

Judge the Cover – The Cover Judges

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Contrary to the aphorism, in the publishing world a book, and even more so a magazine, is judged by its cover. And on that basis this edition should be judged excellent.

Our gracious cover models bear three of the finest judicial minds in this country. At the forefront our beloved and outgoing Chief Justice of the Supreme Court, the Hon Tom Bathurst AC. Standing modestly slightly behind, are *ex-Bar News* editor and incoming Chief Justice the Hon Andrew Bell, and our new President of the Court of Appeal, the Hon Justice Julie Ward.

This edition contains a number of articles about Bathurst CJ. In 'Not (quite) a hagiography', Julia Roy writes about the man behind the wig. While always able to summon the sincerity or gravity demanded of a justice-in-chief, Bathurst delighted in some of the attendant absurdities of the role. She shares some private anecdotes amidst the celebrations of his Honour's more obvious achievements, saying that he did all that 'while being, at the same time, a really great person'.

Another of Bathurst's associates, Naomi Wootton, interviews her old boss. His answers are wonderfully candid and amusing. His description of what it was like to start at the Court, dealing with judges he did not know and fields of law he knew nothing about, of sitting in the Court of Criminal Appeal for the first time with no clue as to what everyone was talking about, should reassure the rest of us that we too may succeed despite initially feeling we have insufficient knowledge.

What did Bathurst learn from being a judge? The benefit of good written submissions. What will he miss the least? Submissions that refer to every case on the topic when one High Court case has conclusively dealt with the issue.

In the last few months the Court of Appeal has conceived not one new Chief Justice, but two. The Hon Lucy McCallum JA has left to take up the position of the new Chief Justice of the ACT Supreme Court. *Bar News* committee member, and fellow rock climber, Daniel Tynan interviews



McCallum CJ. I was particularly taken by McCallum's focus in her swearing-in speech on the need for an exchange of ideas about the concept of moral culpability and our own moral responsibilities to address the causes of endemic disadvantage and deprivation.

As an aside, soon to join McCallum on the bench of the ACT Supreme Court is *Bar News* committee member Belinda Baker. Belinda has made a very significant contribution to *Bar News* over her years on the committee. Among other achievements, she established a regular column titled 'With my own two hands', focussing on barristers and the judiciary whose involvement in charitable activities are assisting to improve society. It seems fitting that Belinda is herself the interview subject this edition, telling us about raising a Guide Dog puppy. This article is definitely not just an excuse to feature a number of very gorgeous photos of a black Labrador puppy.

The Joy of Editing

I can say without reservation that the role of *Bar News* editor is joyful.

My happiness stems entirely from the quality, insight and humour of our authors, who I sometimes commission to write on a certain topic, but usually come unprompted with ideas or indeed fully formed articles that delight, provoke and entertain.

This edition is no different.

Gail Furness SC turns her expert interview skills onto friend and colleague Martin Einfeld QC, to ask him about his

recent book, a collection of anecdotes, *I Object!*. Martin has been at the Bar 47 years. Apparently his accountant says he will be able to retire at 82yrs.

Talitha Fishburn interviews two experienced barristers, Lester Fernandez and Cynthia Cochrane SC to find out what they have learnt about practice and what, on reflection, they would have done differently. Both recall that as readers they said 'yes' to almost all work coming their way. Lester now takes concrete steps to avoid being constantly busy, diarising preparation time and ensuring there are gaps between trials. Cynthia Cochrane says on reflection she should not have taken a brief that required her to pull out of a holiday which involved running the New York marathon.

Anthony Cheshire SC's excellent thought piece, 'Advocacy in the face of confirmation bias', led me to reflect on recent a recent case of mine where I too attempted, with only limited success, to put an *irresistible* argument: reasonable, not emotional, softly delivered and derived from common sense, so that the conclusion appears obvious and makes the advocate seem incidental. Just as Anthony experienced, my opponent adopted a contrasting style involving stigmatising my submissions using strongly dismissive adjectives, delivered with full force, a loud voice and strong emotion, in effect daring the judicial member to come to a different view and implicitly suggesting they would be generally scorned for doing so. I too was left wondering which style is in fact more effective. No doubt it depends on the capacity and confidence of the judicial member. I cannot imagine the new President of the Court of Appeal, for example, being particularly moved by mere loud, hectoring advocacy.

Douglas McDonald-Norman, committee member, interviews three barristers who are current serving members of the NSW Parliament, to find out why they chose to swap the courtroom for the bearpit. Each identified that whereas a barrister can ordinarily only assist a small number of people at any point of time, a politician has a much greater capacity to promote public welfare.

Stephen Ryan has written an article that looks back at some of the more colourful contempts of court by the media.

Three authors who are not committee members have contributed wonderful pieces.

