THE LEADING STUDENT LAW MAGAZINE OF WESTERN SYDNEY UNIVERSITY

SAPERE AUDE©

DARE TO KNOW

SPRING 2017
VOLUME 4 - **ISSUE 2**

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***About* Dare To Know Publications**

Dare to Know Publications is an official student club of Western Sydney University.
Founded in 2013 by students, the Club aims to promote community engagement through student publishing. The Club is proud to have two student-led productions: "Sapere Aude"- the leading student law magazine, and "Bitesize Law"- an online legal animation series which brings law to life. Through our student-centred productions, Dare to Know Publications strives to create platforms of communication that allows students to develop personally and professionally. Celebrating diversity and critical thinking, Dare to Know Publications welcomes all students to join in our journey of innovation and creativity.

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EDITOR'S NOTE

Just know that as long as you are a student of Western Sydney University and as long as you are part of Sapere Aude, then you are thriving in the midst of a legacy. You are one of many in a network that will inspire, support and challenge you.

Established in 2013, Sapere Aude is the Western Sydney University gateway into the world beyond. Sapere Aude and the University **share in the vision of a greater Western Sydney.** We welcome diversity, champion gender equality and challenge stigmas of the old era. Sapere Aude represents **the era of the global scholar, the over-achiever, the optimist.** This excellence is reflected in our pages, the quality of our events and most importantly, the students in our team.

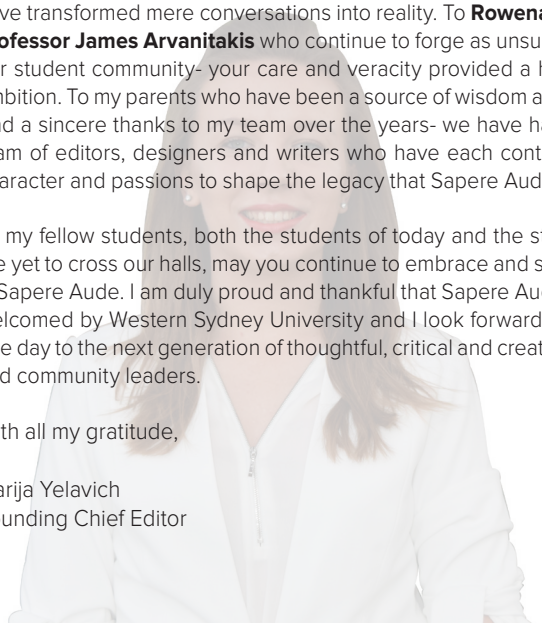
In September 2017, we will welcome 80 academics, students and practitioners to our community event, "**Cultural Diversity & The Legal Profession**," on the brand new 1PSQ campus. People told me not to 'have my hopes too high,' but in addition to welcoming Vice-Chancellor Professor Barney Glover, we are also hosting *Race Discrimination Commissioner,* Dr Tim Soutphommasane and a waiting list that could well attract an audience of 150. Each year, Sapere Aude continues to reach new milestones and I hope that the teams to come never choose to settle, but will **continue to pioneer with courage.**

I am thankful to a number of people who have supported me in achieving what we have today, Dare to Know Publications: a publications firm, and our first and most successful production, Sapere Aude. To the School of Law, under **Professor Michael Adams** and **Professor Freeland,** for nourishing the hopes and ideas of all our energetic and bold students. To **Nap, Nick** and the entire Clubs team who have been the springboard that have transformed mere conversations into reality. To **Rowena Saheb** and **Professor James Arvanitakis** who continue to forge as unsung heroes in our student community- your care and veracity provided a home for my ambition. To my parents who have been a source of wisdom and patience. And a sincere thanks to my team over the years- we have had a diverse team of editors, designers and writers who have each contributed their character and passions to shape the legacy that Sapere Aude is today.

To my fellow students, both the students of today and the students who are yet to cross our halls, may you continue to embrace and shape all that is Sapere Aude. I am duly proud and thankful that Sapere Aude has been welcomed by Western Sydney University and I look forward to returning one day to the next generation of thoughtful, critical and creative students and community leaders.

With all my gratitude,

Marija Yelavich
Founding Chief Editor



DEAN'S LETTER

It is an absolute pleasure for me, as the Dean of Western Sydney Law School, to welcome you to the latest edition of Sapere Aude, the leading student law magazine of Western Sydney University. This is a particularly special edition, focusing as it does on Cultural Diversity and the Legal Profession. This is obviously an important issue, given that the profession has certainly become more diverse in recent years, and continues to do so with the graduation of many excellent students from a wide range of cultural and geographical backgrounds.

This is, of course, a very positive development, making the provision of legal services even more relevant to the needs of the wider community. We celebrate the cultural diversity of Australian society but, at the same time, must ensure that appropriate and comprehensive professional services – such as legal services of all types – allow everyone to have access to justice and proper advice and representation.

At Western Sydney Law School, we pride ourselves on focusing all of our efforts to deliver excellence in everything we do – in our research collaborations, in our teaching and supervision activities, and with respect to our engagement with the community at the local, regional, national and international levels. We have wonderful staff and amazing students, and this allows us to continually refine and improve our efforts to educate every one of our students in the most practical, ethical and appropriate way possible so as to allow them to best meet the challenges of the 21st Century in a diverse and complex world.

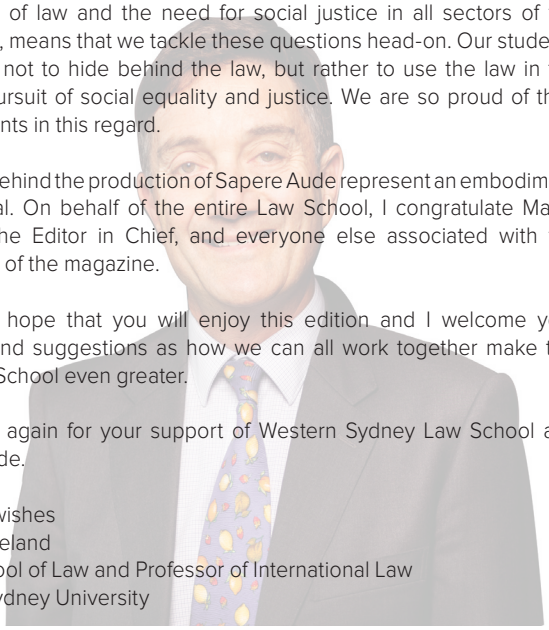
Some of the issues addressed in this edition, and which will also be considered by our guest speakers at its launch in early September, raise difficult questions. Our vision, which centres around the preservation of the rule of law and the need for social justice in all sectors of the community, means that we tackle these questions head-on. Our students are taught not to hide behind the law, but rather to use the law in the ongoing pursuit of social equality and justice. We are so proud of their achievements in this regard.

The team behind the production of Sapere Aude represent an embodiment of that goal. On behalf of the entire Law School, I congratulate Marija Yelavich, the Editor in Chief, and everyone else associated with the production of the magazine.

I sincerely hope that you will enjoy this edition and I welcome your thoughts and suggestions as how we can all work together make this great Law School even greater.

Thank you again for your support of Western Sydney Law School and Sapere Aude.

With best wishes
Steven Freeland
Dean, School of Law and Professor of International Law
Western Sydney University



Journalist's Ethics on the Frontline

Simon Levett
PhD Student, Western Sydney **University**

Journalists are being threatened and assassinated in conflict zones worldwide but the issue of safety has been hijacked by the parties involved over demands for ethical behaviour.

The release in March 2017 of blogger Anania Sorri came in the middle of an ongoing State of Emergency and crackdown on Freedom of Speech in Ethiopia. Many tens of thousands of people had been detained during the crisis, which has failed to attract international condemnation.[1]

Sorri was detained in November 2016 in a high security prison in the capital Addis Ababa. His wife had continued to lobby the international community for his release during the term of his imprisonment.

In an interview with the Guardian, the Communications Minister Negeri Lencho said that journalists who had been jailed had not "'respected the ethics of the profession".[2]

In Thailand in February 2016, the BBC announced that it would fight allegations of defamation against its South-East Asia correspondent Jonathan Head, who faces a long battle in court.[3]

Thailand has had a history of repressive actions against journalists. In May 2010, in the middle of a crackdown on "Red Shirt" protest leaders, several journalists were wounded and one killed.

In the middle of the attacks, the government alleged that several "Red Shirt" media sites were spouting propaganda that tended to incite violence against citizens.

These allegations were accepted by press advocacy group the Southeast Asian Press Alliance, which said that "all members of the media [should] practice ethical and responsible journalism... [and] not to take sides... and instead to simply provide as much reliable information and commentary as they could to help Thai society understand and navigate their current crisis."[4]

Journalism is a value-laden profession but the debate about ethics has repeatedly and cynically used to crack-down on the practice of journalism in conflict zones worldwide.

The calls have been partly motivated by recrimination over the rise of bloggers and citizen journalists worldwide – like the Ethiopian journalist. Talk about ethics often excludes these new forms of media from the safeguards of belonging to a professional and privileged club of journalists.

