BAR BULLETIN

Newsletter of

The Australian Capital Territory Bar Association

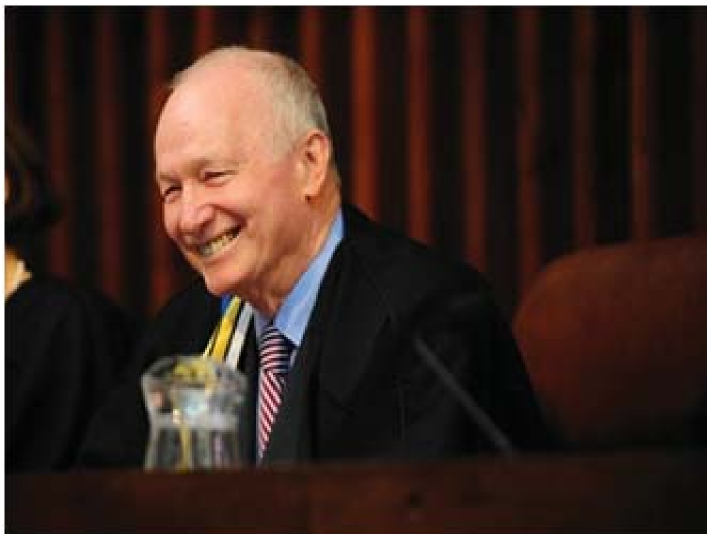
July 2011

From the Editor

"A New Beginning"

Justice Malcolm Gray in his farewell speech on Friday 29 July 2011 said in part:

"...*The acting judges were appointed to assist the court with its workload in a situation where for some time the court's judicial complement suffered from the untimely loss of Terry Connolly and the retirement of Justice Ken Crispin. I know the government is placing its faith in systemic changes to address the problem. However, it is concerning that no short term solution is being considered until the longer term effect of these changes are evaluated. In both civil and criminal matters the time for matters to be heard is still unacceptably long. Figures related to the impact of the acting judges on the workload indicate some impact but without additional judicial resources the court is going to struggle to deliver justice in a timely fashion..."*



It is clear from what Justice Burns and Attorney Corbell said on 1 August 2011 at the swearing-in ceremony for Justice Burns that the Magistrates Court in the ACT has had appropriate consultative liaison with the Chief Magistrate and the ACT Government through the Attorney himself together with Ms Kathy Leigh. This has led to appropriate discussion on staffing and resourcing of that court. I support that consultative process. What then is the situation with the Supreme Court? Interstate silks say to me that the physical condition of our Supreme Court for criminal matters is substandard and inferior by comparison to other interstate Supreme Courts and that dramatic changes are warranted.

In relation to the delivery of justice in a timely fashion in the criminal and civil streams the adjectives used are "Appalling" "Unacceptable" and "Unbelievable".

Assuming that these comments are accurate and warranted - as I do - what then must be done to remedy this situation? Clearly there is no point in a "Blame Game". We need to have a system where there is a proper discussion and consultation between the Chief Justice and the Court and the Attorney and his department about securing appropriate facilities, resources and staffing. If it works for the Magistrates Court it should also work for the Supreme Court.

If the additional acting judges only ameliorated in a temporary way the unacceptable backlog, then clearly we need a 5th Judge - whatever the statistics show. Clearly also we need a dramatically renovated or a new Supreme Court where security for Judges, staff and the jury are addressed together with appropriate facilities for all stakeholders. If the current Supreme Court is to be renovated then a move to temporary quarters should be implemented A.S.A.P. The time has come for a giant cooperative step forward whereby case management initiatives and other matters are assessed.

Whilst I am, I admit, an old and grumpy senior counsel, I have been a former President of this Association and a former Vice-President of the Australian Bar Association as well as serving on the Council of the Law Society. I have seen many changes - not only in Canberra but in other jurisdictions since my admission to the NSW Bar in 1973. I am a proud Canberran and see no reason why the ACT should not have the best administration in Australia - we should not

be the worst. Chief Minister Stanhope showed the way in pioneering Human Rights in the ACT and surely with proper consultation and resource application we can "pioneer" the best and timely delivery of Justice in Australia.

