I am delighted to announce that in August 2016 the Section Executive resolved to award honorary life memberships to two former Section Chairs, Chris Cunningham and Peter Kite, in recognition of their long and outstanding service to the Section. The awards will be presented at the Section’s annual general meeting (AGM) in Adelaide on 21 October 2016.

We recently closed the call for nominations for candidates for the Section Executive for 2016–18. We have attracted a full complement of Executive members from four states and the ACT. As a result and in accordance with the Section by-laws, a ballot is unnecessary. The Section Executive is deemed to have been elected and will be declared at the AGM. The term of office starts from the close of that meeting. The Section Executive will then agree on the office-bearers for the next term.

Another key item on the agenda for the meeting of the Section Executive in October 2016 is a discussion with Bret Walker SC and Professor Anne Twomey about issues on the Constitutional Law horizon.

Further work will be done before the Section Executive meeting to develop a proposed Section membership recruitment and engagement strategy.

This edition of the newsletter brings you the usual round-up of news from federal courts and tribunals, CPD events, and CLPWatch casenotes concerning client legal privilege and public interest immunity cases. The feature article by David Jackson AM QC explores the attributes of successful advocacy in arbitrations.

John Emmerig
Chair, Federal Litigation and Dispute Resolution Section
Vale James Merralls AM QC (1936–2016)

Source: Attorney General George Brandis QC’s media release:

James D. Merralls AM QC was an outstanding Australian barrister and a pillar of the Victorian bar.

In the many accomplishments of a lifetime’s service to the law, one stands out in particular: Mr Merralls’ editorship of the Commonwealth Law Reports (the authorized published record of the decisions of the High Court of Australia) for a remarkable 47 years – almost half of the entire life of the Court. From 1969 until his death on the weekend, every reported decision of the High Court passed through his hands; his summaries of the judicial reasoning, contained in the “headnotes” to each case, were an unerringly accurate précis of each decision, relied upon by generations of barristers and judges. There will surely never be a longer-serving or more influential editor of the Commonwealth Law Reports.

Mr Merralls combined his work as the editor of the Commonwealth Law Reports with an extensive practice, specializing, in particular, in constitutional law and equity. He appeared in countless leading cases in the High Court. His was a richly deserved national reputation for erudition and tireless preparation, and for uncompromising integrity.

After graduating with Honours from the Melbourne Law School, Mr Merralls served as associate to Chief Justice Sir Owen Dixon, with whom he shared many qualities. While he was one of the Australian Bar’s most eminent members, his approach, and style, were distinctively Melburnian. I sometimes sought his discreet and wise counsel on a range of matters, including appointments.

Mr Merralls’s outstanding contributions to the legal profession, including to legal scholarship and teaching, have rightly been acknowledged with an honorary Doctorate of Laws of the University of Melbourne, and a James Merralls Visiting Fellowship in Law has been created at the Melbourne Law School.

Mr Merralls’s wide cultural and sporting interests were evident throughout his life. These interests included a passionate and successful commitment to horse breeding and horse racing, extensive knowledge of cricket statistics, a love of music, and fearless reviewing of novels, plays, and films.
In recent months Section Committees’ contributions to the Law Council’s law reform advocacy has included:

- the Federal Court of Australia’s National Class Actions Users’ Group Committee met in August 2016 to discuss the Court’s draft Class Actions Practice Note. A revised Practice Note is likely to be issued this month along with the Court’s other new National Practice Area Practice Notes. The Co-chairs of the Section’s Class Actions Committee Ben Slade and John Emmerig represented the Law Council at the meeting;

- the Administrative Law Committee provided comments in support of the Council of Australasian Tribunals’ recommendation that barristers’ preclusion periods under the Legal Profession Uniform Law be reduced to two years from the current five. The Committee noted that a two-year preclusion period applies under the Victorian Civil and Administrative Appeals Tribunal Act 1998 (VCAT Act). The Committee noted that 5 years is out of step with the preclusion period under the VCAT Act. Rule 38 of the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 provides that a solicitor who is a former judicial officer must not appear in any court in which the solicitor has been a member for a period of 2 years. Court is defined in such a way as to include tribunals. The Committee expressed a preference for the same preclusion period for barristers and solicitors, and that it be applied flexibly. A shorter period is less likely to discourage barristers from accepting appointment as full or part-time tribunal members;

- the Migration Law Committee continues to press for the implementation of the recommendations made by former Law Council Director Dr Christopher Kendall in his 2014 Review of the Office of the Migration Agents Registration Authority (OMARA) that the dual regulation of migration lawyers be dismantled. The Law Council’s view is that lawyers should be able to offer their services independent of the regulatory body for migration matters and that dual regulation is unnecessary, inefficient, burdensome, economically inefficient, and confusing, and does not improve the level of consumer protection;

- the Migration Law Committee Chair Erskine Rodan OAM has been liaising with the Department of Immigration and Border Protection about the Committee’s preference for regular and exclusive meetings with the Department independent of other stakeholders as is appropriate for the national peak body for lawyers;

- the Migration Law Committee and ADR Committee provided comment on the discussion paper produced by the Judicial Council on Cultural Diversity (“JCCD”) on the draft Australian National Standards for Working with Interpreters in Courts and Tribunals; and

- the Migration Law Committee also drafted a submission to the review of Working Holiday Maker Visas.

Other Section Committee activities since June 2016 include:

- each Committee Chair has been engaged with the Law Council review of Section and Advisory Committees and Working Groups. The Section Executive Officer and Section Chair are working to complete the evaluation of our Committees;

- the reconstituted Administrative Appeals Liaison Committee met on 15 June 2016 by phone and with the AAT face-to-face and by videoconference in Sydney on 17 June 2016. The Committee’s membership has been diversified to reflect the extended jurisdiction of the AAT following the 2015 amalgamation of federal tribunals, with eight members appointed to represent the practice areas of migration, employment, workers’ compensation, tax, and administrative law. The Committee will monitor the impact of the amalgamation and take a close interest in resourcing issues given the AAT’s increasing listing delays, and its growing migration law caseload. Issues discussed with the AAT include:
  - the Taxation and Commercial Division’s Practice Direction that is due to reviewed by the AAT in late 2016 or early 2017;
  - AAT member appointments;
  - pre-hearing procedures and the identification of issues prior to hearings in the Migration Refugee Division;
  - procedures concerning the attendance at hearings of visa applicants in detention;
- the AAT’s Digital Transformation Strategy;
- AAT contributions to this newsletter;
- proposed CPD events involving the AAT similar to the already successful Commonwealth Compensation Hot Topic seminars; and
- the Australian Government Attorney-General’s Department likely release of a discussion paper on filing fees later this year.

- the ADR Committee continued to discuss the National Mediator Accreditation System and provided comment on the discussion paper produced by the Judicial Council on Cultural Diversity (“JCCD”) on the draft Australian National Standards for Working with Interpreters in Courts and Tribunals;
- the ADR Committee Chair, Mary Walker, provided input to a secretariat briefing for the Law Council President and staff who attended a meeting with the Hong Kong Secretary for Justice, Mr Rimsky Yuen SC, on 18 August 2016; and
- nominations have been invited for the inaugural Distinguished Person in Immigration Law Award, closing 1 January 2017, and for the 2017 Migration Manager John Gibson AM Young Australian Migration Lawyer of the Year Award, closing 30 November 2016.

**CPD and networking events**

The Section will host several events in coming months:

- **25 November 2016**: Hot topics in Commonwealth Compensation, Australian Postal Corporation, Sydney
- **24–25 February 2017**: 2017 CPD Immigration Law Conference at the Four Seasons Hotel, Sydney

Recent events are profiled later in this issue.

**Federal Court Case Management Handbook**

The *Federal Court Case Management Handbook* is a handy reference tool for practitioners. It is available here.