However, the historical roots of attempts to link vague demands over ethics to the international legal regulation of journalism in armed conflict are well established. The disappearance of seventeen journalists in Cambodia in 1970 led to lobbying for a draft United Nations Convention for the Protection of Journalists. The Convention stated vaguely that safe-conduct cards were to be issued to journalists if they promised they would "conduct himself or herself while on mission in a manner consistent with the highest standards of journalistic integrity".[5]

Standards for ethical behaviour in journalism are often characterised as more identifiable with developing countries, where the press are often required to identify with mythologies of national development and identity.[6] However, in this case, the Convention – which remained in draft form – was supported by Western countries such as Australia, Denmark, France and Italy (there is still no international convention on the protection of journalists).[7]

In other cases, the West has rejected attempts by third world countries and Soviet States to put conditions on journalism. In 1983, the United States walked out of the United Nations Economic, Social and Cultural Organisation (UNESCO) over claims that it championed "group rights" at the cost of individual human rights.[8]

Journalistic Behaviour

The regulation of journalistic morals can be used by repressive governments to clamp down on media rights. Media licensing and repressive accreditation mechanisms with conditions attached have all been used throughout the world to restrict freedom of expression.[9]

However, journalists misbehave in war time too. In the pursuit of so-called professional objectivity, journalists reporting on armed conflict can rely too heavily on official sources, artificially creating news stories and producing journalism that is one-sided and biased.[10]

The close proximity of journalists to government is well-documented – in fact, some war correspondents even run for political office.[11] Journalists who historically have reported on armed conflict situations have even ended up Prime Minister – look at Winston Churchill.[12]

The derivative reporting of conflicts in Guatemala and El Salvador has been discussed by Edward S. Herman and Noam Chomsky in Manufacturing Consent – who criticised the New York Times and Time magazine.[13]

A lot of academic flak has focused on the parachute journalist, who flies in from comfortable bases in Europe and America to report on conflict zones with an itinerary and contacts already organised from head office while other journalists rough it out in the field.[14]

Meanwhile, journalists – who have been embedding in increasing

numbers with the military in war time since the conflict in Bosnia in 1995 – have been accused of displaying bias towards their hosts, who they depend upon for their security, hospitality and access to information.[15]

Journalists who embed do not carry weapons but generally rely upon their hosts for protection, acting as pseudo bodyguards.

The risk is that embedded reportage is an increasingly normalised option for unsafe situations. The dilemma is that journalism in armed conflict is an increasingly dangerous profession, where freedom of movement is already strictly constrained.

International Law

Too much discussion of ethics of journalism has led to resistance from journalists themselves. Journalist Henry Louis Mencken said that "every time a disabled journalist is retired to a professorship in a school of journalism, and so gets time to give sober thought to the state of his craft, he seems to be impelled to write a book upon its ethics, full of sour and uraemic stuff."[16]

However, international law provides a normative framework that can provide some guidance for ethically murky situations in war. This is although issues of national security require some leeway, something that would appear to clash with the free flow of ideas.[17]

There is a line between acceptable and non-acceptable speech in war-time. The European Court of Human Rights has held that journalists who incite violence or propagate hate speech are committing illegal acts in some circumstances. The "duties and responsibilities" clause in the European Convention on Human Rights has been invoked in these cases. The Court has ruled that the proper role of the media – as opposed to inciting violence – is "to impart information and ideas on political issues, including divisive ones."[18]

Norms of good journalistic practice have been repeatedly enshrined by the human rights courts and enforced by the International Criminal Tribunal for the Former Yugoslavia. The principle of source confidentiality – where journalists reporting on armed conflict are protected at law from giving up the identity of their sources of information - is related to the journalistic obligation to provide "accurate and reliable information" in the European Courts.[19] The Tribunal has also made a clear policy choice in favour of "vigorous investigation and reporting" practices in times of war.[20]

The European Court is unlikely to favour one type of journalism over the other. All journalism is protected under the law.[21] The Court in Jersild's case said that "the methods of objective and balanced reporting may vary considerably, depending on the media in question". However, it is implied that the courts have a preference for information that is relevant to the watchdog function of the media.[22]

One of these possible rights could be the right of access to information in war zones –inspired by the laws protecting the special type of journalist – which could be extended to the military authorities at home or abroad.[23]

Talking about human rights and humanitarian law conventions – difficult to enforce – may seem a little misplaced at a time when States are withdrawing from international institutions and agreements. Trump himself says that the principle of the protection of journalist sources might be revoked.[24] However, in these troubled times, national law courts and lawyers in war zones may benefit from any attempt to resolve these difficult questions.

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17 *Stoll v. Switzerland* (2007) Application No. 69698/01 (Eur Court HR).
18 *Ozgur Gundem v. Turkey* (2000) Application No. 23144/93 (Eur Court HR).[57]
19 *Goodwin v. the United Kingdom* (1996) Application No. 17488/90 (Eur Court HR).[39]
20 *Prosecutor v Radoslav Brdjanin Momir Talic (Randall's Case) (Decision on Interlocutory Appeal)* (2002) IT-99-36 (International Criminal Tribunal for the Former Yugoslavia).[38]
21 *Jersild v. Denmark* (1994) Application No. 15890/89 (Eur Court HR).[31]
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THE ROLE OF EQUITY - TO PROTECT US FROM PREDATORS OR FROM OURSELVES?

Student, Samantha, submits her piece written for Equity under the supervision of Ludmilla Robinson

Samantha Jane Marsh

I INTRODUCTION

While the stated legal principle that equity will only intervene for unconscionable conduct in circumstances were a special disability is shown and where one party has 'actual knowledge' of this disability and uses this knowledge in a predatory way to exploit for their own gain, case law and commentary examined on these matters appears to diverge in their application and interpretation.

This paper will show that while in theory equity's main purpose is to protect us from predators, in practice it is evident that while we do reap what we sow, there is relief when we are unduly exploited.

II ORIGINS - UNCONSCIONABILITY AND SPECIAL DISABILITY

The doctrine of unconscionability derives from 'catching bargains' and was used as a shield to protect voluntary (fool hardy) heirs who wanted to live the high life from unscrupulous moneylenders.[1] This concept of protection of the weak (willed) was then extended to cover those who were especially disadvantaged by recognising a particular class of persons with a 'special disability'.[2] This arises when certain aspects of their personhood make them vulnerable to exploitation. Examples of this were articulated in Blomley v Ryan[3] and include, but are not limited to; the poor, the infirm, the intoxicated, and those with little worldly expertise or education.

Equity may set aside unconscionable transactions when three factors are present[4];

1. One party is shown to have a 'special disability'.
2. The second party must be aware of this 'special disability'.
3. The second party exploits the first for their own advantage.

The burden of proof rests on the one claiming the unconscionable conduct. In theory courts cannot simply set aside transactions which on the face appear to be in themselves disadvantageous to one party, as the role of equity is not that of a protective father shielding their offspring from their lack of common sense. The court examines the whole circumstances surrounding the impugned transaction; weighing the respective bargaining power of the parties, asking whether one party satisfied the 'special disability' requirement and whether the second party had 'actual knowledge' of it. Courts will also examine whether the aggrieved party was being exploited in a predatory manner or whether they simply acted foolishly.

As settled in Kakavas v Crown Melbourne Ltd [2013] (Kakavas)[5] 'constructive knowledge/notice' (being "aware of the possibility that that situation may exist" as used in Commonwealth Bank of Australia v Amadio (1983) (Amadio)[6]) does not satisfy the unconscionable conduct requirement and cannot be extended to infer that Crown should have known that Kakavas suffered from a 'special disability'. This resulted in a narrowing of the application to 'actual knowledge'. Kakavas confused the terms 'constructive notice' and 'constructive knowledge', and the reference in Amadio didn't mean that a party 'ought to have known' that a special disability existed if they had made further inquiries, but instead referred to 'wilful ignorance'[7], as mere inadvertence doesn't meet the victimisation standard.

III THE CASES

The huge disparity between the wealth and superior intellect of Mr Kakavas and the meager means and poor intellectual ability of the Burns is the first obvious difference between these two cases[8]. It is also poignant to note the different ways in which the unconscionable conduct of one party was weighted and the application of 'actual knowledge' is applied in both cases.

In "Kakavas v. Crown Melbourne Ltd - still curbing unconscionability"[9] it is suggested that Kakavas should never have been provided with leave to the High Court, as the facts didn't warrant testing of the 'unconscionable conduct' doctrine. Yet this case has caused substantial debate over various aspects pertaining to 'actual knowledge' and the doctrine.

The first instance of Kakavas' problem gambling was noted at his hearing for fraud[10] , but the court considered this to be a "mere pitch", an attempt to avert conviction. Crown referred Kakavas to a doctor who provided treatment for his pathological gambling, they also sought medical sign-off from his clinical psychologist when he sought re-admission to the casino. Interestingly, his original psychologist refused to comply, to which Crown responds "try any psychologist"[11], resulting in the engagement of another who didn't provide an assessment of his condition, merely reiterates what Kakavas advised. One simply cannot have it both ways; Crown cannot refer Kakavas for treatment and yet maintain that his application for self-exclusion was not to address genuine gambling problems and also maintain they had no knowledge.

Kakavas alleged that Crown took advantage of his known pathological gambling addiction in order to profit, as the 'house usually wins'[12]. Perhaps his wealth and astute business acumen precluded him from protection resulting from his 'special disability', as the court noted that if Kakavas had been on a widows-pension he may have found relief.

Contrast this to Perpetual Trustees Victoria Ltd v Burns [2015] (Burns)[14] ; the respondents were financially struggling on disability pensions and were found to have been exploited by Perpetual Trustees (Perpetual), who were aware of their disabilities as a result of several meetings with their agents and found to have 'actual knowledge'[15]. Mrs Burns relied heavily upon the advice of her husband, similar to Garcia v National Australia Bank Ltd (1998)[16], and Mr Burns was consumed with proving himself by striving to become a successful property investor. Perpetual facilitated this desire by loaning them $840,000 on several 'low doc' mortgages, requiring little supporting documentation. When you consider that they were on disability pensions, coupled with the fact that the rental income would not cover the interest accrued in

direct contradiction to the advice provided by the agents, this clearly shows predatory behaviour and satisfies the 'actual knowledge' requirement, affirming Elkofairi v Permanent Trustee Co Ltd [2002][17].

The language framing Mr Kakavas throughout the case was inflammatory, referring to him as a 'high roller' who could afford to gamble[18], contrasted with Crown who was merely acting in the 'ordinary course of business'.[19] Courts readily recognise that mental conditions preclude a person from making rational decisions, however a mental condition differs from the compulsion to gamble. A mental condition prohibits a person from making a rational decision when committing an offence, and appellant courts have found that 'problem gambling' has no direct causal link to the offence, only a connection to it, as the offence is usually well orchestrated and as such shows that the cognitive ability is still intact[20].

Evidence adduced showed that Kakavas met the requisite level for the diagnosis of a 'pathological gambler' to which both sides agreed, and therefore should meet the 'special disability' benchmark[21]. The psychologist on behalf of Crown, however, differed by finding that it did not impair his ability to control his urges, evidenced by the self-exclusion orders, as well as his effective participation in the negotiation process. It seems that the causal link required from your 'special disability' to affecting the capacity of a person to make valued decisions is difficult to prove[22]. Isn't an abnormally strong urge, greater than the ordinary person, the same as being unable to prevent oneself from gambling, and the existence of the self-exclusion orders an example of his attempts to curb his addiction?

