal practitioners can be confident, therefore, that this publication will continue to be a useful tool in keeping up to date with the law in this area.
It is difficult to place this book. It is a collection of 23 comparatively short essays by 23 different contributors, but arranged as a text book. The book aims for a quite comprehensive coverage of administrative law. In general, it may be divided into three parts. First there are 4 introductory chapters dealing with the constitutional context, themes and values, the public versus private distinction, and the human rights dimension. The next group of four chapters provides a discussion of Administrative Tribunals, the Australian Ombudsman, freedom of information, and delegated legislation.

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The largest part of the book, chapters 9 to 23 is a series of essays on different aspects of judicial review, both statutory and common law, from justiciability and standing through to remedies. Essays are included on the common grounds of review, such as relevant and irrelevant considerations, and improper purpose. There are four chapters on various aspects of natural justice – one each on the hearing rule and the rule against bias, but also two much more specific papers, including an exploration of “The impact of these recent cases is generally reflected in the current reference in federal constitutional considerations have achieved prominence, reflected in the current reference in federal judicial review to the “Constitutional writs” of prohibition and mandamus. The impact of these recent cases is generally well presented throughout the various chapters.

This leads to the second major issue – depth of coverage. Currency is welcomed, but the more detailed treatment of particular subjects in earlier books remains relevant and, for me anyway, preferable. While the chapters on standing and on each of the more detailed treatment of particular subjects in earlier books remains relevant and, for me anyway, preferable. While the chapters on standing and on each of the grounds of judicial review are relatively detailed, there are major areas where the present text is of very limited use. An older work such as Benjafied and Whitmore provides more than sixty pages on the remedies in review of administrative action. Aronson, Dyer and Groves – its natural successor – has 5 chapters on remedies. The present work has twelve pages.

The authors, with few exceptions, are academic. The two editors are from the Faculty of Law at Monash University, and the Monash faculty is heavily represented. The fact that the authors are primarily from an academic background may account for the comparative prominence given to such topics as the impact of Toob and Lam – not something that has regularly cropped up, at least in my practice – while remedies are almost neglected. With a range of contributors, the standard varies (or at least whether the writer of this review agrees with particular opinions expressed by the author varies). Despite the number of authors, the work is surprisingly uniform in the style of writing.

None of the essays is longer than 25 pages, and some are much shorter – delegated legislation is dealt with in 9 pages and remedies in 12. Those seeking an administrative law text now have a bit of choice. There is a greater range of specifically Australian texts available than when I studied administrative law. Perhaps of most value for practitioners is Judicial Review of Administrative Action by Aronson, Dyer and Groves – LBC, 3rd Edition 2004. Thomson has also recently published Administrative Law in Australia by Professor W B Lane and Dr Simon Young – it appears to be primarily a student text. LexisNexis has a cases and materials book, but does not currently publish a text. Federation Press published Federal Administrative Law by Christopher Enright in 2001. I am not sure whether it is still available.

For most practical purposes for practitioners, there are excellent loose-leaf and on-line services from both Thomson (for Federal law) and LexisNexis. They are large and detailed, and the loose-leaf/on-line format ensures currency.

As an aside, it is interesting to see how public law has developed in thirty years. Compared with the range of chapters in the current text, we can return to Principles of Australian Administrative Law by Benjafied and Whitmore (4th Edition 1971) where merits review and the Ombudsman, appear in the last chapter as proposals for reform; statutory judicial review warrants two pages; and freedom of information is unheard of.

Where does the present work fit in this landscape?

First, it is relatively current. That is an advantage when the High Court has given several significant decisions in the last 5 years, particularly in matters arising under the Migration Act. Constitutional considerations have achieved prominence, reflected in the current reference in federal judicial review to the “Constitutional writs” of prohibition and mandamus. The impact of these recent cases is generally well presented throughout the various chapters.

As an aside, it is interesting to see how public law has developed in thirty years.
This may be suitable for a tertiary course – particularly where administrative law is taught in early years and the law relating to remedies seems to be regarded as an unnecessary complication. But in Western Australia, where there is no ADJR, and in federal matters where relief is sought under s 39B of the *Judiciary Act*, attention to the remedies is essential. Otherwise, subject to my complaint in the next paragraph, the treatment of most topics would be an excellent introduction for a student. Individual essays are short, but not superficial.

Finally, I have a major grumble. All of the contributors write clearly, and the work should be easy to read, but it is let down by a formatting decision. The text contains extensive references which could not be more inconveniently set out. The references are found in 82 pages of end notes, located between the last essay and Index at the end of the book. An example: Chapter 14 is an essay on “Reasonableness, rationality and proportionality.” It begins on page 212 with the statement: “Reasonableness is a central, defining concept in Australian administrative law. All justiciable aspects of the administration, determinations of fact, questions of law, discretion, and delegated legislation – are subject to judicial review for unreasonableness.” The correctness of this statement is not immediately apparent. There is, however, a superscript reference, the text for which I eventually found on page 424. The reference text does not in fact in support the breadth of the opening statement on page 212, but is almost an aside on administrative tribunals interpreting words according to their “ordinary English meaning.” But more important, it was so hard to find. If you want to check the when a case referred to in the text was decided, or to see what support there may be for a statement such as that on page 212, it is unnecessarily frustrating to have to skip to the back of the book. Several of the chapters have more than a hundred references – I just stopped looking at them. It’s a shame when it must have been avoidable.