**Pro bono assistance – SA and NT**

The Federal Court of Australia is seeking expressions of interest from barristers and solicitors for assistance with the Court’s pro bono referrals in South Australia and the Northern Territory. Need is greatest in the areas of migration, fair work and human
Selection of judicial speeches:


Full Court Sittings 2017

Subject to there being sufficient business, the Full Court and Appellate sittings of the Federal Court of Australia during 2017 will be held in all capital cities within the periods indicated below:
• 13 February – 10 March 2017
• 1 – 26 May 2017
• 31 July – 22 August 2017
• 30 October – 24 November 2017

Any urgent matter may be transferred to a place of sitting other than that at which the matter was heard at first instance.

If the circumstances require it, a Full Court may sit to hear matters on dates other than those listed.

**Rules and Practice Directions**

**High Court Practice Direction on Suppression Order and Non-publication Order Applications**

The Justices of the High Court issued Practice Direction No 1 of 2016 effective from 1 July 2016 relating to applications for suppression orders and non-publication orders made under Part XAA of the Judiciary Act 1903 (Cth). A copy of the Practice Direction is available at: www.hcourt.gov.au/assets/registry/practice-directions/Practice_Direction_No_1_of_2016.pdf

**High Court Amendment (2016 Measures No 1) Rules 2016**

The High Court Amendment (2016 Measures No 1) Rules 2016 were registered on the Federal Register of Legislative Instruments on 15 June 2016. They amend the following parts of the High Court Rules 2004, effective from 1 July 2016:

- Part 26 – Applications for Removal under s 40 of the Judiciary Act 1903 (Cth);
- Part 41 – Applications for Leave or Special Leave to Appeal;
- Rule 44.08 – Outline of Oral Submissions; and
- Schedule 1 – Forms.

The Amendment Rules incorporate the new special leave procedures in Part 41 agreed by the Court following a review of the procedures governing the filing and determination of applications for leave and special leave to appeal.

The amendments also bring Part 26 dealing with applications for removal of proceedings pending in other courts into line with the new procedures.

The amendments are aimed at streamlining some of the Court’s processes in order to reduce the time between filing and determination of applications and to reduce the cost to the parties.

The Amendment Rules also provide a new Form 27F for the outline of oral submissions required in Full Court hearings.

**Part 26 – Applications for removal pursuant to section 40 of the Judiciary Act 1903**

The Application for Removal (Form 17) and the Summary of Argument of the Applicant (Form 18) have been consolidated into one Application for removal (Form 17) and has been limited to 12 pages.

The time specified in Rule 26.01(g) for service of an application has been reduced from 90 days to 7 days.

The applicant is required to file an affidavit in support of the application, setting out the details of the proceedings sought to be removed into the Court. The Amendment Rules will add to Rule 26.04 a requirement that a respondent file an affidavit setting out any factual issues in contention.

The respondent’s summary of argument (Form 19) has been renamed and numbered as Response to Application for Removal (Form 18) and has been limited to 10 pages.

Unrepresented applicants will no longer be required to prepare and file an application book. There will instead be added a new requirement for copies of documents to be
provided in applications filed by unrepresented applicants.

Represented applicants will need to prepare and file an application book unless the Registrar directs that an application book is not required. It is envisaged that Attorneys-General making an application pursuant to s 40(1) of the Judiciary Act will not be required to prepare multiple copies of an application book.

In place of the existing Rules 26.06.2 and 26.06.3 applying the provisions in Part 41 for the determination, discontinuance or deemed abandonment of an application, and the making of directions by the Registrar, the provisions have been set out in full in Rule 26.

**Part 41 – Applications for leave or special leave to appeal**

The Application (Form 23), Draft Notice of Appeal (Form 24), and Summary of Argument/Written Case (Form 18) for all applicants have been consolidated into one single Form 23 – Application for leave or special leave to appeal.

The Application for leave or special leave to appeal should identify the judgment sought to be appealed, the proposed grounds of appeal and the orders which will be sought if leave or special leave is granted, the leave or special leave questions said to arise and the argument in support of the grant of leave or special leave.

The Application for leave or special leave to appeal should be accompanied by the documents currently required by Rule 41.01.2 to be filed with the Application.

The time for filing the Application for leave or special leave to appeal will be 28 days from the date of judgment of the Court below.

The requirement in Rule 41.07.3 that a party wishing to appear and present oral argument in an application must state that wish in the summary of argument has been removed. In determining whether to list an application for oral argument the Court will consider, on merit, whether it will be assisted by oral argument.

The page limit for the Application for leave or special leave to appeal is 12 pages and will apply to the entire document, including the proposed grounds of appeal and the orders to be sought.

Form 19 – Respondent’s summary of argument has been renamed and renumbered as Form 23A – Response to application for leave or special leave to appeal and is limited to 10 pages.

The provision allowing parties to file additional material (Rule 41.09.7) has been removed, leaving to the direction of the Registrar the question of filing and reproducing material not otherwise required by the Rules.

A new rule has been added to require the applicant to provide an electronic copy of the application book in addition to paper copies.

**Part 44 – Written and oral submissions**

Rule 44.08.1 requires the parties and interveners to provide, at the commencement of argument in Full Court hearings, a brief outline of the propositions to be advanced on behalf of the party or intervener. A new Rule 44.08.2 has been inserted prescribing the form (Form 27F) of the outline of oral submissions. As with written submissions filed by the parties and interveners, the new Form 27F will include a certification that the document (or a redacted form of the document) is suitable for publication on the Internet.

Updated High Court forms are available at: www.hcourt.gov.au/registry/filing-documents/forms

- Form 4 – Consent;
- Form 17 – Application for Removal;
- Form 18 – Response to Application for Removal;
- Form 23 – Application for Leave or Special Leave to Appeal;
- Form 23A – Response to Application for Leave or Special Leave to Appeal; and
- Form 27F – Outline of Oral Argument.
Federal Court (Criminal Proceedings) (Interim) Rules 2016

On 6 July 2016 the Judges of the Federal Court promulgated interim rules under the authority of the Federal Court of Australia Act 1976 (Cth).

The Rules relate to/provide for, amongst other matters:

• general powers of the court;
• indictable primary proceedings;
• criminal appeal proceedings; and
• matters relating to bail.

The Rules commenced on 8 July 2016 and apply to indictable criminal proceedings and criminal appeal proceedings before the Federal Court on an interim basis pending the finalisation of comprehensive criminal proceedings rules. The Rule and Explanatory statement can be viewed at: www.legislation.gov.au/Details/F2016L01167

It is understood that it is the Court’s intention to issue a Practice Note in relation to the Criminal Proceedings Rules in due course and once more detailed Rules have been issued.

Federal Circuit Court Practice Direction No 1 of 2016

This Practice Direction applies to any proceedings in which there is a challenge to a decision of the Commonwealth Administrative Appeals Tribunal or any other tribunal established under a law of the Commonwealth (‘the Tribunal’): www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/rules-and-legislation/practice-directions/2016/012016.

If the parties propose that an order be made with their consent, the effect of which is to set aside or vary an order of the Tribunal (‘consent order’), they must file the proposed consent order and, with it, a notation concisely setting out the matters said to justify the making of the proposed order and giving references to any authorities or statutory provisions relied upon. The proposed order must be signed on behalf of all parties. As well as the original two copies must be filed.

If the proposed consent order relates only to costs, only the proposed consent order need be filed.

If the Court makes a consent order the parties must, within seven days of the order being made, serve a copy of the order and the supporting statement (if any) upon the Tribunal.

Note: The Practice Direction does not apply to migration proceedings in which there is a challenge to a decision of the Minister or a delegate of the Minister or a report and recommendation to the Minister. In respect of those proceedings, the current practice will continue to apply, that is, for the submission of a note to accompany the draft consent order explaining the legal reasoning for the consent order.

Retirements and appointments to the Federal Court and Federal Circuit Court

Appointment: Justice Burley

On 23 May 2016, the Full Court of the Federal Court held a ceremonial sitting to welcome Justice Burley to the bench. His Honour is well known as one of the
pre-eminent intellectual property silks at the Sydney Bar, and it is fitting that his appointment fills the vacancy occasioned by Justice Bennett’s resignation from the Court.