Crown was ultimately shown not to have taken advantage of Kakavas' 'abnormally strong urge to gamble'[23]. Self-exclusion orders are notoriously flawed and some commentators have argued that they place too little onus on the part of the casino to enforce them[24], and Crown actually provided inducements which would seem to support a finding for the alleged predatory behaviour.

Perhaps the real difference in Kakavas and Burns lies in their ability, or lack thereof, to function in everyday life. While the Burns' special disability was a direct result of their respective IQ's, Kakavas' was the result of his gambling addition, which didn't preclude him from functioning in all other parts of his life[25]. It could be argued that both parties suffered from compulsions that were difficult to manage, with Mr Burns being consumed with proving himself as a worthwhile property investor. Both participated in fool-hardy schemes, consumed by their respective compulsions, satisfying the 'special disability' requirement which resulted in exploitation.

IV ROLE OF EQUITY - PROTECTION FROM PREDATOR'S OR ONESELF?

The overarching theme of the research performed shows that there is a divergence on how courts interpret the basis for relevant criteria for finding a 'special disability', and what constitutes 'actual knowledge' and 'predatory behaviour'. There seems to be a push-pull process in high court findings; the parameters and applicable circumstances get extended and then the reins are tightened in subsequent cases. The ultimate goal should be to restore the respective bargaining power of the parties, and thus resolve any instances of exploitative or predatory behaviour.

In Louth v Diprose[26] where the evidence of the two parties contradicted one another. The appellant claimed she had been completely honest with the respondent, who confirmed that he was aware of the status of their relationship. The testimony differed on salient facts; the appellant was adamant that she had not claimed to be suicidal, and the respondent claimed that the house was not a gift and would be transferred into his name some time in the future. Both sides agreed that the purchase of the house was a result of the respondent's suggestion. The court preferred the testimony of the respondent above that of the appellant, depicting her as a woman who preyed on the vulnerability of the besotted man. However, the court agreed with the appellant that it was unlikely that the respondent had stated that the home would be transferred back into his name.

Justice Deane eloquently articulated the purpose of equity,
"The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation."[27]

Commentary suggests that the court erred in its finding as a result of stereotyping of their characters[28], rather than an actual exploitation of a special vulnerability. The finding of unconscionable conduct is tenuous at best and in all likelihood the respondent made a foolish decision for which he sought relief[29], and thus unduly extends the parameters for predatory behaviour and what constitutes a 'special disability'.

It appears from Kakavas that vulnerability and showing the requisite "predatory state of mind" is near impossible to prove when dealing with 'arms-length transactions'[30], despite Kakavas being able to show on one occasion that upon re-entry Crown refused to accept his request for a hand-limit and so he left. This incident highlights the courts misunderstanding of the circumstances surrounding his special disability[31], and also shows his own inherent understanding of his mental incapacity by removing himself from temptation. It can be argued that courts have deliberately taken an uncompassionate approach to 'problem gamblers' by placing the onus of responsibility on the gambler and thus reducing the 'floodgates effect'[32].

The courts have historically chosen not to confine the definition of 'unconscionable conduct' nor have they sought to limit the applicable circumstances[33]. In the article 'The Varying Shades of "Unconscionable" Conduct'[34] the author makes reference to the continued confusion surrounding the parameters of 'unconscionable conduct'. The article discusses the case of Nichols v Jessup[35] where the plaintiff sought specific performance of a right of way over the

defendants land (the plaintiff was an estate agent who knew that there was an imbalance of rights over the causeway and thus was found to be unconscionable). The court noted that the plaintiff did not exhibit any dishonest conduct, thus failing the 'predatory' standard of victimisation, but the imbalance of the transaction itself was the issue.

This same article makes reference to another case O'Connor v Hart[36] where the Privy Council found that a transaction was unconscionable as the perceived weaker party had not obtained independent advice, despite no evidence of predatory behaviour. This leads one to conclude that in some cases the mental element of victimisation of the weaker party may not be required, as these two cases are more concerned with an unconscionable transaction as opposed to unconscionable conduct.

Another case where the finding of unconscionable conduct seems to be based on a flimsy transaction is that of Bridgewater v Leahy[37]. The nephew in this case had the same vocation as his uncle and at first instance it was obvious that the uncle was of 'sound mind' and had wanted his nephew to keep the property in order to continue his legacy. The court held that the nephew and uncle had unequal bargaining power and that the nephew had taken advantage of their close relationship, despite the lack of evidence showing any impropriety on the part of the nephew. Again, it was purely the terms of the agreement that were deemed unfair.

This seems contrary to the established principles of unconscionability and the dissenting judgment in this case highlighted that the uncle behaved rationally and with informed consent. It also noted that courts have historically been reticent to make binding agreements which the parties have not entered into willingly, concluding that the court should not interfere as the uncles wishes were clearly articulated.

V CONCLUSION

"...exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose." [39]

Examining the various perspectives with regard to the interpretation of 'special disability', and whether they have been exploited for unconscionable conduct due to predatory behaviour or for their own lack of common sense, has been eye-opening. Ideally the conscience of the law should only intervene when 'predatory behaviour' is apparent and equity should not intervene in order to save someone from their lack of common sense. Equity should also abstain from intervening in a purely unfair transaction which has been negotiated with full knowledge and consent, with no evidence of impropriety from either party.

It seems illogical to distinguish the gambling addiction of a poor man with that of a wealthy 'high roller', surely both suffer from a similar compulsion, and thus both should be afforded protection. In both the Burns and Kakavas cases it can be argued that both were quite foolish in the way they handled their affairs resulting in financial hardship. And, the respective 'stronger' parties had knowledge of the 'special disadvantage' of the weaker party, and yet Kakavas was found otherwise, which has subsequently been affirmed in Owerhall v Bolton & Swan Pty Ltd [2016][40].

The finding in Burns is restricted to cases with similar circumstances and in this case was to protect them from predatory behaviour. The element of predatory behaviour, however, is not compulsory and in some instances it is the nature of the transaction which is of concern to the court. In the case of Kakavas it is clear that the behaviour of Crown was predatory as the facts show they had 'actual knowledge' of his pathological gambling and yet no protection was forthcoming.

Has stereotyping of players precluded our courts from making objective decisions? Surely, we are all equal before the law?

Footnotes

1. Carter on Contract/Part V -- Vitiating Factors/Chapter 25 Unconscionability/2. EQUITABLE PRINCIPLES/(a) Catching bargains - accessed 7/4/2016 @ 11:11AM
2. Carter on Contract/Part V -- Vitiating Factors/Chapter 25 Unconscionability/2. EQUITABLE PRINCIPLES/(b) Unconscionable transactions accessed 7/4/2016 @ 11:12AM; Gino Dal Pont, 'The varying shades of 'unconscionable' conduct : same terms, different meaning' (2000) 19(2) Australian Bar Review 135-166.
3. Blomley v Ryan (1956) 99 CLR 362.
4. Blomley, n3 above.
5. Kakavas v Crown Melbourne Ltd [2013] HCA 25 (5 June 2013) at [155] "cannot be taken to have supported the importation of the concept of constructive notice into the operation of the principle he enunciated in Amadio.".
6. Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, Mason J "And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.".
7. Kakavas v Crown Melbourne Ltd [2013] HCA 25 (5 June 2013); Warren Swain, 'The unconscionable dealing doctrine : in retreat?' (2014) 31(3) Journal of Contract Law 255-266.
8. Kakavas v Crown Melbourne Ltd [2013] HCA 25 (5 June 2013); Perpetual Trustees Victoria Ltd v Burns [2015] WASC 234.
9. Rick Bigwood, 'Kakavas v. Crown Melbourne Ltd- still curbing unconscionability' : Kakavas in the High Court of Australia' (2013) 37(2) Melbourne University Law Review 463-508.
10. Kakavas [2013], n5 above, [41].
11. Kakavas [2013], n5 above, [58], [61] and [63].
12. Ian Freckleton, 'Pathological gambling and civil actions for unconscionability : lessons from the Kakavas litigation' (2013) 20(4) Psychiatry, Psychology and Law 479-491.
13. Kakavas [2013], n5 above, [30].
14. Perpetual Trustees Victoria Ltd v Burns [2015] WASC 234.
15. Perpetual [2015], n14 above.
16. Garcia v National Australia Bank (1998) 155 ALR 614 a case where the wife was considered to be in a special disadvantage due to the relationship of trust and confidence vis-a-vis her husband
17. Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413 [51].
18. Kakavas [2013], n5 above, [31].
19. Kakavas [2013], n5 above, [21]; Warren Swain, 'The unconscionable dealing doctrine : in retreat?' (2014) 31(3) Journal of Contract Law 255-266.
20. Ian Freckleton, 'Pathological gambling and civil actions for unconscionability : lessons from the Kakavas litigation' (2013) 20(4) Psychiatry, Psychology and Law 479-491, quoting R v Grossi [2008] "This Court has said ..., that addiction to drugs, or addiction to liquor cannot be regarded as a licence to commit crime, and that if persons who are addicted in that way succumb to the temptation... they must expect to answer for those crimes by experiencing the appropriate punishment.".
21. Ian Freckleton, 'Pathological gambling and civil actions for unconscionability : lessons from the Kakavas litigation' (2013) 20(4) Psychiatry, Psychology and Law 479-491.
22. Ian Freckleton, 'Pathological gambling and civil actions for unconscionability : lessons from the Kakavas litigation' (2013) 20(4) Psychiatry, Psychology and Law 479-491.
23. Kakavas [2013], n5 above, [11] "abnormally strong urge to gamble was not a compulsion which deprived him of the ability to make a worthwhile choice whether or not to gamble, or to continue to gamble".
24. Natalia Antolak-Saper, 'The legal effect of voluntary self-exclusion programs for problem gamblers' (2010) 15(2) Deakin Law Review 169-204. <http://search.informit.com.au.ezproxy.uws.edu.au/fullText;dn=20111285;res=AGISPT>
25. Kakavas [2013], n5 above, [127] & [129], "Individuals like Harry Kakavas who have strong narcissistic traits have an over-inflated view of their skills and abilities and a strong sensitivity to reward that affects their decision-making processes.".
26. Louth v Diprose (1992) 175 CLR 621.
27. Kakavas [2013], n5 above, [13]; Rhett Walton, 'Kakavas v Crown Melbourne Limited' (2014) 27(4) Commercial Law Quarterly 33-35.
28. Peter Heerey, 'Truth, lies and stereotypes : stories of Mary and Louis' (1996) 1(3) Newcastle Law Review 1-31.
29. Gino Dal Pont, 'The varying shades of 'unconscionable' conduct : same terms, different meaning' (2000) 19(2) Australian Bar Review 135-166.
30. Warren Swain, 'The unconscionable dealing doctrine : in retreat?' (2014) 31(3) Journal of Contract Law 255-266.