I call upon the all relevant persons to adopt a proactive approach towards this problem.

FJ Purnell SC

Congratulations Justice Burns

When Justice Burns commenced practice at the Bar he was my pupil. It became abundantly clear to me in a very short time that he was destined to have a most successful career at the Bar.

When he told me he was applying to become a Magistrate, I counselled him against such a move mainly because of his youth. He very wisely rejected my advice. He has served the ACT community very well as a Magistrate and Chief Magistrate.

His appointment to the Bench has been a popular appointment amongst the practising profession. He is expected to be fair, polite and decisive. The Bar congratulates him and wishes him and his family success, enjoyment and fulfillment in this new role. As always the Bar will give Justice Burns all the support he wants in discharging his judicial duties.

VALE Brian Ross Maguire QC

Brian Maguire died on 24 June 2011. He was 75 years old. In his life he had achieved much and made many friends. He stood for the seat of North Sydney and Eden Monaro as a Labour candidate. He was on the NSW Bar Council and the President of the ACT Bar Association. He was a District Court Judge and a Judge of the Dust Diseases Tribunal. His death came suddenly after a massive brain haemorrhage leaving a distraught and loving Janny. Brian had 4 children, Matthew, Frank, Ben and Tory. Frank also died of a brain haemorrhage after being tackled playing beach football. It was a loss that Brian and Jan never overcame.

The funeral was held at Bowral on 1 July 2011. Many of the Irish community as well as members of the Bar, solicitors, current and ex members of the bench were present together with family and friends to hear three wonderful Eulogies. John Maguire, first cousin, gave a history of the Maguire clan in Australia, John O'Meally gave a pocketbook sketch of his friendship with Brian since they were both Supreme Court Judges Associates in the 1960's. O'Meally regaled us with an account of a wild car trip around much of Australia, which he and Brian made before they both got married. Ben Maguire gave a son's account of the memory of his father. Ben was poignant and humorous.

For my part I remembered an enormously loyal and generous friend - who led me many times in cases in the Supreme Court in Wollongong and Canberra as well as being a tough opponent in a few cases. In Wollongong, we represented the Mine Workers for almost 10 years. That meant 3 to 4 months every year in Wollongong. We went underground together in full miners kit with our experts, clients and our solicitor Mark McDonald - our families spent time in Wollongong as the mines became part of our lives.

We both were required to make speeches at miners dinners and meetings. Our solicitors expected and demanded that we become part of the Wollongong legal fraternity which again meant attendance and speeches. Brian discharged those duties with enormous enthusiasm and passion. It defined in part who he was as a member of the Bar.

We were together in the Winchester Inquest. Brian represented the AFP and I represented the Winchester family.

Brian was a talented advocate and a ferocious effective cross examiner. He was an industrious, fair and compassionate Judge. He will be greatly missed by his family and friends and the community generally.

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From the DPP

The Courts Legislation Amendment Act 2011 provides for the insertion of a new section 374 in the Crimes Act 1900. The provision has now commenced. In essence it provides that the prosecution may elect summary jurisdiction for any offence punishable by imprisonment for longer then 2 years but not longer then 5 years. Of course offences punishable by imprisonment of 2 years and less are already summary.

The most common offences that will be encompassed by the new provisions are assault occasioning actual bodily harm, breaching protection orders, stalking and stealing motor vehicles.

Under the legislation the prosecutor must make an election for summary disposal before the later of the second time the proceeding for the offence is before the court, or 21 days after the first time the proceeding for the offence is before the court. In practical terms this means that in most cases the prosecutor's election must be made before the second mention of the matter.

It is important to note that the defendant will not be required to plead to the matter until the prosecutor has made the election.

It should also be noted that even if the prosecutor does not elect for summary disposal, this does not prevent the defendant seeking summary disposal.