In summary, for practitioners who want to have a general administrative law text on their shelves, this is not the answer. It has no coverage of remedies, and lacks detail in other areas (unless the detail was to be found in the endnotes). But this may be criticising the work for not being what it doesn’t try to be, when the primary target audience appears to be tertiary students and not the profession.

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**Cycling, Old Papa’s and the Henk Vogels Cycling Foundation**

On each weekend day groups of colourful lycra clad cyclists now ride one after the other in continuing streams along the roads and streets that circle the Swan River. Many start and finish the journey in Fremantle. This cycling spectacle, that has something to do with the formation of a cycling charity about which I say more later, had its origins in the late 1970s and early 1980s in Newport, Rhode Island, in the United States of America.

In 1977 Fremantle local John Longley AM was in Newport preparing for that year’s America’s Cup Challenge. He had been there in 1974 as a crew member of Southern Cross representing the first Royal Perth Yacht Club challenge for the Cup. In 1977 most of the crew drove large American cars around Newport. In the height of the summer the historic town became clogged with tourist traffic and negotiating its narrow streets in a large car was virtually impossible.

Visible on the streets of Newport was a new phenomenon not then seen in Australia – adults in numbers riding 10 speed bicycles. Traditional road racing bikes had been marketed to the general public as an alternative to cars. Their popularity may have been a response to the inflationary oil shocks of 1974. The climate of rising oil prices decades later brings to mind continued ‘Australian Administrative Law: Fundamentals, Principles and Doctrines’
John realised that a bicycle was the solution to the Newport traffic problem and promptly bought his first bike, a red Fuji Sports 10.

Newport on 10 speeds. By the time the famous 1983 Australia II Challenge came around America’s Cup crew members riding bikes (by then 12 speeds) was the norm.

After the America’s Cup was won John returned to Fremantle with his latest Shogun 12 speed 27” frame machine. With a group of friends he made a habit of cycling regularly. One day John and his group conceived the idea of riding together around the Swan River, along the streets and roads that line its foreshore, from Fremantle to Perth and back to Fremantle. They set out one weekend day stopping once at a public telephone in Dalkeith to call spouses to let them know where they were.

That one group ride in the 1980s led John's group to form the “Royal South Beach Cycling Association” (or RSBCA – named after the Royal South Beach Cricket Association, an indoor cricket team). It became a growing collective of cyclists who at around 6am each Sunday morning set off from the road outside John’s Fremantle home on the 50 plus km “around the river” ride.

When the early morning noise became too much for residents the group moved its start (and its finish) point to what was then the “Old Papa’s” Café on what became the café strip of South Terrace Fremantle. Every year or so the group produced a cycling jersey that prominently displayed the “Old Papa’s” logo as the principal “sponsor”. They became known to other cyclists as “Old Papa’s riders”. Among themselves they were members of the RSBCA.

The original small group expanded over time and more adults were attracted to the idea of group cycling from Fremantle. The RSBCA cyclists developed what became Western Australia’s largest cycling club. In the late 1990s more than 400 cyclists claimed to be “Old Papa’s riders”. Although in the main they were recreational cyclists the group also included A Grade cyclists who regularly competed in top level cycling races conducted by the Western Australian Cycling Federation and its clubs.

In the 1990s riders set off in four groups from Fremantle – a fast group at 6am, a faster group at 6.15, an even faster group at 6.30 and a splinter group of older cyclists at 6.35. Many cyclists came to prefer riding in the “Old Papa’s” rides over competitive cycling races. Vast numbers of colourful cyclists returning to Fremantle by 8 to 8.30 for post-ride coffee added to the colour and ambience of the Fremantle café strip.

The Old Papa’s group was not a formal club. It was an informal collective of cyclists with a limited number of rules. The rules included that the qualification for membership was to ride once around the river with an Old Papa’s peloton (“peloton” being once defined by an Old Papa’s rider as “a French word that means ‘peloton’”). Secondly, membership was for life. Thirdly, there were no office bearers and no list was to be kept of members. It held an “Annual General Meeting”, but not more often than once every 18 months, and possibly longer. Indeed an AGM has not been held for some years now.

The Old Papa’s collective of riders, although not a formal cycling club, developed into a significant network of individuals. Its membership reflected a vast reserve of financial and skills resources. Members came from most trades, professions and business. Its members occupied positions in the clubs that made up the components of the WA Cycling Federation as well as occupying positions on the Board and Disciplinary Committee of that Federation.