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In Equity we Trust; the amelioration of the common law:

A discussion of the Quistclose trust, mistake and total failure of consideration.

Scott Worthington and Kaeegan Willingham

In Equity we Trust; the amelioration of the common law:
A discussion of the Quistclose trust, mistake and total failure of consideration.

The law of trusts developed from a series of authoritative cases decided in the English Courts of Equity, and has been refined by recent Australian decisions. Consequently, the precise doctrine of trusts is a wide and complex area of law which is constantly developing. However, the institution of Trusts can be described as an equitable obligation on the holder of a legal or equitable interest in property (Trustee), to maintain that property for the benefit of another party (Beneficiary).[1] 'Trusts' may generally be characterised under three categories based on the level of intention being either, express[2], resulting[3] or constructive[4]. Following Barclays Bank Ltd v Quistclose Investments Ltd,[5] the institution known as the 'Quistclose Trust' was created which may not simply fall within the recognised institutions.[6] This paper will discuss the category of a Quistclose Trust, the elements of a constructive trust and the impact of insolvency on a trust.

The general structure of this article will follow a discussion of the key issues argued at the recent Australian Law Student Association Championship Moot. Ground (A) herein was drafted by Mr Keegan Willingham as presented, and grounds (B) and (C) was drafted by Mr Scott Worthington as presented. Mr Chris Barker acted as Solicitor during ALSA. This team ranked 9th out of a field of around 30, and was a single ranking off breaking to the Quarter Finals.

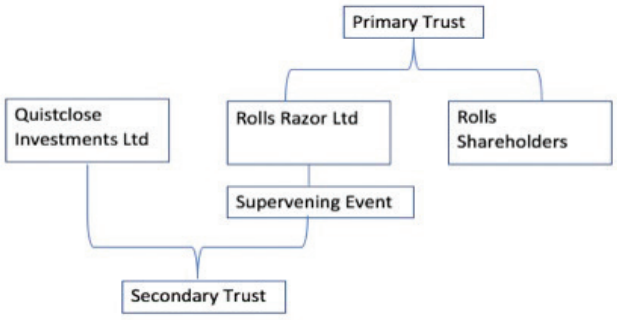
The Quistclose Trust

The Facts:[7]

The factual matrix of Barclays Bank Ltd v Quistclose Investments Ltd was that Rolls Razor Ltd had an overdraft of £484,000 with Barclays Bank which exceeded the agreed credit limit of £250,000. The essential element of this case was that Rolls Razor Ltd declared a dividend to shareholders of a further £209,719. As Rolls Razor Ltd did not have the liquid assets to cover the dividend, and Barclays Bank Ltd refused to extend the existing overdraft, Rolls Razor Ltd subsequently obtained a loan with Quistclose Investments Ltd solely to pay that dividend. The cheque for the loan amount was accompanied with a letter to the relevant branch manager of the Bank, which confirmed that the loan was 'only to be used to meet the dividend due on July 24, 1964'.[8] This amount was paid into a separate account which was opened on June 8, 1964 for the sole purpose of holding these loan moneys. This designated purpose failed due to the supervening event of Rolls Razor Ltd going into liquidation. The salient issue then was whether the loan made by Quistclose should be held as general assets, and thus available to all creditors' claims, or whether a trust may arise to form a separate pool of assets.

Lord Wilberforce reasoned that the '**mutual intention**' of the parties and the '**essence of their bargain**' was that the loan was provided for a designated purpose and did not form a part of the general assets of Rolls Razor Ltd.[9] Where money is advance for a designated purpose, the lender retains an equitable right to ensure that the primary designated purpose is fulfilled. If the purpose is fulfilled the lender acquires a remedy in debt for the amount lent, at common law. If the primary trust to repay the amount advanced to the indebted party has failed due to supervening events, a secondary trust arises where the lender is beneficiary and indebted party is trustee.[10]

While the Quistclose Trust has been affirmed in Australia, it is necessary to consider the nature of this institution by reference to its particular application in Australian courts.[11] The essential elements are the required intention, the role of the primary



designated purpose and the role of a separate account.

1). Intention

In Quistclose, Lord Wilberforce referred to the 'mutual intention' of the parties in his reasoning.[12] However, it is unclear on his reasoning whether mutual intention is required in all cases, and whether this mutual intention is to create a trust, or merely that the amount be held separately for the primary designated purpose. As discussed above, **the nature of intention is what distinguishes express, resulting or constructive trusts from one another.**[13] Therefore, the nature of the intention required is essential in determining whether the Quistclose Trust falls within the existing categories discussed above, or as some unique legal institution.

a) Express private trust

The Quistclose Trust[14] was considered at length in the decision of Gummow J in Re Australian Elizabethan Theatre Trust.[15] In this case, Gummow J did not characterise the Quistclose Trust as a unique institution but instead as an application of existing principle on particular facts; specifically, as an express trust with two limbs.[16] His Honour reasoned that this type of trust demonstrated the flexibility of the institution of the express trust.[17] Additionally, Gummow J stated that the existence of an express trust is always to be answered by reference to intention, which is typically that of the settlor. However, the factual matrix of a particular case may require mutual intention.[18] Gummow J further reasoned

that this intention need not be explicit, as it may be inferred from the surrounding circumstances including the language used, the nature of the transaction and the circumstances surrounding the relationship of the parties.[19] The parties need not comprehend the law of trusts or whether a trust is the appropriate institution to achieve their intended outcome, as the court may infer this from the circumstances of the case and the outward manifestations of the parties.[20] The reasoning of Gummow J has been further affirmed in the High Court of Australia.[21]

b) Resulting trust

The Quistclose Trust may also be characterised as a resulting trust, where intention is implied to create a trust.[22] This is consistent with the reasoning of Lord Millett that the Quistclose Trust was an orthodox example of a resulting trust.[23] Lord Millett reasoned that money advanced for a designated purpose and subject to a revocable mandate may only be used for the designated purpose.[24] Where that purpose fails, the recipient holds that sum on resulting trust to return the payer. Whilst this conception has received some positive reference in Australian authority[25], it has not been applied under this reasoning with any authoritative weight. This conception seems largely unnecessary and inconsistent with the broad application of the inferential approach to intention adopted currently with regards to express trusts.[26]

iii) Constructive trust

The final potential conception of the required intention is the standard of a remedial constructive trust, which does not require intention at formation.[27] This interpretation is based loosely on the language of Gibson J when referring to the Quistclose Trust.[28] Gibson J stating that in **trust cases equity 'fastens on the conscience**' of a person advancing the money for a specific purpose, meaning the recipient is bound to use the amount in furtherance of this purpose or hold the amount on trust to return the sum to the payer.[29] This language, it is argued, is similar to that adopted by the High Court of Australia in Hospital Products Ltd v United States Surgical Corp with reference to the conscience of equity converting a recipient to a trustee.[30] However, this approach does not appear to have received support or direct reference in Australian judicial reasoning. Furthermore, it is unclear in what circumstances a constructive trust would arise where the other elements of the Quistclose Trust are evident, and where intention is unable to be inferred. The nature and status of the constructive trust in Australia is discussed further below.

2). Designated purpose

The designated purpose of the funds is a fundamental element for a Quistclose Trust. The designated purpose for the funds must be a clear requirement for use of the property advanced, as a mere preference is not sufficient.[31] Although reference to the purpose for which the property was advanced is a fundamental consideration in determining whether a trust of this type was intended, it would be incorrect to view references to purpose in the Australian authorities as revitalising the non-charitable purpose trust. Therefore, it goes to the purpose sought by the settlor and whether the requisite intention may be inferred.[32] Subsequently, **the designated purpose is more appropriately viewed as one of several indicia used to determine whether a trust of this character exists, rather than evidence of the characterisation of this type of trust and process of legal reasoning as a whole.**

3). Separate account

It must be noted **that it has not been categorically decided whether a requirement of the "Quistclose Trust" is that money advanced be held in a separate account.** However, it is pertinent to note that analysis of the reasoning of the relevant authorities shows that courts have considered a separate or 'earmarked' account as highly persuasive.[33] It is also important to emphasise the relevance of a separate account to the legal analysis of the Quistclose Trust. The relevant determination, in addition to the primary designated purpose, is that the funds are not intended to form a part of the assets of the recipient to use as they deem appropriate.[34] This reference is to whether the recipient acted as a medium or mere conduit pipe for achieving the purpose for which the property was advanced.[35] Therefore, the use of a separate or earmarked account aids the court in determining whether the intention of the parties is that the sum advanced does not form a part of the recipient's assets. However, this may not be required in all instances as this intention may be proven by other elements.

B. Grounds for a Constructive Trust

Separate to any elements of a Quistclose Trust, **the constructive trust has been applied many times over the last forty years as a mechanism to ensure that property is distributed justly and equitably.** Throughout the 1980's a number of seminal cases were decided in the High Court of Australia which developed expanding grounds for a constructive trust. The Australian authorities generally cited English cases with approval, and refined equitable maxims to support property distribution, generally in a matrimonial setting. Since the 1990's, a number of cases have been decided in Australia which have broadened the scope of the constructive trust to a commercial setting.