If the prosecution elects for summary disposal, the penalty available will be a fine of $5000.00 and imprisonment for 2 years or both.

As to the factors that will be taken into account by the DPP in electing summary disposal, a guideline has been published on this. Essentially the guiding principle will be whether in the circumstances the Magistrates Court can adequately deal with the matter given the available penalty on summary disposal. In turn that will depend on:

- the nature and circumstances of the alleged offending;
- any other matter that a court would have to consider under section 33 of the Crimes (Sentencing) Act 2005 in sentencing the alleged offender; and
- the criminal history if any of the alleged offender.

Other factors to consider are:

From the Chief Justice

On 29 July 2011 the ACT Supreme Court bade a fond farewell to Justice Malcolm Gray in a ceremonial sitting to mark his retirement. His Honour was appointed to the ACT Supreme Court on 12 October 2000 from South Australia, and was later appointed President of the ACT Court of Appeal on 21 December 2007, following the retirement of Justice Ken Crispin.

His Honour's legal career has been diverse. Having been admitted to practise in 1964 in South Australia, he joined the Office of the Crown Solicitor and was appointed Solicitor General of South Australia in 1978, an office he held until 1986.

His Honour took silk in 1982 in South Australia and was appointed a Senior Public Defender in 1986. That same year he was recognised by the state of NSW and was appointed Queens Counsel. In 1989 his Honour returned to South Australia as Chief Counsel for South Australian Legal Aid. Three years later his Honour joined the National Crime Authority and then moved to the private bar in 1995 until his appointment in the ACT.

Such a distinguished legal career has enabled his Honour to make significant legal contributions to many areas of the law in the ACT in areas such as human rights, criminal law and medical negligence. He has also contributed to the legal community as President of the South Australian Bar Association and Vice President of the Australian Bar Association.

The ACT Supreme Court is sad to see his Honour leave and wishes him all the best in his retirement. The Court extends its welcome to his successor the Honourable Justice John Burns.

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• whether the alleged offence is part of a series of related alleged offences, and if so whether it is appropriate to deal with those alleged offences summarily; and
• whether there are any co-offenders of the alleged offender and if so whether it is appropriate for the alleged offender to be dealt with together with those co-offenders.

Under no circumstances will the prosecution make an election for tactical reasons.

The prosecution will signify its election by filing a written document with the court. It should be noted that the authority to make elections can only be exercised by senior officers within the DPP's office and accordingly it should not be expected that the prosecution will be in a position to make elections for summary disposal on the run in court.

Jon White
Director of Public Prosecutions

FACE TO FACE

Classic Interviews with Outstanding Figures of the 2Oth Century; BBCDVD 2908 (6 Disc Set of DVDs) BBC London

Reviewed by Douglas Hassall

We have seen some of these images before, but usually only in small portions or snatches used as part of other documentaries. This remarkable DVD re-issue by the BBCTV is of the whole of the surviving audio-visual footage from its Face to Face series, which was telecast as a regular feature in the United Kingdom from 1959 to 1961. The format of the series was unusual. The subjects interviewed included a wide variety of eminent people in politics, the arts and the professions, ranging from Nuremberg War Crimes Prosecutor Lord Shawcross QC to Dr Martin Luther King, from the psychologist Carl Jung to the comedian Tony Hancock, from the poet Dame Edith Sitwell to the pop singer Adam Faith, and from the painter Augustus John OM to the racing driver Stirling Moss. In all, some 34 people who were great figures at the middle of the twentieth century, agreed to undergo a lengthy and probing (but always civil) interrogation on national television. The interviewer was former Labour Party MP John Freeman MBE, who was later to be British Ambassador to the United States. He was one of the most confident, astute and penetrating interviewers ever to appear before a television camera. Notably, however, the format agreed upon also required that for all of these many interviews, only the back of Freeman's head would appear, with the camera focusing intently (and at times, quite intensely) upon the interviewee, who remained seated in a chair set against nothing more than a black velvet studio cloth, which further focused all attention upon the features and demeanour of the subject.