The transcript of the swearing in ceremony reveals someone who is an outstanding cross-examiner and a superb orator. Despite a range of difficult and complex cases his Honour is seen as a model professional courtesy, and someone who has no difficulty giving compliments to his opponents for arguments and submissions well made: www.fedcourt.gov.au/publications/judges-speeches/justice-burley/burley-j-20160523.

Retirement: Justice Mansfield

On 1 July 2016, the Full Court of the Federal Court held a ceremonial sitting to farewell the Hon Justice Mansfield, who has given almost 20 years of his life to the work of the court, having been sworn in on 4 September 1996. The transcript recounts Justice Mansfield’s great contribution and repays reading: www.fedcourt.gov.au/publications/judges-speeches/former-judges/justice-mansfield/mansfield-j-20160701.

Federal Circuit Court appointments

Judge Terence McGuire

Judge Terence McGuire is based permanently in Launceston, Tasmania. Judge McGuire took over from Judge Stuart Roberts when he retired on 19 June.

His Honour was born and raised in Devonport, later studying Arts and Law at the University of Tasmania before being admitted to the Bar. During his career as a barrister, Judge McGuire was a well-known and greatly respected member of the legal profession in northern Tasmania.

Judge Alister McNab

Judge McNab commenced in the Melbourne registry on 18 May 2016. His Honour fills the vacancy in the Melbourne registry left by the untimely passing of Judge Dominica Whelan.

His Honour graduated with a Bachelor of Laws from Monash University in 1985. He was admitted as a barrister and solicitor of the Supreme Court of Victoria in 1988 and signed the Bar Roll in 1990. He commenced his legal career as an articled clerk with Williams, Winter & Higgs in 1987 prior to practising as a solicitor with Purves Clark Richards 1988–90. He commenced practising as a barrister at the Victorian Bar in 1990. Judge McNab’s areas of practice are commercial law, discrimination law, employment and industrial law.

Judge Brana Obradovic

Judge Obradovic commenced in the Parramatta registry on 30 May 2016.

Her Honour graduated with a Bachelor of Science, Bachelor of Laws from the University of Technology Sydney in 1997 and Master of Laws (International Law) from the University of New South Wales in 2005. She was called to the Bar in 1998.

Judge Obradovic commenced practising as a barrister with Lachlan Macquarie Chambers in 1998. She was a casual lecturer at the University of Western Sydney 2000–08, and a senior associate with Harmers Workplace Lawyers 2003–05.

Her Honour’s areas of practice are bankruptcy, civil and human rights, discrimination, commercial law, equity law, family law, industrial and employment law, international law and workplace health and safety.

Noot Competition

The Section has again agreed to sponsor trophies in the 2016 Negotiating Outcomes on Time (Noot) Competition, as we have since its inception in 2014. The Administrative Appeals Tribunal (AAT) hosts this annual competition for Queensland law schools based on the format used in the AAT’s conciliation process model. To support co-operative rather than competitive negotiation the scoring system permits both teams in one
negotiation to receive strong scores and progression of teams is based on their cumulative scores across multiple negotiations. The AAT General and Other Divisions makes extensive use of ADR processes and resolves 80% of matters without the need for a hearing.

You can read more about the 2015 Noot competition here, or email Justin Toohey, Director ADR, at noot@aat.gov.au.

**Review of external dispute resolution and complaints schemes**

On 8 August 2016, Minister for Revenue and Financial Services, Kelly O’Dwyer MP announced an independent review of the role, powers, governance and accountability of the federal financial system external dispute resolution and complaints framework:

- the Financial Ombudsman Service (‘FOS”),
- the Superannuation Complaints Tribunal, and
- the Credit & Investments Ombudsman.

A report is expected by the end of March 2017.

**Terms of reference**

The terms of reference allow for the effectiveness of the existing framework to be comprehensively assessed, and for different models for resolving disputes to be considered. Stakeholders including industry, dispute resolution and complaints schemes, peak bodies, and regional and consumer representatives will be consulted as part of the review that builds on the Government’s response to the Financial System Inquiry.

The review will have regard to: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.

The review will make recommendations on:

- the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users, including linkages with internal dispute resolution;
- the extent of gaps and overlaps between each of the bodies (including consideration of legislative limits on the matters each body can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users;
- the role of the bodies in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better outcomes for users; and
- the relative merits, and any issues that would need to be considered (including implementation considerations), of different models in providing effective avenues for resolving disputes.

In making its recommendations, the review will, to the extent relevant, take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors.

The review will take into consideration and consult with ASIC on the concurrent review of the FOS’s small business jurisdiction.

The review may make observations, but not recommendations, on the establishment of a statutory compensation scheme of last resort.

**Process**

The review will be led by an independent expert panel, consisting of a Chair and two members, and be supported by a secretariat from Treasury.

A final report is to be provided to the Minister for Revenue and Financial Services by the end of March 2017.

The review invites submissions from the public and will consult with a range of stakeholders, including consumers and industry.

**ADVOCACY IN INTERNATIONAL ARBITRATIONS**

by David F Jackson AM QC FCIarb FACICA FAAL

This paper was presented to the NSW Bar Association’s ADR Masterclass organised by the Chair of the Section’s ADR Committee, Mary Walker, on 13 August 2016. It had previously been presented to the Chartered Institute of Arbitrators, Australia on 24 May 2016. We
gratefully acknowledge the permission of the Chartered Institute of Arbitrators (Australia) to reproduce this article which was published in The CIArb Australia News (August 2016).

Introduction

I commence by saying something about the ambit of this presentation, which is about advocacy. That term can be used broadly or narrowly, and that is so whether it is employed in relation to proceedings in courts or tribunals or employed in connection with arbitrations, domestic or international.

At the heart of advocacy in this sense is the endeavour to persuade. Persuade others, of course, not self-persuasion. Used broadly in the present context it would be an apt description of all the steps taken on behalf of the client in, or in relation to, proceedings. It would include matters such as preparation of witness statements, examination, cross-examination and re-examination of witnesses, opening statements or addresses and written and oral submissions.

But it would be impossible to deal with all these matters here. The aspects of advocacy with which I shall deal are the oral and written submissions as to outcomes which may be required to be made at various stages of the arbitration. And in doing so I shall mention one or two related matters. By “outcomes” I mean the result which the submissions seek to achieve. The submissions may be as to what may be described as interlocutory aspects, or as to final results.

Interlocutory aspects they might relate to would be called “interim measures” under the UNCITRAL Model Law in Schedule 2 to the International Arbitration Act 1974 (Cth), i.e. temporary measures to maintain or restore the status quo pending determination of the arbitration, prevent harm to the arbitral process itself, preserve assets or preserve potentially material evidence. Again they may relate to the procedure to be followed in the arbitration.

Some procedural similarities – some procedural differences

There are obvious procedural similarities between arbitrations – domestic or international – and court proceedings, but there can be differences too and in the case of international arbitrations the differences may reflect a number of matters.

One is that the arbitrators may not be from the same legal milieu. There may well be a spread of nationalities in the composition of the tribunal, and their backgrounds may be European or Indian or Asian, Central or South American or something else. Even if all the arbitrators are from countries which have a common law background, it does not mean they will all have the same, or necessarily a very similar, approach to the ultimate resolution of the matter, and also to questions of procedure.

The different approaches may manifest themselves in a number of ways. At the simplest level it may be reflected by silence by an arbitrator throughout oral argument. This rather Trappist approach is not uncommon for those with a European background. On the other hand it may be manifested by considerable involvement, a more interventionist, dare I say garrulous, approach. It may also manifest itself in the tribunal discouraging oral, and preferring written, submissions.

Another difference in procedure from court proceedings is that the arbitration, of course, will be conducted according to the arbitration rules applicable to it. Those rules may be determined by the agreement to arbitrate, or by the domestic procedural law applicable to it, or in some other way. Those rules may provide for, or allow, a procedure with which lawyers from an Australian background are not entirely familiar. For example they may allow the arbitral tribunal, if it thinks it appropriate to do so, to adopt an inquisitorial approach. They may also affect the identity of the party upon whom lies the burden of proof of an issue or the extent to which a party may have recourse to the other side’s material (for example by disclosure or discovery of documents) in order to satisfy a burden of proof.