At its heart, these more contemporary cases have found that a constructive trust may prima facie arise on grounds of unjust enrichment. The seminal case of David Securities, decided in 1992, centred around the grounds of unjust enrichment in a corporate setting.[36] It was held that the grounds for finding unjust enrichment in a corporate setting may be based on elements such as payment by mistake, or a total failure of consideration. Upon this general foundation, subsequent cases have further refined what grounds are required for a finding of a constructive trust.

4). Mistake

Consideration made in contract by mistake is subject to a varied legal background, which was stated in the Australian decision of Daly, and subsequently refined in the New South Wales decision of Wambo.[37] It is generally accepted that a payment made by mistake may give rise to an interest in the payment made, and that the transfer of the legal interest from payer to payee will not always give rise to a transfer of equitable interest.

It is of the essence then that a finding of timing may be made by the court. White J in Wambo stated "**a constructive trust arising from the retention of moneys known to have been paid by mistake, and for which there was no consideration, would ... arise from the time the payee acquired such knowledge**...."[38]

With consideration of this ratio, and of the requisite elements for a trust, a factual framework which would support a mistaken payment being held on trust is limited. Indeed, many cases of payment in mistake have not found a trust, and have instead been remedied by common law actions in debt, noting the absence of insolvency as a supervening event. The clearest factual framework may be found in the case of Chase,[39] while noting that the ratio of that case is not authority in Australia. In Chase[40] a clerical administrative error was made, which resulted in a double payment. Two days after the mistaken payment, the other party became aware of the error. Similar to Quistclose, the supervening event of insolvency occurred, however in this case a constructive trust was declared, and the assets returned.

5). Total Failure of Consideration

A total failure of consideration is a more complicated matter, as the elements of prior notice, totality and character of contract may

be determinative elements. The general principles of total failure of consideration are established in the cases of Wambo, David Securities and Angelopolous.[41]

The question of notice may be grounds for a secondary finding of misrepresentation or potentially fraud. **Notice in this sense relates to the knowledge of the contracting party of their inability to perform, hence the failure of consideration.** It may generally be the case that a contract exchanged with the knowledge of the performing party that a contract may be frustrated by non-performance will be grounds for a finding of constructive trust as remedy. **The essential question then becomes what level of knowledge the contracting party must have, and whether any principles of agency may apply.** In Wambo, the New South Wales Supreme Court found that knowledge may be where a party "(a) (has) actual knowledge, or (b) wilfully shuts his or her eyes to the obvious, or (c) wilfully and recklessly fails to make such inquiries as an honest and reasonable person would make, or (d) has knowledge of circumstances which would indicate the facts to an honest and reasonable person."[42] Where one of the above levels may be proven, a further element may be whether a relationship of agency arises. In the Australian Case of Daly, a failure of consideration was not found to establish misrepresentation as the agent who executed the contract did not have the requisite knowledge.[43] It has further been found that a Director will be held to a different standard to an Agent, consistent with the authority of Farah.[44]

The question of totality was considered in **Baltic Shipping, where the essence of totality was the failure to derive any of the bargained benefit**. In Baltic, the factual matrix which supported a finding of total failure of consideration was the failure of a cruise liner to perform a cruise.[45] In the alternate, a partial failure of consideration may be made, in circumstances where the obligations and consideration of a relationship may be severable. In considering whether a failure is total or partial, the character of the contract may be a determinative factor. For example, the consideration exchanged in a cruise may in essence be the transportation, whereas in a building contract the consideration in preparation of completion may be a defence to a total failure of consideration, and potentially defeat any claim in failure of consideration, as were the facts in Angelopolous.[46]

C. Equitable Priority of a Constructive Trust

The defining element of a constructive trust is that a court retains the discretion to define the terms of the trust. In the case of Westdeuche, a discretion on constructive trusts is found to arise, especially on elements such as the time that a trust arises, and whether the trust is based in personam or in rem. **The essential difference of rights in personam or in rem was further established in Wambo, where a finding of either grounds gives rise to different equitable priority.**[47]

It is accepted that the general remedy for a failure of consideration is restitution at common law pursuant to the case of Evans.[48] As a common law remedy, the right to restitution is generally limited in its ability to serve justice, especially in circumstances of insolvency. In cases of insolvency, the common law restitution would generally provide a right consistent with that of a creditor, which would likely prevent a restitution of the entire sum.

The essential element of a trust then is a finding of a trust in personam or in rem. As a general principle, the in personam trust may give rise to a priority consistent with a secured creditor, consistent with the case of Westdeuche.[49] In contrast, a trust in rem would essentially form two separate asset pools, where the restitution claim of the aggrieved party would not be diminished by the claims of creditors, consistent with the case of Chase.[50]

Insofar as the constructive trust is discretionary, the precedent which may be persuasive regarding what grounds an in rem trust may be found are limited. The general principle may be the policy argument established in Wambo, whereby reasoning may be needed to determine why a beneficiaries interest should be declared above a creditor, where the creditors would suffer from the windfall of assets.[51]

i) Defence of Conversion

It is generally accepted, pursuant to the case of David Securities, that a conversion of monies paid on bona fide grounds may be a defence.[52] This general principle is an extension of the bona fide rule of equity, where assets obtained by a third party for bona fide consideration will be held with indefeasible title. Consistent with this principle, so too will the conversion of assets in business operation be limited in their recovery.

The operative element then may be the right of a claimant to seek tracing. The issue of tracing is then that an additional discretionary finding may need to be found in favour of the claimant.[53]

Conclusion

In summary, the law of trusts is much more than a question of express, resulting or constructive. As practitioners, we should aim not to recite legislation and review common law, but also turn our minds to the wealth of remedies offered by equity. In this single narrow snapshot, equity has effectively ameliorated a harm of the common law, and developed a range of remedies from an institution originally developed to protect matrimonial property. As the next generation of practitioners, it is incumbent upon us to develop new precedent, with one eye on the past and one eye on the future.

Footnotes

1 John D Heydon and Mark J Leeming, Jacobs' law of trusts in Australia (LexisNexis Butterworths, 7th ed, 2006) 1.
2 Ibid 55.
3 Ibid 234-5.
4 Ibid 255.
5 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 (Lord Wilberforce).
6 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 (Lord Wilberforce).
7 Ibid 578-9.
8 Ibid 579.
9 Ibid 580.
10 Ibid 580-2.
11 See Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491; Peter Cox Investments Pty Ltd (in liq) v International Air Transport Assoc (1999) 161 ALR 105.
12 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, 580 (Lord Wilberforce).
13 Above n 2, 55, 234-5, 255.
14 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.
15 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491.
16 Ibid 500.
17 Ibid 503.
18 Ibid 502.
19 Ibid 503.
20 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491; Byrnes v Kendle (2011) 243 CLR 253, 273-4 (Gummow and Hayne JJ); Legal Services Board v Gillespie-Jones (2013) 249 CLR 493, 525 (Bell, Gageler and Keane JJ); Twinsectra Ltd v Yardley [2002] 2 AC 164, 185 (Lord Millett).
21 Peter Cox Investments Pty Ltd (in liq) v International Air Transport Assoc (1999) 161 ALR 105.
22 Above n 2, 234-5.
23 Twinsectra Ltd v Yardley [2002] 2 AC 164, 192-3 (Lord Millett)
24 Ibid.
25 Salvo v New Tel Ltd [2005] NSWCA 281.
26 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491, 502 (Gummow J); Peter Cox Investments Pty Ltd (in liq) v International Air Transport Assoc (1999) 161 ALR 105; Byrnes v Kendle (2011) 243 CLR 253, 273-4 (Gummow and Hayne JJ).
27 Muschinski v Dodds (1985) 160 CLR 583, 613 (Deane J)
28 Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd [1985] Ch 207, 222 (Gibson J).
29 Ibid.
30 Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 108 (Mason J) quoting Beatty v Guggenheim Exploration Co. (1919) 225 NY 380, 386 (Cardozo J)
31 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491, 506-7 (Gummow J)
32 Ibid 502.
33 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491, 505 (Gummow J); Barclays Bank Ltd v Quist close Investments Ltd [1970] AC 567, 579-82 (Lord Wilberforce).
34 Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491, 499 (Gummow J); Barclays Bank Ltd v Quist close Investments Ltd [1970] AC 567, 580 (Lord Wilberforce).
35 Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd [1985] Ch 207, 220 (Gibson J)
36 David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; 390.
37 Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371, 380; Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [42]
38 Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [42]
39 Chase Manhattan Bank NA v Israel-British Bank (London) Limited [1981] 1 Ch 105, 119D
40 Chase Manhattan Bank NA v Israel-British Bank (London) Limited [1981] 1 Ch 105, 119D
41 Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [42]; David Securities Pty Ltd v Common wealth Bank of Australia (1992) 175 CLR 353; 390; Angelopoulgs And Another v Sabatino And Another (1995) 65 SASR 1, 13.
42 Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [42]
43 Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371, 380
44 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, 174-178
45 Baltic Shipping Company v Dillon (1993) 176 CLR 344, 350.
46 Angelopoulgs And Another v Sabatino And Another (1995) 65 SASR 1, 13.
47 Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [42]
48 Evans v European Bank Ltd (2004) 61 NSWLR 75 at 143-146
49 Westdeutche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 715
50 Chase Manhattan Bank NA v Israel-British Bank (London) Limited [1981] 1 Ch 105, 119D
51 Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, [43]
52 David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; 390.
53 Gertsch v Atsas [1999] NSWSC 898

Russia's ban on Jehovah's Witnesses: reasonable or radical?

First year student, Maja, worked with the School of Law's Ingrid Matthews to research and draft the following piece. Join Maja as she explores the history, controversies, and way forward for our community and how we respond to ethnic-cleansing

Maja Podinic

Considering oneself as a human does not automatically give one the title of humane. Is it reasonable to call a person humane when they consciously murder and alienate an entire ethnicity? Perhaps not. The idea of ethnic cleansing should be unfathomable because we live in what we call, an enlightened age, that we consider all humans to be capable of civilisation. Whilst society wishes to believe that regimes demonstrated in Nazi Germany or Soviet Russia are behind us, they are far from such. Ethnic cleansing, as the Britannica states, is "the attempt to create ethnically homogeneous geographic areas through the deportation or forcible displacement of persons belonging to particular ethnic groups." Ethnic cleansing is still practiced today, with Russia taking the lead in the contemporary world. The question is how has ethnic cleansing within political regimes, been ignored by global leadership, either willfully or by ignorance?