The results are startling and wonderful in their immediacy. Such in-depth interviews of major public figures are these days increasingly a rarity. Indeed, it is hard to think of any really like examples in recent years; and it is a long time since David Frost's interviews of Richard Nixon. And no wonder, any politician's media "minder" these days would run a mile before exposing his charge to John Freeman. But then, the likes of a Freeman are very scarce on the ground now too. Occasionally these days, an evening television news magazine in Australia such as The 7.30 Report, will feature an experienced interviewer such as Kerry O'Brien effectively grilling a public figure on some issue or other and managing to get a little beyond the "spin" which now infects so much public discourse on serious matters. Or, we may see more extended interviews with public figures, most often in retirement or decline, being interviewed in a 'softer' manner. Yet we rarely see an incisive and long-extended probing under the television lights such as those by John Freeman in Face to Face. Hence this DVD re-issue stands out as an exceptional document. It is accompanied by a generous 48-page booklet about the origin and making of the series, as well as notes on the lives and careers of the "sitters" in this exhibition gallery of televised notable personalities. The notes appear over the name of Hugh Burnett, producer of the series, but they were presumably proofed by someone of a much more recent generation than Freeman and his collaborators, as they contain some "howlers" such as an English Judge being "elected" to the Bench, and reference to a lawyer as "King's Council [sic]". One wonders what UK readers of The Spectator would make of the blandly egregious statement, in connection with the interview of the British Politician Lord Morrison of Lambeth (1888-1965), that: "His grandson, Peter Mandelson, became a prominent Labour politician and played a major part in modernizing the party in the mid-1990s."

Obviously, space does not permit comment here upon all the interviews; and to do so might reduce the fun of one's actual viewing. However, suffice it to notice the following few instances from these sequences of footage, which must now, at an interval of about 50 years, constitute insightful historic documents of the very first order. We see the eccentric dress, style and manner of Dame Edith Sitwell, but we also learn her quite down-to-earth reasons for adopting them; as well as her reasons (good ones) for trying to teach critics "their manners". And all expressed in her very distinctive mode of speech. One of the boldest and effusive subjects interviewed was an associate of Churchill, Lord Boothby, who had a lengthy affair with another premier's wife, as well as leading a colourful playboy life generally. However, the jewel in the crown of these interviews is perhaps that of Evelyn Waugh – by turns reserved, sharp, precise and almost feline in evasion when it suited him, but on the whole frank and forthright. This interview has not quite the same fire as Waugh's 1953 BBC radio effort (also now available on CD from the British Library in its Spoken Word series) which was described as "the most ill-natured interview ever" – but his televised performance is not to be missed.

Some of the interviews were (exceptionally, due to the subjects' age or frailty) conducted not in the special studio, but on location. Thus, Freeman visited Jung in Switzerland, Sculptor Henry Moore OM at his studio at Much Hadham in Hertfordshire, John in his Hampshire

studio, and Sir Compton Mackenzie in bed at his Edinburgh home. Among other subjects interviewed by Freeman were the conductor Otto Klemperer, the politician Lord Hailsham, philosopher Bertrand Russell, diplomatist Adlai Stevenson, King Hussein of Jordan, filmmaker John Huston, Lord Reith of BBC fame, the French actress Simone Signoret, politician Jomo Kenyatta, playwright John Osborne, photographer Cecil Beaton and the footballer Danny Blanchflower. It is an interesting and valuable additional feature of this DVD re-issue that the fine portrait drawings of the interview subjects, done for the series by Feliks Topolski, also appear at the start of each episode. The signature tune used for the series, an overture excerpt from Berlioz's unfinished opera Les Francs-Juges, caused some hilarity after Lord Birkett, a then very senior Judge, appeared on the series. A friend of his noted that Les Francs-Juges "concerned the sinister tribunals held in Westphalia during the Middle Ages, after which the condemned prisoner would disappear for ever." Birkett then wrote to Freeman amusingly: "What do you think the damages would be if a powerful Broadcasting Corporation were to play this music as the prelude and postlude to a television programme consisting of an interview with a celebrated Judge who sits judicially in the House of Lords?"