The differences in legal background may be reflected in matters which are more substantive.

For example, a member of the tribunal from another national background may have a more flexible view than Australian lawyers about the extent to which the provisions of a contract cease to be applicable if the passage of time has made them operate rather more harshly upon a party to the contract than was perceived at its inception.
The points I would seek to make from all that are first, it is necessary to think about the procedures that are likely to be applied, and how they may be used to your client’s best advantage, and to its least disadvantage. Secondly it is worthwhile to do at least some research into the background of the arbitrators. Your side is likely to have appointed one, but the other two may otherwise be a mystery.

The shape of submissions

There is, of course, no “one size fits all” for submissions. So much depends on the issues and circumstances with which they are to deal, and the stage of proceedings at which they are being made. The comments I shall now make are thus necessarily expressed at a level of generality, but they should be capable of application to the many issues and circumstances which arise.

The starting point to my mind is that it is always important to identify what you are seeking to achieve by the submissions. In that regard the first question should be what is the ruling or order or award which the arbitral tribunal is being asked to make. You may be seeking that ruling or order or award, or you may be the party resisting its making.

Often the answer to that will be simple enough. Take a common case: the claimant seeks an award of damages for breach of contract; the respondent denies breach and puts in issue the quantum of damages if breach is established.

Sometimes, however, the answer will be more complex, for example if the relief sought is of a different kind – declarations of right, injunctions, orders for transfer of property. It is then necessary to check that the agreement and rules governing the arbitration allow the tribunal to grant an order of the nature sought. Even in the simple breach of contract and damages case to which I referred a moment ago, however, questions may arise, e.g. does the agreement to arbitrate, or do the rules pursuant to which the arbitration is taking place, place any restrictions on the types of damage or quantum of damages which may be awarded? Having identified the orders sought and the power to make them, the next step is to identify the series of matters that need to be established for such an order to be made and, to identify the logical sequence of them. Bear in mind also that if you are acting for the respondent there may be additional issues that you seek to raise to resist the making of such an order. You then need to identify also the steps which need to be taken to make out that defence.

It will be appreciated that these questions arise, or can arise, more than once in the course of arbitration.

The first occasion should have been at an early point when the matter is being “got up”, that is being prepared before the hearing. It is then that you do have to work out what are the issues of fact, and of law, that you need to succeed on, or establish, in support of your case. Or, if you are the respondent, to defeat the claimant’s case. Also, do not forget to identify the party on whom lies the burden of proof in relation to particular issues. This may depend on the law underlying the conduct of the arbitration.

A second occasion when these matters need to be considered is when the case is being “opened” to the arbitral tribunals. This may take place orally or in writing (or both). An opening can be of significant importance, whether for claimant or respondent.

• For the claimant it allows the claimant’s case to be put in relatively simple form, combining logically the issues of jurisdiction, law and fact necessary to establish the claim.

• For the respondent it is highly desirable that the respondent’s opening “grasp the nettle” of defending the respondent’s position. As a practical matter this means, I think, that the respondent’s opening submissions should state the issues of fact and law which are contested, noting that the respondent may also wish to contest whether the claimant’s statement of the issues has been correct.

In short I think it important that there be before the tribunal at an early point what will be the true issues in the case. It makes the actual conduct of the proceedings more focussed. It also has the advantage that at that stage the parties know what the true issues are and, importantly, have some better understanding of their prospects of ultimate success. This can lead to settlements which might otherwise not have occurred.

The third, and usually the most important, situation in which submissions are necessary is as the final submissions. Again these may be oral or in writing, or both. The manner in
which they are dealt with will vary depending on the occasion.

I shall come to final submissions in a little more detail in a moment, but I add something which I always say in speaking about advocacy, namely that written submissions are at least as important as oral submissions. Even after 30–0 years in Australia where a requirement for written submissions has been the norm in courts, some people disregard their significance, thinking that it can all be fixed up in the oral submissions. That should not occur. To prepare written submissions properly not only concentrates the mind of the writer. It also provides the opportunity to bring home to the arbitrators in an attractive and persuasive way the essential elements of the party’s contentions on the issue the subject of the submissions.

And sometimes – as may well be the case in an international arbitration – the written submissions will be the only submissions.

**Final submissions**

From a claimant’s point of view, the final submissions, in my view, should, broadly speaking, follow the following lines.

It is worthwhile first to set out in short form the essential nature of the proceedings, and the events which confer jurisdiction on the arbitrators. Try to do this in a way which the arbitrators could adopt as part of their reasons for their award. (Don’t expect attribution, or claim plagiarism.)

Then should follow a list of the issues which arise in establishing the claimant’s case. Indicate the issues which are not in dispute, and those which are. Indicate too the issues raised by the respondent in defence of the claims and again the position in relation to them.

Sometimes it will have been agreed that the arbitration will turn on the resolution of identified issues, and submissions should be tailored to reflect that situation. A matter to be borne in mind in circumstances such as these is to ensure that the identity of the party bearing the burden of proof on each such issue is agreed or, if not agreed, clearly left as a question for argument.

In short the object of the early parts of the submission should be to make clear to the Tribunal what it has to decide. In the more complicated cases the issues will involve sub-issues. It will be a matter of judgment whether to list those sub-issues at that point, or whether simply to say that “some of these issues may involve sub-issues, which we discuss below”.

What then follows? Needless to say the several issues in the proceedings have to be dealt with. And, I think, dealt with in the order you have mentioned, and dealt with one by one. In doing so it is better most often to keep submissions on substantive liability separate from submissions on the relief which is appropriate. No doubt it is possible to mention, when dealing with substantive liability, that a finding one way or the other will be the basis for, or affect the type or quantum of relief but it is usually a mistake to run the two together. As a general proposition, separate issues are better dealt with separately.

Turning to submissions on substantive liability, the issues which arise may be questions of fact, questions of construction of a contract, or other questions of law.

Again generally speaking, my view is that it is best to deal with the issues, of whatever nature, in the order in which they arise logically. But it is not always easy to decide what is the logical order. And sometimes circumstances suggest that other features may cause logic to take second place.

A reason why it is not always easy to decide the logical order is because the relationship between issues of fact and issues of law tends to be symbiotic. An issue of fact won’t arise unless a decision on it is relevant to the application of a legal principle, but the question of the possible application of the legal principle won’t arise unless there are facts to which it can apply.

The practical problems brought about by that dilemma can sometimes be ameliorated. The case may be one where the party has a very strong case on the facts and it seems possible to persuade the tribunal that it will be unnecessary for it to go to the law, because on no view of the law, if disputed, could the facts satisfy the legal requirements. In such a case it won’t seem odd that you go to the strength of your case
at an early point. The opening parts of the submission should have indicated how the issues relate to each other. But be careful: the arbitrators, or one or more of them, may not hold your view as to the strength of your case. If matters are equally balanced my inclination would be to deal first with the question of law.

I turn next to the some observations about the content of submissions on issues of fact and of law.

First, fact. It is likely that many of the basic facts will have been admitted or are agreed. It is necessary to identify what further findings of fact are required to make out the party’s case. It is then necessary to provide reasons why the fact should be found as suggested by the party.

Bear in mind that “findings” in this sense can refer not only to ultimate findings of fact, but also to findings on intermediate facts, i.e. on facts from which the ultimate inference may be drawn.

Submissions on fact are most desirably based on contemporaneous records and events, and inherent likelihood.

In making submissions on factual issues it is often desirable to set out a narrative based on the documents, and then to indicate the issues that remain to be decided pursuant to the evidence of the witnesses. Don’t forget that if there is evidence, whether documentary or from witnesses, which is against the findings of fact which you seek to have made, you can’t just treat that evidence as if it doesn’t exist; your opponent will ensure that the tribunal is aware that it does exist.

Submissions on factual issues may involve, of course, contentions as to the credibility of the witnesses.

There are many features which may affect the credibility of witnesses – their demeanour if evidence has been given orally, consistency of their evidence with contemporaneous events or documents, the inherent believability of what they say, whether they have any interest in the outcome and so on. These are matters which you need to consider in making submissions on whether a witness’s evidence should be accepted, rejected or treated with caution unless corroborated by other evidence.