When civilization fails, the world cries and says "never again", like the boy who cried wolf. There becomes no meaning behind the words when said one too many times, and our remorse for such actions is questioned, as is our humanity. There is an air of condemnation against ethnic cleansing as a whole. Democracy seems to be at the forefront of the age of globalisation, but how democratic really is Western Society?
All parts of the world are closer to us and more intimately involved with us than formerly.

Globalisation has allowed for connections to be forged not only between nations and their political leaders but with ordinary people countries apart. For example, the aftershock of an attack on Jehovah's Witnesses in Russia, is felt by Jehovah's Witnesses across the world. From a global perspective we begin to question how progressive our society has become, specifically how leaders of the former USSR have left an imprint on the way contemporary Russia is governed.

On April 20th, a ruling that Jehovah's Witnesses violated the Russian Federations Federal Law on Combating Extremist Activity, placed Jehovah's Witnesses in the same category as ISIL, claiming they were an extremist group. Not only has this ruling transformed a religious community into a criminal network, it has created a sense of vulnerability for Jehovah's Witnesses beyond Russian borders around the world. As a result of the order, the religious organisation must disband and hand over all property to the state.[1] This included banning church publications, which were cast as extremist literature. Lawyers from the Russian Ministry of Justice argued that Jehovah's Witnesses pose a threat to "public order and public security".[2] In the context of former USSR, this language is all too familiar, is it possible to predict what the next chapter in history may be?

The KGB (Soviet State Security Committee), which was responsible for terror and espionage within the Soviet Union during the twentieth century, was concerned with the 'disruptive' activities of Christians that they did not have control over.[3] A dramatic increase of Jehovah's Witnesses in the Soviet Union was a result of nations annexed in 1939-40, specifically Latvia, Lithuania, Estonia and Moldavia. Walter Kolarz, author of *Religion in the Soviet Union* (1961), explains that this is not the only reason for the increase. Many in the Russian population in the German concentration camps "had admired the courage and steadfastness of the 'Witnesses' and probably for that reason had found their theology attractive." As a result, a proportion of young Russians from these camps returned to the Soviet Union with a newfound faith in Jehovah God.

The KGB were unconcerned with small groups with no sway, however, when religious groups rose to a degree of prominence, these groups began to be considered as threats to the atheism of the Soviet State.
Professor Sergei Ivanenko observed in his book *The People Who Are Never Without Their Bibles* that in early April 1951, "more than 5,000 families of Jehovah's Witnesses from the Ukrainian, Byelorussian, Moldavian, and Baltic Soviet republics were sent to 'a permanent settlement' in Siberia, the Far East, and Kazakhstan."

The purpose for this brief review of history is to make a comparison. Sociologist, Roman Lunkin[4] argues that there is a fear that in non-Orthodox movements there is a western influence; and that these influences could potentially support a democratic revolution, as non-Orthodox religions are feared to be independent of the government.

If we were to erase the date on this recent ban on Jehovah's Witnesses and place it in a history textbook, it would be more fittingly placed in the twentieth century with the likes of Hitler and Stalin rather than our post-war, twenty-first century age.

The most striking similarity in both crucial events in history is that despite being more than fifty years apart, keeping political power is regarded to be of higher importance than freedom of the people. The attempt to eliminate a specific religious group with identifiable ethno-national origins is an attempt to ethnically cleanse the nations of Latvia, Lithuania, Estonia and Moldavia. If history is any guide to political leaders, it is that through terror there is the ability to control. Niccolo Machiavelli and his political guide, *The Prince* was one of the first publications preaching this: "it is much safer to be feared than loved because ...love is preserved by the link of obligation which, owing to the baseness of men, is broken at every opportunity for their advantage; but fear preserves you by a dread of punishment which never fails."

As horrific as it may sound, it is not surprising that political dictators have been able to set a precedent that redefines what our leaders perceive to be a successful political model.
An example would include the recently elected Donald Trump, who when discussing the 1989 Tiananmen Square Massacre in which hundreds of protesters were killed by the People's Liberation Army, labelled it a "riot."[5] Riot and massacre have two

different meanings, the most common, the former refers to *a violent disturbance of the peace by a crowd*[6] whilst the latter is *an indiscriminate and brutal slaughter of many people*.[7] They are not synonyms and they cannot be used interchangeably with any coherence.

How can we expect people to condemn the actions in Russia of banning Jehovah's Witnesses when one of the most influential figures in the twenty first century downplays a massacre to be a riot?

Just prior to the ban of Jehovah's Witnesses, Russia awarded The Order of "Parental Glory" to a Jehovah's Witness couple, Valeriy and Tatiana Novik. The award is to honor parents who have raised at least seven children and have shown extraordinary care for their family's health and education, as well as their physical, mental, and moral development.[8] Families awarded the Order are considered models that strengthen the family institution.

Is it contradictory that Russia awarded an openly devout couple for the excellent raising of their family while, just months later, banning the religion on the basis that it is undermining the nation with its religious beliefs? Russia has been successful in creating a stigma that the ban imposed is not one out of religious intolerance but rather out of caution and reason for the greater good of the nation. Here, the word reason is conflated with acts of oppression.

Whilst the UN is credited for its success in preventing nuclear wars and aiding nations suffering famine, its track record of preventing genocide and ethnic cleansing is far different. UN Special Rapporteurs (Dr Kaye, Mr Kiai and Mr Shaheed) have urged that "the use of counter-extremism legislation in this way to confine freedom of opinion, including religious belief, expression and association to that which is state-approved is unlawful and dangerous, and signals a dark future for all religious freedom in Russia."[9]

However, other than reporting and condemning the ban, the UN's involvement is limited. Perhaps, it is limited because it seen as 'just' a ban on a minor religious group.

With the Supreme Court rejecting the appeal on July 17th, Jehovah's Witnesses have exhausted all measures within Russia to regain their religious freedom once more, meaning religious intolerance within Russia is legal. "We plan to appeal this at the European Court of Human Rights as soon as we can,"[10] Yaroslav Sivulskiy, a member of the European Association of Jehovah's Christian Witnesses stated, however will this appeal have enough power to overturn Russian legislation?

Intervention from peace keeping organisations such as the UN, is now necessary more than ever. However, by the time the realisation dawns that this is a stepping stone to Stalin's USSR, religious hatred will have been heightened because of its legal standing. I will not conclude definitively but I will leave this thought to resonate, will the UN's leadership be sufficient in restraining Putin and the state of Russia from further acts of ethnic cleansing?

The world as we know it is coming to an end. Not in an apocalyptic sense, but rather one where we must redefine what we consider to be humane, who we consider to be a good leader, and what we consider democratic.

When politicians tell us they MUST do something for the greater good, should we believe them? The answer, perhaps, is to not believe uncritically. We must question and reflect so we are not blind-sided by propaganda which is racially and religiously intolerant to minority groups.
Ethnic cleansing is a taboo phrase in society, our minds tend to be drawn to events of the past, however, despite its condemnation by international organisations, it is still being practiced. Much ethnic cleansing – and, in this case, ethno-religious cleansing, goes unnoted by the global leadership because we have become immune to the actions leading up to the killing of an entire group of people on the basis of their ethno-religious identity.

Footnotes:

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3 Andrew and Mitrokhin, *The Mitrokhin Archive: The KGB in Europe and the West* (Penguin Books Ltd, 2000).

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7 Dictionary, *Definition of Massacre* (2017) Dictionary.com <http://www.dictionary.com/browse/massacre?s=t>.

8 David A. Semonian, '*President Putin Gives Parenting Award to Jehovah's Witnesses*' (2017) Jehovah's *Witnesses* <https://www.jw.org/en/news/releases/by-region/russia/president-putin-gives-parenting-award-to-jehovahs-witnesses/>.

9 United Nations Human Rights Office of the High Commissioner, *UN rights experts urge Russia to drop Jehovah's Witness lawsuit which threatens religious freedom* (4 April 2017) United Nations <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21479&LangID=E>.

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A General Overview

The Quistclose Trust: the breadth of its field

Mark Nasralla

I. INTRODUCTION

Since its inception in *Barclays v Quistclose*,[1] the Quistclose Trust ("QT") is a long recognised and invaluable device within the commercial world, particularly given its quasi-security element and its application during insolvency events.[2] However, many elements of the QT have been heavily debated resulting in both academic and practical significance. This paper argues that it would be incorrect to apply a QT beyond the field defined by the House of Lords, as endorsed asserted by Pincus J in *Re Miles*.[3] Part II will outline the general characteristics of the QT, Part III will discuss the problems associated with the QT and Part IV will discuss Pincus J's statement in relation to the QT.

II. THE TRADITIONAL QT

The traditional formulation of Qquistclose Ttrusts is provided by Lord Wilberforce (delivering judgement for the House of Lords) , who held that, a resulting trust that may arise when an asset is given to party B, by party A, for a specific purpose and if for whatever reason party B fails to fulfil the purpose, party A may take back the asset. Both parties must share a common intention that the lender shall retain the beneficial interest in the asset advanced and that the asset advanced shall be treated as separate from the assets of the borrower. If such an intention can be proved, the legal rights (to call for repayment of the asset) and the equitable rights (to claim title) will co-exist and will ultimately govern the relationship of the parties.[4]

III. THE PROBLEMS ASSOCIATED WITH THE QT

Courts in the late nineteenth century and early twentieth century have accepted the possible co-existence of a legal and equitable relationship such as a debt which had a specific purpose. The case of *Toovey v Milne*[5] encapsulates this attitude with Abbott CJ stating:

'I thought at the trial and still think, that the fair inference from the facts proved was that this money was advanced for a specific purpose, and that being so clothed with a specific trust, no property in it passed to the assignee of the bankrupt. Then the purpose having failed, there is an implied stipulation that the money shall be repaid. That has been done in the present case; and I am of the opinion that repayment was lawful, and that the non-suit was right.'[6]

The courts were influenced by the specific objective of the advanced asset; however, the factual situations in these previous cases were so similar that there was no need to consider some of the issues that were later raised in the *Barclays v Quistclose* case.[7]

Unfortunately, the judgement of the House of Lords proved misleading as the facts of *Barclays v Quistclose* were not adequately understood. The judgement has been left open to various interpretations in which a trust arises on the basis that there was a specific purpose of the asset advanced.[8] It is true that the intention of the parties was that the monies advanced by Quistclose Investments Ltd ("**Quistclose**") would be used for a specific purpose however, it would be wrong to consider that a trust arises merely due to the fact that there was a specific purpose for the monies advanced. It is standard commercial practice for a lender to provide a secured or unsecured loan to a borrower for a specific purpose however a trust does not arise.