It is a sad comment on how the medium of television has "developed" to have to note that television interviews of this depth and incisiveness are not only now a very rare occurrence, but also that such an interview at the same level of timing (an average duration of about 30 minutes each) and same standard of sustained and informed interrogation, is fairly infrequently countenanced by telecasters. Well after Face to Face came Michael Parkinson's shows involving a different type of interview (and sometimes with more than one person at a time) and often with subjects whose main point of eminence was celebrity. David Frost's interview style was perhaps a little closer to Freeman's style, but the format was again one which gave at least some prominence to the personality of the interviewer rather than a close and unrelieved focus on the subjects themselves. One has to allow for some idiosyncrasies on Freeman's part: in certain ways (more or less irritating, according to taste) he does remind us of "the man with the New Statesman" who keeps turning up at sightseeing venues in Martin Boyd's Much Else in Italy. Contemporary interview formats are more usually much more diffuse and more often than not, tend towards the "panellist" format. Some television interviewers today, such as Andrew Denton in Australia, do still operate along lines broadly similar to Face to Face. However, with respect to their work, Freeman is a hard act to follow. This DVD set from the BBC is an inspired document of television past.

Loveridge v Emery 2011 FamCA 203

Can a judge continue to sit in a matter even after being asked by one party to disqualify himself because he had appeared fleetingly for the other party when he was still a barrister? The answer is "Yes, in some cases", and on good authority.

The recent decision by Justice Austin sitting in the Newcastle registry of the Family Court published under the name of Loveridge v Emery 2011 FamCA 203 illustrates such an example.

Recusal

In 2006 the parties were involved in domestic violence proceedings in the Local Court responding to an AVO application arising out of a bizarre incident between the parties. The father was, incidentally, at that time represented by the same firm of solicitors who were now acting for the mother in the Family Court. At the request of the Magistrate, Mr Austin (as his Honour then was) had a transient appearance pro bono for the mother, without a brief, simply to advise that the mother would thereafter be represented by a Sydney Advocacy Centre. The matter was then adjourned to a new date and Mr Austin had no further involvement.

Ironically in the 2010 proceedings, the solicitor who had been acting for the father in 2006 was called by the mother to give evidence on a voire dire. Neither that solicitor nor his Honour had any recollection of what had happened back in 2006 let alone any recollection of anything said by Mr Austin. The mother did not even recognize his Honour, and his Honour did not recognize her or her name. He certainly did not recognize the father.

On the 4th day of the trial in November 2010 the father said he recognized his Honour.

The father and his lawyer had appeared before Justice Austin in June 2010 and on the first 3 days of the trial in November. He did not make any application that his Honour should disqualify himself. In February 2011 the father's solicitor wrote to the solicitors for the other parties, ie the mother, the Director-General of the NSW Dept of Human Services, the Independent Child's lawyer, and a grandparent, but not to the Court, that he had received instructions about a letter from the father's then solicitor which referred to the appearance by Mr Austin. The other parties responded by asking that he obtain a copy of the 2006 letter. The father failed to produce that letter to any other parties until the part-heard trial was resumed on 11 March 2011. His oral evidence was that he had raised this issue with his lawyers in November 2010. His Honour gave the following reasons -

75 The principles governing recusal, to which it is now necessary to turn, must be applied to that factual background.

76 The cardinal principle is well known (see Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 at 344-345; Johnson v Johnson (2000) 201 CLR 488 at 492):

> ...a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

78 Application of that principle entails two distinct steps, as was explained in Ebner at 345:

First, it requires the identification of what it is said might lead a judge... to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge... has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and

the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

79 There are recognised to be four distinct but overlapping categories of cases covered by the doctrine of apprehended bias (see Webb v The Queen (1994) 181 CLR 41 at 74; Ebner at 348-349). The first is disqualification by interest, the second is disqualification by conduct, the third is disqualification by association, and the fourth is disqualification by extraneous information.….