Secondly, law. The questions of law most likely to arise in arbitrations are questions of construction of contracts, questions of the application of statutory or treaty provisions and questions of the underlying general law. By “underlying general law” I mean in relation to the common law countries the common law and equitable doctrines and in the case of other countries legislation of general application.

In dealing with questions of construction of the terms of a contract, don’t forget that the meaning to be attributed to the words of a contract may depend on the legal approach to be taken in determining contractual meaning. The principles as to the interpretation of contracts that we are accustomed to apply in this country may not be those which the tribunal, or some of its members, are accustomed to apply.

The country whose law is applicable to the arbitrations may also have its own rules for interpretation. Thus some countries may treat the literal terms of the contract as more important. Others would regard the terms as generally binding but not in circumstances which could not reasonably have been foreseen. Again the extent to which pre-contract negotiations on the one hand, or post-contractual behaviour on the other, may be taken into account in interpretation of the contract can vary from jurisdiction to jurisdiction. (And even in Australia, from time to time.)

Submissions in favour of, or against, particular interpretations of contracts need to be based on matters such as the role played by the provision in the structure of the contract, the consistency with other provisions of the contract of the interpretation contended for, the consequences of adoption of that interpretation, the “flow on” effect if that contention is correct, and similar matters. The object is to persuade the tribunal that the interpretation contended for by your side is the “better”, the more workable, the more likely, interpretation of the relevant provision.

Rather similar observations apply in relation to submissions on questions of statutory interpretation. Again the meaning and operation to be attributed to a statutory provision will depend on the legal approach to be taken in statutory interpretation. Jurisdictions in places like Australia will have Interpretation Acts, the provisions of which have to be taken into account. Sometimes if the arbitration is taking place in circumstances where
a treaty is being interpreted, the treaty may “pick up” provisions of the international agreements as to the interpretation of treaties.

As one might expect, the critical matters to be dealt with in submissions on the interpretation of statutory provisions will be the role played by the provision in the statute, the consistency of the interpretation contended for with other provisions of the statutes and the consequences of adoption of one, or another, interpretation.

It should also be borne in mind that there may be a difference between the substantive law and the procedural law applicable to the arbitration. The substantive law may be that of Nation A – but the procedural law that of Nation B. For example the arbitration may be being conducted in London or Singapore with United Kingdom or Singapore laws respectively applying to its conduct, but the substantive law may be that of Japan.

Some concluding suggestions

I mentioned earlier that the aim of submissions is to persuade the tribunal to whom they are directed to find in your client’s favour on the matter the subject of the submissions. I also said that there is no “one size fits all” form of submissions. Let me, however, conclude with a few general observations.

Put your case simply and clearly. The object of advocacy, as I have said, is to persuade. This is best done putting arguments in a manner which is clear, and logical, and expressed in simple terms. Unnecessary repetition should be avoided. So far as possible the argument should be put in a way that seems to suggest the “right” answer.

Don’t overdo it. Far too often advocates succumb to the temptation to be overly emphatic. Their submissions are littered with phrases such as that the opponent’s contentions are “absurd”, “ridiculous” and so on.

Of course submissions can be forceful and direct, and sometimes should be expressed vigorously, but it should not be overdone. In the first place the tribunal may disagree. Secondly overuse gives rise to a suspicion that the advocate is substituting words for logic. An arbitrator is always more likely to adopt a well-reasoned argument which does not descend (or perhaps ascend) to unnecessary superlatives. And in any event why raise the barrier for yourself?

Deal with the opposing case. The opponent’s case cannot be ignored, it can’t be treated as if it is no more than a slightly unpleasant smell in the room. It has to be dealt with.

In relation to final submissions the time on which this will best occur depends on the nature of the case and on the directions given for submissions.

Thus in some cases, if there is provision for submissions in reply, it may be appropriate for the claimant to wait until the reply to respond to various issues raised by the respondent. After all the respondent’s submissions may not actually raise every contention mooted during the hearing.

If, however, the respondent’s case challenges elements essential to the claimant’s case (e.g. a finding of fact which is sought) it is better to deal with the issue earlier.

It may also be the case that directions have been given that the submissions of the parties are to be delivered at the same time. In that case it is necessary to deal in those submissions with the opponent’s case, as well as one’s own.

The following case notes have been provided by Stephen Tully, Barrister, Sixth Floor, St James’ Hall Chambers


public interest immunity - documents about police operational tactics related to
“matters of state” under s 130(4)(f), Evidence Act 2008 (Vic) - disclosure would prejudice the proper functioning of Victoria Police Mounted Branch

Background

Mark Ryan (the appellant) commenced proceedings against the State of Victoria (the respondent) and a police officer for assault and battery. The appellant alleged he sustained injuries during a demonstration by reason of the officer’s control over her horse, Troophorse Upwey, which included rolling onto the appellant using a rehearsed manoeuvre. The officer claimed that Troophorse Upwey stumbled, fell partly on her side and regained her footing.

During pre-trial discovery the appellant sought the production of documents, including the Mounted Branch’s Defence Tactics manual, its Crowd Control of Movements manual and powerpoint slides on various operational tactics and police strategies. The respondent asserted public interest immunity under s 130 of the Evidence Act 2008 (Vic) which excluded information about ‘matters of state’ where the public interest in preserving confidentiality outweighed the public interest in admitting that information into evidence. There is a non-exhaustive list of considerations which courts must take into account when undertaking this balancing exercise: s 130(5). Information or a document relates to ‘matters of state’ if adducing it as evidence would prejudice the proper functioning of the Commonwealth or a State government: s 130(4)(f).

The trial judge concluded that the documents were exempt from production and inspection, and were inadmissible because they were irrelevant or of nominal importance to the allegations raised in the statement of claim. The judge also concluded that the documents in dispute were protected by public interest immunity. Tate JA (Santamaria and Ferguson JJA concurring) agreed (at [147], [122]).

Appeal judgment

Tate JA extended the reasoning in R v Young (1999) 46 NSWLR 681 to conclude that there was a public interest in protecting information or documents which reflected the workings or operations of those responsible for maintaining peace and social order and administering justice: the police. Section 130(4)(f) was addressed not only to the character of the information involved but to the effect disclosure would have on the proper functioning of government. The nature of the agency holding that information can be relevant because it might be easier to anticipate the type of prejudice that may flow from disclosure (at [121]). Thus immunity was not confined to high-level government deliberations or sensitive areas of executive responsibility (at [105], [114], [115], [117]).

Information concerning police crowd control methods was a ‘matter of state’ because these tactics could be undermined and subverted, including by those intent on committing offences, if released into the public domain (at [118]). There was a public interest in safeguarding the proper functioning of the police in their control of public gatherings (including lawful protests) without which there were real risks to public safety and protecting participants. Whether disclosure was warranted depended upon the balancing exercise undertaken in light of the s 130(5) factors and the circumstances of the individual case.

After inspecting the requested documents, Tate JA also concluded that they were irrelevant to the proceedings or of minimal importance (at [134], [139]). The appellant alleged that the police officer intentionally carried out a harmful manoeuvre (causing Troophorse Upwey to roll onto a person who was lying on the ground) which had been rehearsed. But that conduct was a matter of evidence as to what actually occurred during the demonstration, and could not be revealed by the documents (at [133]). That these documents were discovered documents was not determinative (at [141]).

Finally, Tate JA concluded that the likely effect of access and the difficulties arising from restrictive publication orders had been correctly evaluated at first instance (at [173]). An implied undertaking given by counsel to control access to information (in accordance with Harman v Secretary of State for the Home Office [1983] 1 AC 280) did not avoid the risks to public safety in the event of disclosure because such an undertaking may not provide an adequate means of enforcing confidentiality (at [167], [169]).