There are two factors which set the situation in *Barclays v Quistclose* apart from a standard loan transaction, the first being the intention of the parties. The intention of that Rolls Razor Ltd ("**Rolls**") would not obtain beneficial interest from the monies advanced by Quistclose, meaning the monies advanced were not part of the assets of Rolls. In contrast, where a regular debtor/ creditor relationship exists, the debtor obtains the beneficial interest in the asset advanced.[9] Secondly, the intention of the parties was that the monies advanced constituted a separate fund from the assets of Rolls, which is why they were deposited into a separate account. Furthermore, Barclays Bank Ltd was informed of the separate nature of the monies deposited with the underlying reasoning of this being clear that the lender, Quistclose, retaineds a beneficial interest in the monies and control over them.

In contrast, Gummow J in the case of *Re Australian Elizabethan Theatre Trust*,[10] held that there was no express private trust that supported the case of the arts organisations in relation to the assets collected by the AETT. He His Honour considered the nature of the transactions and more specifically, he found the words used in relation to the monies to be vastly different from the exclusive nature of the specific purpose of the trust in *Barclays v Quistclose.*[11] His Honour found the language of the standard form precatory, rather than imperative (as is in the case of *Barclays v Quistclose*), and as a result, an express private trust was not created.[12] The belief that there was no express private trust was reinforced by the fact that the donations were not deposited into a separate account and held specifically for the arts organisations.[13] This case illustrates that the preferred purpose of the advanced assets will not be sufficient to give rise to a resulting trust, especially when the assets in question are not placed in a separate fund.

There was a third issue regarding the question of intention in the case of *Barclays v Quistclose*. It is clear that the judgement of the House of Lords suffered from an over-emphasis on the purpose of the advanced asset rather than the actual intention of the parties. The dual trust mechanism was constructed on the importance of the specific purpose. The primary trust would apply to enable the specific purpose to take place and where the specific purpose was unable to be fulfilled, the secondary trust would ultimately arise. Yet, certain questions come to mind, such as where the beneficial interest laid? The problem with this case is not that the decision

was made in favour of Quistclose, rather it is with the treatment of the legal issues. The emphasis placed on the purpose of the trust constituting the intention of the parties gives rise to a trust, being the QT, has confused many in what the nature of the trust is and the principal issues involved.

IV. PINCUS J'S STATEMENT

As a result of this confusion, some judges have attempted to limit the operation of the QT to situations where money is lent to discharge the debts of the borrower. This is evident in the case of *Re Miles*. Pincus J stated as obiter dicta '*in my opinion … it would not be right to apply the Quistclose principle beyond the field defined by the House of Lords*'.[14] Whilst the field defined by the House of Lords is somewhat ambiguous due to the fact that it would be impossible to definitely describe the characteristics of the QT, there are a few characteristics which are undeniable and if they are not present, then it would be wrong to apply the QT. Furthermore, Pincus J held that the case of *Barclays v Quistclose* nor any other case in which the QT applied, did not directly govern the facts of the present case and ultimately preventing prevented the application of the QT, as requested by the applicant.

V. CONCLUSION

It is impossible to definitely describe the characteristics of the QT. This is due to it being a great example of the interplay between contracts and trusts. Nevertheless, there are three characteristics of the QT which are undeniable.

The first being the fact that it was the intention of both parties that the monies advanced were not available for distribution amongst the creditors of the borrower. Secondly, it was the common intention of the parties that the monies advanced were to remain separate from the assets of the borrower. Finally, the relationship between the parties was based upon a common intention in the terms as outlined – this intention expressly created a trust.

These undeniable characteristics were evident in the case of *Barclays v Quistclose*, however were not present in the case of *Re Miles* which ultimately leads to the conclusion that Pincus J was correct in stating that it would be incorrect to apply the QT beyond the field defined by the House of Lords.

Footnotes:

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2 Chan, Brandon Dominic, *The Enigma of the Quistclose Trust*, <http://discovery.ucl.ac.uk/1470677/1/2UCLJLJ1%20-%20Quistclose%20Trusts.pdf>.
3 *Re Miles; Ex parte National Australia Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194 ("Re Miles"), 199 (Pincus J).
4 Barclays Bank Limited v. Quistclose Investments Limited [1979] AC 567; Chapple, Simon Harris, Jason Juriansz, John Mirzai, Nicholas Robinson, Ludmilla, Equity and Trusts: Law Principles and Practice (Palgrave Macmillan, 2011), 192.
5 *Toovey v Milne* (1819) 2 B & Ald 683; 106 ER 514 ("Toovey v Milne").
6 Ibid.
7 Ibid.
8 *Re Miles; Ex parte National Australia Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194 is an example of a case where this interpretation has been given.
9 In *Daly v Sydney Stock Exchange Ltd* (1986) ALJR 371 (at 374), Gibbs CJ pointed out that the QT was not applicable to the facts of the case because 'the loan in the present case was not made for any specified purpose and there was no agreement, express or implied, that the moneys lent should not form part of the borrower's general assets.'
10 *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681.
11 Ibid.
12 See Re Williams [1897] 2 Ch 12 for precatory trustees.
13 *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681.
14 *Re Miles; Ex parte National Australia Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194.

Event Review

The Changing Face of Law: A Global Perspective

Marija Yelavich

On Wednesday 16 August 2017, the Asian Australian Lawyers Association and the Women's Lawyers Association jointly hosted the event: The Changing Face of Law: A Global Perspective.

Welcoming Professor Frank H. Wu to King & Wood Mallesons, the night was one of many recent events hosted by the firm that focused on diversity.

Professor Wu's discussion was informed by his experiences as a Chinese man born in America. His experiences as a former law school dean, author, professor and the head of the prestigious non-profit Chinese American Committee of 100, has indeed placed him in the middle of some compromising and sobering situations. Luckily Professor Wu reassured the audience that he was a genuine "people person" and was hardly ever overly offended, but rather took these experiences as a learning opportunity:

"Cultural diversity is happening. It is unstoppable. And we have to face the reality…irrespective of your personal beliefs or values, cultural diversity is a practical business decision. You either understand your client and your adversary, or you fall behind."

Professor Wu primary message is that we all have a role to play:
"Race is not an issue of the past, and racism is not something that happens far away…the issue of racism is not black/white. It's not just victims and aggressors. Just because we don't make blatant remarks and just because we aren't the victims to these remarks, does not mean we can just wash our hands thinking we have nothing to do with it."

He finished with an analogy:
"Diversity, like democracy, is a process not an outcome. The micro aggressions account for more than the black and white picture… Democracy welcomes participation. It's not a vote to end things, it's a vote to contribute to the change and growth of society. This is much like diversity. It's a process that demands participation- that we role up our sleeves, speak our minds and in turn, listen to others. Diversity and democracy are beacons we celebrate and it's what makes America and Australia great."

Sapere Aude thanks the Asian Australian Lawyers Association and the Women's Lawyers Association in their continued support for our students. We look forward to growing our relationship and expanding the opportunities available for our students.

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AN AUSTRALIAN PRESIDENT

Cameron Shamsabad

On the 6th of November 1999, the Australian people voted to decide the future of the Australian constitution. The major question was whether the nation should become a Republic with a president appointed by Parliament or retain the system of constitutional monarchy inherited from the remnants of the British Empire. The referendum failed and has since lingered in the back of public debate. However, eighteen years on people are once again discussing the possibility of revisiting the possibility of an Australian Republic. In 2016, the Australian Republic Movement reignited its efforts with numerous events, national days of action, parliamentary friendship groups and University clubs established nationwide.[1]

However, the same lingering questions exist: why should we become a Republic? Which model should we prefer? What are the benefits? Aside from the social and cultural arguments surrounding the issue, there are numerous political and legal reasons why the reforms should be seriously considered.
The practical reasons for change may be divided, like Caesar's Gaul into three parts, each distinct though interconnected to the next:

HEREDITARY TITLE & POPULAR SOVEREIGNTY

The absurdity of monarchy itself as an institution could be stated no better than by Thomas Paine writing two centuries ago. As an Anglo-American writer, he was considered a profound influence on the American revolution, and stated of Monarchy:

"All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne... have no other significant explanation than that mankind are heritable property. To inherit a Government, is to inherit the people, as if they were flocks or herds."[2]

In applying this to the Australian context it is therefore the fundamental premise that the institutions who make laws should have their power derived from the people. Institutions of hereditary monarchy, especially when clothed in such immense power, as is the case, are at the best of times an inactive tyranny, which stain the principles of democracy and liberty that the nation strives toward. Beyond this however, Paine argued that hereditary rulers are as ludicrous of a proposition as hereditary lawyers, as humans by nature cannot inherit merit or enlightenment at birth.[3] As such this may form a basis of the reasoning behind why the Monarch today, both here and in the UK, plays a desirably small role only.

LEGALLY OBSOLETE SYMBOLISM

There are some that argue that the Crown is mostly symbolic in nature,[4] even more so after the case of *Sue v Hill*, where the Australian High Court established that the United Kingdom was a 'foreign power'.[6] However, the monarchy remains an immensely powerful constitutionally, even if it's practical function today appears merely symbolic. The Queen herself retains an express power to disallow any enactment of Australian parliament within one year of receiving the assent by her Governor-General.[7] While this is considered to be a dead letter, as it currently stands, the Monarch may still legally exercise this power by breaking convention.