81 A reasonable apprehension of bias may exist where a presiding judge has a substantial relationship with a party to proceedings before that judge (see Bienstein v Bienstein (2003) 195 ALR 225 at 232), but it is likely to be a question of degree. A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a judge, from sitting in proceedings before the court to which the former client is a party. However, the apprehension of bias is liable to arise if the correctness or appropriateness of advice as to law or strategy given to the client by the erstwhile legal adviser is a live issue for determination by the court. Much depends upon the nature of the relationship, the ambit of the advice given, and the issues falling for determination (see Re Polites; Ex parte Hoyts Corporation Pty Ltd (1991) 173 CLR 78 at 87-88; Kartinyeri & Anor v Commonwealth of Australia (1998) 156 ALR 300 at 305; Bienstein at 232).

82 In the circumstances of my transitory appearance for the mother in 2006 to facilitate an adjournment of the apprehended violence proceedings, on a pro bono basis, without a brief, and without any interim or final order being made in those proceedings, it is inherently unlikely that I proffered any advice of significance to the mother. Even if I did furnish advice to the mother about the proceedings, there is no evidence before the Court as to the nature of that advice. In the absence of knowledge about the nature of the advice the correctness or appropriateness of that advice is clearly not an issue in these proceedings.

George Brzostowski SC
Adjunct Professor
University of Canberra

Welcome to New Members

Marcus Hassall
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MEAGHER'S CORNER

The Return of Crowe SC - Bobby and Frances returned from a "Tour de France" via a "bike and barge" through Belgium to Paris. The Dutch company reportedly looked after them very well - supplying fresh food daily and more than adequate "tour guidance". The French for the "French Open" apparently approach the tourists dollar differently than the English do for Wimbeldon - meaning Crowe could not secure tickets - no worry Bobby there is always the Australian Open.

Meagher SC sings again - "Byron" Meagher as he was labelled carried the hopes of the impecunious by attending in - style the ABA in Berlin. The French "Merde" gave way to the occasional "Scheizen" as he sang his way through "Check Point Charlie" and drank beer instead of Guiness. We still await to learn why he earnt the appellation of "Byron" as we all know he is a singer not a poet!

Toddy Becomes a Legend - Congratulations to Chris Todd and his team for breaking the "murder drought" after 10 years. Chris led the DPP team that secured a double murder conviction in the Judge Alone Trial before Justice Gray of the meat cleaver killer. There is apparently no truth in the rumour that the police celebrated in the "usual" way for several days after the verdict.

Crownies - If "Rake" is supposed to be "loosely" based on the career at the Bar of Charles Waterstreet, then the Bar Bulletin wants to know upon whom the TV series "Crownies" is based. Certainly I would still be a prosecutor if the lifestyle portrayed in the TV series was approximately one tenth accurate. I expect Jon White will be inundated with applications with "keen" recruits for a career prosecuting that I obviously missed out on.

Magistrate Brewster - Those of us who have seen a mean and leaner "Jimmy B" and have wondered why - well the answer is a triple bypass. The Bulletin understands that there is a residual minor hiccup remaining. We wish Magistrate Brewster a "full" recovery so that he can punch on and enjoy life.

Magistrate Dingwall - Peter's mum (God bless her) died aged 96 very recently. Whilst obviously she had "good innings" a loss of one's mother is always a sad event. We offer our condolences to Peter and his family.

Mossop of the Prairie - Mossop is building the "ranch" of his dreams on the prairie around Bungendore. His builder has complained of the cold but marvelled at the unique design and building materials being used. A green and friendly [expected] "blue spotted gum" house with large doors and ceilings will soon house this giant of a man and his family.

Brzostowski SC, Adjunct Professor - Congratulations to George for his appointment by the Vice-Chancellor of the University of Canberra to the position of Adjunct Professor.

DATES FOR YOUR DIARY

18 August 2011 - Bench and Bar Dinner, Commonwealth Club