Implications

This judgment is noteworthy for considering the scope of the statutory immunity under
s 130(4)(f) of the Evidence Act 2008 (Vic) which the Court of Appeal of the Supreme Court of Victoria concluded substantially reflected common law principles (at [100]). Tate JA thoroughly reviews the jurisprudence on public interest immunity claims over police tactics, strategies and procedures (including protecting informer identities and internal guidelines). The exemption from disclosure for ‘matters of state’ was not limited to high-level government deliberations but was found in this case to include police crowd control methods.

**Hancock v Rinehart (Privilege) [2016] NSWSC 12**  
(2 February 2016)

*legal professional privilege – claim to be made prior to production of documents to court – claimant tendered no admissible evidence of purpose for which documents created – impermissible for court to exercise discretion to inspect documents*

**Background**

Bianca Hancock (the plaintiff) sought access to certain trust documents from Mrs Gina Rinehart (the defendant). The defendant’s law firm produced to the court, without objection, documents in answer to the plaintiff’s subpoena. The defendant asserted legal professional privilege on the basis that the documents were confidential communications or made for the purpose of obtaining legal advice or conducting litigation in her personal (but not her trustee) capacity. However, she tendered no admissible evidence about the facts on which her claim for privilege was founded.

**Relevant law**

A claimant must expose the facts through admissible evidence on the basis of which a court can make an informed decision as to whether a privilege claim was supportable (at [7]). A mere sworn assertion of law did not suffice.

The common law position on when a privilege objection was to be taken (that is, before production to a court) was reflected in r 1.9, Uniform Civil Procedure Rules 2005 (NSW) (at [24]). The case law established that privilege claims are scrutinised either by cross-examination or inspection by a court (at [26]). The court’s power to inspect documents was a response to the potential injustice in treating a claimant’s oath as conclusive (at [34]). But a person claiming privilege could not sustain it by adducing no testimonial evidence but instead by simply asking a court to conduct an inspection.

**Judgment**

The claim for privilege failed and, because the documents had already been produced to the court, the plaintiff was granted access to them.

Brereton J concluded (at [35]) that legal professional privilege is a privilege from production. Such a claim should be made before the documents are produced to a court. To voluntarily produce documents to a court for the purposes of inspection was inconsistent with maintaining the claim (see also at [23]).

Furthermore, a privilege claim must be made on sworn direct evidence which proved the facts on which the claim was founded. This was unaffected by a court’s discretionary power to require production in order to enable inspection so as to adjudicate the claim. This power existed to enable a claim for privilege to be scrutinised and not to enable it to be proved. No party, especially the party claiming privilege, could insist that a court inspect documents. Here, there was no evidence from the defendant as to the circumstances in and purpose for which communications were created (at [17]). Because it would be contrary to justice to uphold a privilege claim solely on the basis of an inspection, the court would not do so for the purpose of ruling on the claim (at [36]).

**Implications**

This case considered the unsatisfactory practice of presenting a court with a bundle of documents and asking it to rule on a privilege claim. The primary judge exercised a discretion not to inspect the documents: see Hancock v Rinehart [2016] NSWSC 116 at [5]; r 1.8, Uniform Civil Procedure Rules 2005 (NSW). An identical approach was recently taken by Mildren AJ in Lawrie v Carey DCM & Anor [2016] NTSC 23 in relation to documents produced under a search warrant.
Leave to appeal Hancock v Rinehart (Privilege) [2016] NSWSC 12 was dismissed in Rinehart v Rinehart [2016] NSWCA 58 because there was no prospect of any different result (at [24]–[25]). This was a “highly unusual case” where the critical question was whether any privilege was maintainable by the defendant in her personal capacity and not as a former trustee (at [40]).

A well-resourced litigant had advanced no evidentiary basis to support a privilege claim in circumstances where it may readily be inferred that evidence was available (at [27], [42]). Instead, she wholly relied on the documents themselves to support her entitlement to withhold production (at [41]). Whether a court itself inspected documents in order to resolve a contested claim of privilege depended on whether all parties consented to that course, the nature of the documents and the magnitude of the dispute (at [31]).

Commonwealth of Australia v Shenzhen Energy Transport Co Ltd (No 3) [2016] FCA 87 (10 February 2016)

joint legal professional privilege

Background

The Commonwealth of Australia (the applicant) sought production of 26 documents from the owner of a vessel which had grounded, Shenzhen Energy Transport Co Ltd (the respondent). The respondent asserted legal professional privilege. Attention focused on two documents prepared by Polaris Applied Sciences (Polaris) which had been retained to provide a report on the incident. The respondent’s lawyers and the lawyers for the salvors of the vessel had jointly retained Polaris for the purpose of gathering information that might be relevant to providing legal advice about any action brought by the applicant for damage caused to the Douglas Shoal by the grounding as well as any salvage claim. The applicant submitted that there was insufficient material to find that the documents were privileged because evidence about information and belief from the respondent said nothing about the salvors’ purpose in retaining Polaris. In other words, the required dominant purpose had not been proved to support a privilege claim.

Judgment

Greenwood J dismissed the application, finding that the documents were immune from production by reason of legal professional privilege (at [29]). The respondent and the salvors by their lawyers had jointly agreed to retain Polaris to gather information which was directed to providing legal advice to the respondent concerning any action that might be brought by the applicant for damage caused to the shoal, and any claim that might be made by the salvors. The two documents were brought into existence for these two purposes, both of which enabled the provision of legal advice to be given (at [25]). A fair inference arose that Polaris’ report would be made available to the joint appointors (at [19]). A joint privilege subsisted because the dominant purpose for bringing the report of a third party into existence was for submission to two law firms for the provision of legal advice (at [27]).

Implications

This judgment is noteworthy for concluding that joint legal professional privilege subsisted in the particular circumstances of this case. The court adopted an unexceptional approach when assessing whether a claim to immunity from production should be upheld by reason of legal professional privilege.

Perazzoli v BankSA (No 2) [2016] FCA 260 (16 March 2016)

Litigation and legal advice privilege – confidential communications between lawyers and proposed class action group members – preliminary consideration given to secure funding by litigation funder – communication prior to instituting proceedings

Background

Perazzoli (an applicant) alleged that it and group members lost funds through a “Ponzi”
scheme: Perazzoli v BankSA [2015] FCA 373. BankSA (a respondent) sought the production of certain documents from a trustee in bankruptcy, lawyers who formally acted for the applicant, and a litigation funder of the principal proceeding.

Relevant law

Common law principles governed the privilege claims made by the applicants and the trustee, rather than ss 118 and 119 of the Evidence Act 1995 (Cth) because the issue was the inspection of documents produced in answer to subpoenas and not the admissibility of evidence (at [21]).

Relevantly to this case, there must be actual or reasonably ‘apprehended’ or ‘anticipated’ litigation for a communication to be protected by litigation privilege, which means a ‘real prospect’ of that litigation as distinct from a mere possibility: Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority (2002) VSCA 59, [19].

Whether a solicitor-client relationship exists between two parties is determined by reference to the parties’ intentions, objectively ascertained. Although there need not be a written or express retainer agreement, there must be a relationship of ‘trust and confidence’ for a solicitor and client relationship to be implied or inferred: Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2) [2009] FCA 449, [19]. Even if no solicitor-client relationship exists, a communication can still be protected by privilege in certain circumstances (at [20]–[21]).

Judgment

The privilege claims were only partly successful.

Judged objectively, it was not the intention of the investors to have a solicitor-client relationship (at [82]). No communications between certain parties over a particular period occurred in circumstances where the lawyers were acting as a solicitor on behalf of, or on instructions from, the applicants or other group members to pursue proceedings (at [73]). There was no coherent record of the terms of any engagement, the submission of accounts or payment of professional fees. It was likely that a number of persons who attended spasmodic meetings or spasmodically communicated were hopeful of participating in a claim, but left it to others to assemble data, secure funding and the like with a view to putting a more specific proposal to the applicants and the group members about providing instructions to investigate, and if appropriate institute and conduct, proceedings such as the present claim (at [78], [80]–[81]).

Furthermore, the evidence did not demonstrate a real prospect of litigation. Only the possibility of a claim such as the present was contemplated, and if it became a realistic possibility then the prospect of funding such a claim by a litigation funder would then be explored (at [87], [89]).