Some members now live in other States or overseas. Some have unusual vocations. One member was the principal private secretary to two English Prime Ministers and eventually the link between the British spy services and Cabinet. Members were mostly middle aged men but many were talented athletes when they possessed the greater vitality of youth. One lady once commented to my wife that as she sat in a Fremantle café sipping her coffee on a Sunday morning she watched a group arrive back at Fremantle dismount and park their bikes after a ride. She said they looked like superbly fit young men, until they removed their bicycle helmets to reveal the evidence of age - the changed shapes and lines of aged faces, and greying or balding heads.

This brings me to the Henk Vogels Cycling Federation of which Henk Vogels OAM is a committee member. I was the inaugural chairman and remain a committee member and vice-chairman. At one of the “Old Papa’s” annual general meetings in the early 2000s John Longley, as nominal but unelected and unofficial head of the RSBCA (there were no official members or officials), invited members present to give thought to using the resources of the RSBCA to put something back into the community.

A group of Old Papa’s riders, including me, met in 2001 and decided to form a body that would try to tap into the resources of cyclists to achieve community and charitable aims. Our initial goal was to raise money to help aspiring junior cyclists, who may not otherwise have the means, to travel to and compete in national and international cycling competitions. We had in mind the experience of one junior cyclist who through personal and economic circumstances

The “Old Papa’s” collective changed dramatically the landscape of recreational and competitive cycling in Western Australia.
We later incorporated the Foundation and embarked on other fundraising ventures, including an annual dinner and auction, and the production and sale of cycling gear.

We have invited prominent Australian professional cyclists based in Europe to these dinners as guest speakers. Since 2001 our achievements have been modest, but we have assisted many young cyclists, some of whom have become World junior champions. One of our assisted cyclists is now training with the Australian Institute of Sport and is knocking on the door of future Olympic selection. We also provide funding for Cycling WA's Western Australian Junior Elite Talent Squad (JETS) a group of exceptionally talented junior cyclists who are given the opportunity through the squad to feed into programs with the Western Australian Institute of Sport and, beyond that, the Australian Institute of Sport.

We run the Foundation as volunteers. All money we receive we pay out. Our aims are not limited to helping junior elite cyclists who, without our help, might not have the means of achieving their dreams in cycling. We aim to apply financial and skills resources of cyclists for community benefit, but preferably in ways linked with cycling. Our broader and longer term community aims include providing funding and resources for programs that help disadvantaged youth, disabled persons, youths in the juvenile criminal justice system and cycling education programs.

All of our funds have not been used to pay for cycling related programs or ends. We have donated money to St Patricks Community Support Centre in Fremantle which provides aid and support for homeless men. We have also provided cycling gear to a former junior cycling champion who, through family breakdown, was unable to continue cycling.

The Henk Vogels Cycling Foundation provides a vehicle to enable the financial and skills resources of cyclists and the corporate world to contribute back to the community. For more information about the Foundation visit our web site www.hvcf.com.au and for information about recreational cycling in Western Australia go to www.wa.cycling.org.au and www.cyclosportif.com.au.

Perth is blessed with the exceptional beauty of the Swan River and environs and a warm climate. The “Old Papa’s” collective changed dramatically the landscape of recreational and competitive cycling in Western Australia. The work of “Old Papa’s riders” led to the creation of what is now Australia’s largest cycling club, Cyclo Sportif. It is a club for recreational cyclists that holds monthly team participation events in Perth and satellite towns. Through this innovation and other public cycling events there is now a substantial “corporate” component among cycling groups. Numerous public companies have their own teams that participate in Cyclo Sportif and other public cycling events. Innovations in Western Australia are potential models for other States.

Australia's most famous cyclists, the Henk Vogels Cycling Foundation was formed as the vehicle to tap into the resources of the Old Papa’s riders and other cyclists and use those resources for community purposes. As a first step the Foundation established a cyclist assistance program, through the Australian Sports Foundation (a Commonwealth Government body), to raise funds for promising junior cyclists. By that means funds could be paid to the ASF and through Cycling Australia returned to reimburse junior cyclists for the expenses of travelling to and competing in national and international competitions.

We later incorporated the Foundation and embarked on other fundraising ventures, including an annual dinner and auction, and the production and sale of cycling gear. However, through lack of money at the outset, he almost did not make it.

One of our group, Henk Vogels OAM, was then the most accomplished of the Old Papa’s riders. Born in Holland, he grew up in Perth and represented Australia in cycling at the Tokyo Olympics. He spent five years racing as a professional cyclist in Europe. Henk is a life member and was a board commissioner of the Western Australian Cycling Federation and over a 20 year period he acted as State coach, team manager, selector and commissaire. His son, also Henk Vogels (and known to all but his family as Henk Jr), has raced in the Tour de France and is currently a member of a professional cycling team in the USA.
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