Jane Needham SC, in her article 'Law in literature and literature in the law', examines the use of quotes from literature in judicial writing. Given the number of times Jane Austen has been quoted, Rocco Fazzari's illustration of Pemberley seems fitting, replete with a wet-shirted barrister emerging from the water (Arthur Moses?).

The article provides Needham with a wonderful excuse to repeat some of the more memorable lines from judgments. 'If this were a tale written by Beatrix Potter, it might be entitled *The Tale of the Tempestuous Teacup*. Unfortunately it is not a children's story', wrote McDougall J about an exchange of solicitors letters in *Birketu v Westpac*. Crispin J in *Klason v ACT* dealt with the attempt by the ACT Family Services Branch to assert the word 'substantiated' did not convey that an alleged offender was in fact guilty of any offence: 'The suggested approaches go well beyond George Orwell's concept of "newspeak" and embrace an elasticity of language not acknowledged since Lewis Carroll attributed to Humpty Dumpty the cheerful assertion that "words mean what I choose them to mean, neither more nor less".'

Beverly Schurr, Acting Magistrate and secretary of the Australian Association of Women Judges, writes about Charlotte Sheens JP, the first woman to exercise judicial powers in NSW. Sheens sat as a JP in 1921 and 1922. It is remarkable to read the public reaction to women being appointed to a position which could see them exercising the powers of a magistrate. The *Sydney Morning Herald* noted that 'some correspondents have deplored the innovation; in their eyes it is another milestone on that via dolorosa along which modern woman persists in travelling.'

Uche Okereke-Fisher's article, 'International Women's Day – Break the Bias', examines how today's modern woman is faring on that via dolorosa in the face of continuing impediments. The article makes a strong case for increased diversity at the

bar. Drawing on UK statistics, it addresses the discrimination that sees white male barristers earning the highest income, while black and Asian women suffer bullying and harassment at four times the level of white men. The article arises from a panel discussion organised by the Bar's Diversity and Equality Committee, at which Justice Dina Yehia SC spoke. Her Honour recalled the experience of an Indigenous solicitor who attended at a Local Court who, upon rising to mention her case, was told to move away from the bar table to the public section of the court and wait for her solicitor to arrive.

Bar News has a number of regular sections and contributors which are always worth reading.

'Recent Developments' is the section that contains analyses of recent High Court or other leading cases. What strikes me again and again, as I read the reports, is the high quality of the analyses, which are entire while pithy. They are written by our newest members of the Bar, and their quality says good things about where the Bar will be in 20 years.

Reg Greycar regularly reviews podcasts, and in this edition has an extended article on the various podcasts that have discussed the rise of #MeToo, including in Australia. For example, in *Everybody Knows*, Bruce McClintock SC discusses whether Australia's defamation laws even make it possible to have a 'Me Too debate'.

In addition to some great book reviews Sean O'Brien and Kavita Balendra review the Ace Attorney computer game series. The games allow the player to be barrister and conduct trials. It must be a relief that if an incorrect forensic decision is made the preceding scene repeats, giving you another chance at presenting relevant evidence or asking a crucial question in cross-examination. I particularly appreciated the quote attributed to the Judge: 'That makes sense. After all, my deductions are almost certainly never correct.'

I have to admit, my favourite regular column is 'The Furies'. Each edition I await with delight the Furies' answers to the (genuine) questions sent in by readers. This edition again does not disappoint. I would have been content with just this sentence:

'Of course, no one joins the bar expecting mediocrity, least of all the mediocre who lack the perspicacity to recognise it in themselves.'

One of the best loved (ok, only) characters in *Bar News* is Bullfry, an aged barrister struggling to deal with the travails of the modern bar. In this edition we find him, as drawn by Jim Poulos QC, appearing by AVL semi-recumbent on the recamier, dressed below the waist in only his bulldog boxers. The article commences with actual transcript from a recent High Court hearing, recording the difficulties the Solicitor General for WA was having dialling into the hearing.

Bullfry would no doubt applaud the words of Chief Justice Bell, quoted by Michael McHugh QC in his President's column, welcoming a return to in-person hearings.

Which reminds me of a recent transcript extract from Fair Work Commission proceedings:

Mr Matarazzo (MM): *Thank you. All right, Commissioner, we seek to call the applicant, Ms Maria Rust, into the witness box. Just a housekeeping thing, Commissioner, we can't see you visually on the TV, is that normal or ---*

The Commissioner (TC): *Yes, it is, unless you want to have a view of my bedroom.*

MM: *No, that's fine.*

TC: *(Indistinct).*

MM: *No, no, I apologise, just – yes, just letting you know that we can't visualise you, that's all.*

TC: *Well, think of a big fat ugly bastard and that's what ---*

MM: *Thank you, Commissioner. All right, well, we can have the assistance of your associate to - I'm not legally trained, so to have a, whatever, you know.*

Justice literally cannot be seen to be done if the presiding member does not turn their camera on. Just saying.