Mansfield J found that some documents created to record certain communications did not attract litigation privilege because, on the evidence, they were not created for the dominant purpose of existing or anticipated litigation (at [86]). Nor did they come into existence as part of a process which amounted to an abuse of process or were used improperly for the purposes of the current proceeding (at [124]). However, privilege existed over other documents because they were brought into existence for the dominant purpose of giving or receiving legal advice or for use in actual or reasonably anticipated legal proceedings.

Finally, a trustee in bankruptcy can be entitled, in the course of their administration, to explore the availability of a proceeding conducted by investors (at [180]). In this case there was no submission that the trustee had any capacity to do so against BankSA, and so did not attract litigation privilege (at [181]). However, the trustee’s claim to privilege could be sustained by reference to advice privilege to the extent that it applied (at [183]).

Implications

This case is of interest for, among other conclusions, the finding that certain communications were not protected by litigation privilege because they merely related to investigating the prospects of a class action. It has also been held that there is no legal professional privilege in communications between a solicitor and a potential litigation funder, except where a communication is made pursuant to a retainer or in a lawyer-client relationship: Trade Practices Commission v Sterling (1979) 36 FLR 244,
246. The fact that parties, one of which is a litigation funder, may agree to treat their communications as confidential does not endow them with an entitlement to assert legal professional privilege.


*common law public interest immunity – applied to oral evidence sought to be adduced before the Administrative Appeals Tribunal*

**Background**

The Minster for Immigration and Border Protection (the second respondent) decided to refuse to grant Qi Guo (the first respondent) a visa by reason of lack of good character. The first respondent sought merits review before the Administrative Appeals Tribunal (the tribunal). Oral evidence was sought to be adduced from a witness over which the Commissioner of Police of New South Wales (the applicant) claimed public interest immunity. The tribunal determined that common law public interest immunity was unavailable. It observed that the Commonwealth had enacted the *Evidence Act 1995* (Cth) to govern the reception or exclusion of evidence of matters of state in Commonwealth judicial proceedings, and that this might be reason to conclude that the correct characterisation of such rules in any federal proceeding was as rules of evidence. The applicant appealed.

**Relevant law**

The tribunal’s procedure is a matter of its discretion, to be conducted with as little formality and technicality, and with as much expedition, as possible, and it is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate: s 33, *Administrative Appeals Tribunal Act 1975* (Cth) (the Act). A hearing of a proceeding shall be in public (s 35) but the tribunal may direct that it shall occur in private (s 35). The operation of any rules of law that relate to the public interest and otherwise applicable in relation to information disclosure are excluded (s 36D(6)).

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, then a court may direct that the information or document not be adduced as evidence: s 130 of the *Evidence Act 1995* (Cth).

**Judgment**

The Federal Court remitted the matter for reconsideration by the tribunal. Common law public interest immunity was not displaced by the provisions of the Act relating to oral evidence (Robertson and Griffiths JJ at [66] and Collier J at [1]).

Robertson and Griffiths JJ held (at [72]) that a claim to public interest immunity over oral evidence was to be analysed by reference to the principle that this immunity was a basic common law doctrine and not merely a rule of evidence. Public interest immunity moreover applied to bodies other than courts, including the tribunal. Consistent with the principle of legality, words of irresistible clarity were required to exclude the doctrine, and the provisions in the Act did not rise to that level. Section 36C of the Act did not exclude a claim to public interest immunity. Furthermore, there was no other indication that s 36C was intended to preclude anyone other than the State Attorney-General from claiming it such as the Commissioner of Police.

Collier J considered (at [8], [15], [18]) that the provisions of the *Evidence Act 1995* (Cth) were not relevant as a guide to the proper approach by the tribunal on whether the common law doctrine of public interest immunity continued to apply in the tribunal. Although the principle of public interest immunity addressed the admissibility of evidence, that it was a doctrine of substantive law rather than a “rule of evidence” was supported by extensive authority (at [9]).

**Implications**

This judgment clarifies that (i) the *Administrative Appeals Tribunal Act 1975* (Cth) does not prevent claims of public interest immunity under the common law from being made before the Administrative Appeals Tribunal, and (ii) such claims may be made by State Attorneys-General, the tribunal and others state institutions, including the Commissioner of Police.
Martin Patrick Dowling v Ultraceuticals Pty Ltd [2016] NSWSC 386 (8 April 2016)

"without prejudice privilege" – nature of connection required between two disputes for privilege to apply

Background

Martin Patrick Dowling (the plaintiff) was suing Ultraceuticals Pty Ltd (the defendant) for damages for alleged breach of an employment agreement. Three documents were produced by a non-party to proceedings in answer to a subpoena issued by the defendants. The plaintiff contended that they were subject to “without prejudice” privilege.

Relevant law

The availability of the “without prejudice” privilege was determined under the common law rather than its statutory embodiment in s 131(1), Evidence Act 1995 (NSW).

The policy underlying this privilege is to enable parties to freely communicate with each other in an attempt to compromise litigation: Field v Commissioner for Railways for New South Wales (1957) 99 CLR 285 (Field), 291–292 per Dixon CJ, Webb, Kitto and Taylor JJ. The liability arising from a communication subsequently being put into evidence discourages settlement if a party believes that admissions might be held against it.

Following a jurisprudential review, Hammerschlag J concluded that the privilege covered disclosure to third parties in a subsequent dispute provided there was a sufficient connection between the subject matter of the original dispute and the later one (at [28]). The question was whether the underlying policy (which protected the documents from disclosure in the first dispute) would be served by extending the privilege to the second dispute (at [35]). A court must assess whether the party resisting disclosure had a legitimate expectation that material brought into existence to settle an earlier dispute would not be used against it in the later dispute (at [37]). There was no bright line: each case turned on its own circumstances and the particular subject matter of the two disputes (at [39]).

Judgment

Hammerschlag J decided that the documents were not privileged from disclosure. The two disputes under consideration were different and the relevant actors held no legitimate expectation of protection from disclosure (at [45]). Indeed, extending protection would encourage dishonesty in settlement discussions. The privilege was concerned with what was said during negotiations as evidence by way of admission, and not with objective facts that may be ascertained during negotiations and proved by direct evidence (at [46], citing Field at 291). Furthermore, any “without prejudice” privilege had been waived (at [52]).

Implications

The “without prejudice” privilege enables documents produced in the course of negotiating one dispute to be privileged from production in a later one. Protection from disclosure is given to parties to induce a lack of inhibition in making potentially damaging statements with a view to facilitating dispute resolution (at [38]). This judgment contains a useful reconciliation of the authorities where the legal test had been articulated in different and not necessarily consistent ways (at [34]). The approach taken by the Supreme Court of New South Wales in this case mirrors that of South Australia: see Yokogawa Australia Pty Ltd v Alstom Power Ltd [2009] SASC 377.

Holloway v Commonwealth of Australia [2016] VSC 317 (8 June 2016)

public interest immunity - legitimate forensic purpose demonstrated by plaintiff – basis for secrecy or confidentiality not demonstrated
Background

Greg Holloway (the plaintiff) sought to inspect in unredacted form certain documents identified in two affidavits of discovery sworn on behalf of the Commonwealth of Australia (the defendant) that legal professional privilege or public interest immunity prevented their disclosure. These documents pertained to matters of state because they concerned passenger clearance information and policy, compliance and training documents which affected the operational activities of Australian Border Protection (ABF) officers.

The plaintiff claimed that customs officers had detained him more than 30 times at international arrival areas in Australian airports for questioning and luggage testing. He contended that these detentions were unlawful because ABF officers exceeded their statutory powers. The Commonwealth submitted, with reference to s 130(4)(a), (c), (d) and (f) of the Evidence Act 2008 (Vic), that the documents were confidential because they related to national security, efforts to prevent or investigate offences or legal contraventions and the proper functioning of government.

Relevant law

A court will not under the common law compel or permit the disclosure in evidence of information where to do so would be injurious to the public interest. The test for public interest immunity was stated by Gibbs CJ in Alister v The Queen (1983) 154 CLR 404 at 412.

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in that information or document, then a court may direct that the information or document not be adduced as evidence: s 130(1) Evidence Act 2008 (Vic). There is a non-exhaustive list of circumstances in which the information or document is deemed to relate to ‘matters of state’: s 130(4). There is also a non-exhaustive list of factors to be considered when undertaking the balancing exercise required by s 130(1): s 130(5).

Dixon J considered that the proper starting point was to determine whether the documents were relevant and admissible in the proceeding (at [34]). This required analysis of the issues raised on the pleadings and was a matter on which the plaintiff bore the onus. The considerations in s 130(5) were apposite. The next step involved an enquiry into the public interest in preserving secrecy or confidentiality in relation to the information or document (at [35]). This was a matter on which the defendant carried the onus. Here, the considerations in s 130(4) were apposite. Where both preliminary thresholds of public interest were met, the final step was undertaking the balancing exercise to determine whether the information or document could not be adduced as evidence (at [36]).

Judgment

His Honour inspected each of the documents. For some of the categories over which immunity was claimed, His Honour found that the material did not meet the threshold of requiring immunity from inspection so as to protect a genuine public interest (at [42]).

The plaintiff had a legitimate forensic interest in seeking disclosure of certain documents (at [54]). It was in the public interest in the administration of justice that such documents in unredacted form be freely available to him for use in the litigation. Immunity from disclosure of any document or redaction thereof by reason of exposing the identity of ABF officers was not warranted and in any event was outweighed by the public interest in the proper administration of justice (at [79]).

Each of the discovered incoming passenger cards could also be produced in unredacted form to the plaintiff for inspection notwithstanding a powerful public interest in the maintenance by the Commonwealth of a secure system of checking persons and goods entering Australia (at [92]–[93]).

The ‘Passenger Clearance Course – Learner Guide’ was a mixture of broad, general material one would expect to find in training manuals and specific details regarding the mechanics of the system used by ABF officers (at [98]). However, it did not provide the public with insight into the incoming passenger assessment system so as to prejudice the effectiveness of policing. Much of the material was an introduction to the legislation
and powers of enforcement. Inspection by the plaintiff and its use in evidence would not reduce the effectiveness of risk profile assessments being undertaken.

The discovered CCTV footage could be produced to the plaintiff for inspection (at [124]).

The redacted content of the Commonwealth’s affidavits raised concerns, including that some redacted material was already in the public domain, claims of immunity over particular terms and concepts had not occurred consistently across and within affidavits, and some information could be logically derived from the open content of affidavits and basic reasoning (at [130]). However, cross-examination of the deponents would not assist (at [140]).

**Implications**

Public interest immunity should not be lightly asserted. Claims must be articulated with rigour and precision, and be supported by evidence so as to constitute a compelling case for maintaining secrecy. The Supreme Court was unwilling to accept a blanket approach for applying the security concerns raised by the Commonwealth to all of the material over which immunity had been asserted (at [71]). Phrases such as ‘high risk’ and ‘extremely sensitive’ did little to assist a court to determine where the balance lay. Vague and general statements about insight into the way that ABF officers performed their duties were insufficient to ground a public interest immunity claim (at [73]).

The prospect of prejudice to effective policing of Australia’s borders had been overstated in this case (at [118]). The plaintiff was hamstrung when challenging the immunity claim by a lack of information because the Commonwealth’s affidavits were heavily and unnecessarily redacted (at [80]). Except for exceptional circumstances, the reasons for redaction should be clearly stated to demonstrate that redaction was justified and appropriate (at [131]). Dixon J criticised the process of identifying proper from improper redactions as an unnecessary waste of judicial resources.
FUTURE EVENTS (SECTION AND OTHERS)

17-18 November
IP & Technology Conference 2016
Host: LAWASIA
Venue: Hilton, Kuala Lumpur
For more information visit: www.lawasia.asn.au/it_ip_kl_2016.html

22 November
4th International Arbitration Conference
Host: Business Law Section, Law Council of Australia
Venue: Federal Court, Queens Square, Sydney
Email: carol.osullivan@lawcouncil.asn.au

25 November
Hot topics in Commonwealth Compensation
Host: Federal Litigation and Dispute Resolution Section, Law Council of Australia
Venue: Australian Postal Corporation, Ground floor, 219 Cleveland Street, Strawberry Hills, Sydney
Email: events@lawcouncil.asn.au

29 November
Regional Law Firm Management Forum
Host: ALPMA and ALMG
Venue: Raffles City Convention Centre, Singapore
For more information click here

24–25 February 2017
Law Council’s annual CPD Immigration Law Conference, Sydney
The Migration Law Committee in the Federal Litigation and Dispute Resolution Section of the Law Council of Australia, chaired by Erskine Rodan OAM, will host the conference. Deputy Chair Rita Chowdhury, Lawyers Weekly 2016 Migration Partner of the Year, chairs the conference organising committee.
The Conference will tackle a wide range of topics relating to migration, and include judges, leading practitioners, academics, departmental policy officers and an array of other fine speakers. There will be plenty of time for networking and mingling with the speakers and other colleagues.
View the ‘save the date’ flyer here www.lawcouncil.asn.au/lawcouncil/images/IILC_2017_Save_the_Date.pdf

10 March
2017 Future of Environmental Law Symposium
Host: Australian Environmental and Planning Law Group, Legal Practice Section, Law Council of Australia
Venue: The Langham, Sydney
Email: events@lawcouncil.asn.au

20–24 March 2017
20th Commonwealth Law Conference, Melbourne
Registrations are now open. The early bird registration deadline is 25 November 2016. This is the first time in 13 years that the Conference has been held in Australia.
The theme of the 2017 conference, “Thriving in a global world: building on the rule of law” presents a unique canvass to consider legal issues in our globalised world that both innovate and challenge lawyers practising today. See: commonwealthlawconference.org/?utm_source=Newsletters&utm_medium=email&utm_campaign=NewsletterJun23
23–25 March 2017
National Access to Justice and Pro Bono Conference
Adelaide Convention Centre
Contact: www.lawsociety.sa.asn.au/na2jpb2017

6–9 April
Inter-Pacific Bar Association 27th Annual Meeting and Conference
Host: Inter-Pacific Bar Association
Venue: SkyCity Auckland Convention Centre, Auckland
Email: ipba2017@tcc.co.nz

RECENT EVENTS

FOI Masterclasses
On 20 and 22 September 2016 in Melbourne and Sydney respectively; the Section’s Migration Law Committee hosted two FOI Masterclasses that were aimed at imparting tips and skills that lawyers can apply to use FOI legislation to the benefit of clients’ cases, particularly in the migration law area.

FOI statistics in the migration portfolio for 2014–15 include that the Department received 18,851 requests for access which made up 53% of all requests received by the Australian Government. Of the ones determined during that year, 94.6% of requests were granted in full or in part with only 5.4% being refused in full. Departmental decisions made up 19% of all IC reviews and 21.9% of AAT FOI matters.

Mick Batskos, the founder and Executive Director of FOI Solutions spoke on:
• how to make a valid Freedom of Information (FOI) request
• how to maximise the chances of accessing the information you seek
• examples of Commonwealth FOI cases involving migration law matters

Caitlin Emery, Assistant Director in the FOI Dispute Resolution team at the Office of the Australian Information Commissioner (OAIC), working predominantly on Information Commissioner reviews and developing FOI guidance for decision makers and applicants, spoke on:
• the role, functions and powers of the OAIC
• how the OAIC can help to resolve complaints about FOI
• procedural matters

If you would like to purchase a copy of the digital recording of Mick Batskos’s presentation, and a copy of both presentations, please email events@lawcouncil.asn.au.

Feedback about the sessions was very positive.
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### Membership renewal

If you haven’t yet renewed your membership of the Federal Litigation and Dispute Resolution Section would you please do so at your earliest convenience by completing and returning the membership form accessible here.

Practitioners with an interest in contributing material to this newsletter may contact the editor Mr lan Bloemendal by email at ibloemendal@claytonutz.com or by phone on 07 3292 7217.