In line with this view, the late Professor George Winterton argued that the true apex of the system is in fact the Governor-General who represents and exercises the absent Monarch's power.[8] The question then arises as to why we should retain the immensely powerful monarchy, given not only it's desired inactivity but also the fact that the Governor-General already functions in an almost wholly Australian manner. Therefore, it would seem that the Monarch exists as a vestigial fourth party to a legal and political system that already functions naturally by its own right. This would also validate the view that a minimalist Republican model (the simple removing of the Monarch), is possible without disrupting the current system.[9]

AN OVERPOWERED GOVERNOR-GENERAL

The Executive power of the Australian Government is derived from the Monarch, who delegates the duties to the Governor-General to act on the advice of cabinet ministers.[10] Some of the express powers include that the Queen's representative may dissolve parliament,[11] issue writs of election[12] and is commander-in-chief of the Military.[13] However, the Governor-General also holds certain reserve powers, which are derived originally from Royal prerogative. Although the powers are unwritten they may be exercised without ministerial advice.[14] A modern example of such being power being arbitrarily utilised is the events of November 11th 1975, where Governor-General Sir John Kerr dismissed the sitting Labor Government under Gough Whitlam, by utilizing the executive reserve powers of the Monarch.[15] Furthermore, the Queen refused appeals to overturn the dismissal, creating what many considered a constitutional crisis.[16]

The event was a sobering reminder: the reserve powers of the executive, emanating from the crown of the UK, could be utilised against democratically elected members of parliament.[17] While this reality inspired many to become Republicans, it also led the movement to divide on the question as to whether a future President should have such a reserve power. Indeed, Alan Ward criticised the 1999 minimalist proposal on such grounds, as it would have done little to codify reserve powers of the President, instead relying more on conventions after the transition.[18]

Therefore, the problem stands that these potentially dictatorial powers that are derived from the hereditary institution of Monarchy have few true constraints and have little regard for the will of the people and consent of the governed. While any one of these factors would be reason alone for reform the overall effect with all factors combined makes a strong argument in favour of

a Republic. There, however remains division as to what model should be adopted.

THE REPUBLICAN OPTIONS

There are two main categories of Republican models and each is based on the degree to which the constitution is reformed.

MINIMALIST REFORM

In line with the model that went to the 1999 referenda, the foundation of the Minimalist proposal is the principle that Republican reforms should be made without impacting greatly on the current constitution, allowing for the system to function as it currently does.[19] This was the case put forward by Malcolm Turnbull in the 90's. Turnbull stated that to have a more expansive reform would alter the balance of the constitution, which he argued could upset the relationship between the Legislative and Executive branches.[20] This was on the basis that a popularly elected presidency may form a political mandate independent of parliament.[21]

While this may be the case, the minimalist approach (setting aside its defeat in 1999) would still require reform of the executive as it currently stands. In order for the checks and balances of the system to be retained, Professor Winterton argues that a minimalist model would still require codification of the President's powers and means of dismissal.[22]

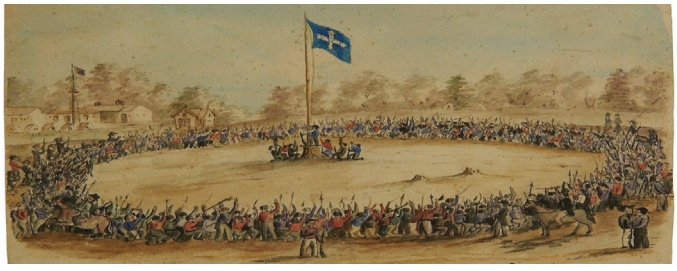
The inherent benefits to parliamentary appointment of the Presidency would be that the costs for elections would be alleviated, the position would be almost ensured to serve in a neutral capacity, and further codification of the executive would mean the current parliamentary democracy would be mostly retained.[23]

DIRECT ELECTION REFORM

While the reform would necessarily require some codification of Presidential powers and creation of checks and balances to ensure distribution of powers is maintained, the Direct Election models of Republic require more expansive change of the constitution.

Prior to the 1999 referendum, polls showed that as late as October 1999, 70% of Australians favoured an elected president, when contrasted to 27% who supported the parliamentary appointment model.[24] Immediately after the Referendum, further polls showed that 37% of 'No' voters stated their vote reflected their desire for a popularly elected President.[25] Needless to say, this view has likely persisted over time with political dissatisfaction high among the general public, who arguably would be receptive to change should it empower people with more rights and foster trust in the system.[26]

Such models require constitutionally established protocols to allow for Presidential nomination and election. This would be in addition to the amendments for codification of powers, and provisions for dismissal and impeachment.[27] Professor Winterton argued that in any case, the Presidency should be granted only such power as is 'absolutely necessary.' [28]
The caution being that while this model allows for larger scale reform, many fear that politicisation of the role could lead to struggles for power between executive and legislative branches of Government.[29] While this is indeed a possibility, there are examples elsewhere in the world (such as Ireland), where a popular presidency isn't politicised. Whether this will eventuate in Australia will ultimately depend on what the powers are and how the people expect the President to exercise their duties.



CONCLUSION

It may be stated therefore, that the system as it currently exists, functions on principles and institutions that are both outdated and undemocratic. Depending upon the Australian public's desire for change, the renewed push for an Australian Republic is legally desirable to readdress the issues stated previously. Whether this will be expressed in the form of a Minimalist or Direct Election model, arguably the notion of constitutional reform should be welcomed. Indeed, a successful Republic referendum will also potentially foster further development and discussion, around matters of Indigenous issues, abrogated Federalism and entrenching a Bill of Rights in the constitution.

Footnotes:

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2 Thomas Paine, 'The Rights of Man' in Philip S Foner (ed), *The Complete Writings of Thomas Paine*(Citadel Press, 1945) 243, 364.

3 Thomas Paine, 'Common Sense' in Philip S Foner (ed), *The Complete Writings of Thomas Paine* (Citadel Press, 1945) 3, 9-17

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6 *Sue v Hill* [1999] HCA 30; 199 CLR 462, 484 [57].

7 Commonwealth of Australia Constitution Act (1901) s 59.

8 George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986), 31.

9 Sarah Louise Murray 'The Minimalist Winterton Model' in Sarah Louise Murray (ed), *Constitutional Perspectives on an Australian Republic: Essays in Honour of Professor George Winterton* (Federation Press, 2010) 42, 50.

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11 Ibid s 28.

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19 Stephen Mills, 'The Australian Republic: The Failure of the Minimalist Model and the Next Steps Forward' (2002) 61(2) *Australian Journal of Public Administration* 10, 12-16.

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26 Thomas Andrews and Glenn Patmore. 'Fiducial Governance: An Australian Republic for the New Millennium by John Power' (2011) 70(2) *Australian Journal of Public Administration* 224.

27 Australian Government Republic Advisory Committee, *An Australian Republic: The Options* (1993) 1, 10-18.

28 George Winterton, 'Presidential Powers in Republican Australia' (1993) 28 *Australian Journal of Political Science* 40, 46.

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TOP TEN LEGAL MYTHS

Niall Clugston

The law says...

Misleading. The law is what it is, in a particular jurisdiction, at a particular time, relating to particular circumstances. These answers relate to here (New South Wales) and now (2017). They should not be relied on as legal advice. If you get into trouble, hire a good lawyer, don't try to mount a case based on a page ripped out of a student magazine.

Many people base their understanding of the law on American news, movies, and TV shows. Even if the reporters and scriptwriters have got it right, American law is different from Australian law in many ways. For example, a copyright violation can be a crime in the USA, but it isn't in Australia. It's still wrong, but you won't go to jail – you'll only have to pay damages (compensation).

The English common law system in force in Australia is shape-shifting, and changes with every decision handed down by the High Court, every piece of legislation passed by state and federal parliaments. In the end, it all comes down to the decision by the court on the day in every single case. The High Court can overturn the decisions of lower courts. It can overturn legislation based on the Constitution or common law principles. High Court judgements are binding. But not on the High Court. Welcome to Luna Park.

It's not an assault if the other person doesn't touch you

False. Technically speaking, in criminal law an assault is the apprehension of an attack. Battery is the actual touching. This was recently confirmed by the NSW Court of Appeal. There have been plenty of assault cases where touching did not occur; for example, fearing imminent harm, a young woman threw herself from a moving van. This was held to be assault occasioning actual bodily harm. English judges have argued that a silent phone call can constitute assault if it creates an apprehension of an immediate attack.

You can't sue lawyers

False. The traditional position of the English common law system was that no one could be sued for what they said in court. This was extended to 'advocate's immunity' in which lawyers could not be sued for what they did whilst preparing their clients' cases for court. This has been abolished in all other English common law jurisdictions, but has been upheld by the High Court of Australia and is still in force here.

Everyone is presumed innocent

Misleading. The presumption of innocence only relates to criminal matters. In civil matters, for example, if you are sued for defamation, the onus of proof is on you to show that what you said is true and in the public interest.

A related issue is 'sub judice contempt'. This prevents the media from running commentary that could prejudice a jury in a court case. However, this only applies to that particular jurisdiction when the case is running. In other words, the Australian media is not bound to respect the presumption of innocence in reporting trials happening overseas.

Possession is nine tenths of the law

False. Tenants are in possession of rented properties, but do not own them. They can be asked to leave by the landlord when their lease ends, or with sufficient notice if there isn't a fixed term lease. Similarly, if you hire a car, you acquire possession, but you don't own it. A courier is in possession of your parcel, but doesn't have 90% of the legal rights to it.
But, yes, possession generally equates to ownership if there are no other legal claims to the property.

Squatters have rights protected by law

Not really. Squatters have 'adverse possession' of a property against the will of the owners. They can apply to be made owners after 12 years, but up to that point the owner has a right to evict them. In New South Wales, the law of adverse possession has basically been abolished for government property. The golden age of the 'squat' is long gone.

Proof beyond reasonable doubt

This only applies to **criminal cases.** Civil cases – when someone sues for damages, etc – are decided on the balance of probability.

An oral contract isn't worth the paper it's written on

False. English law lords have construed contracts based on what might have been said in used car yards. A major exception to this is contracts relating to the sale of land, which have to be on paper.

Cyberspace is a lawless frontier. The law has been outpaced by changes in information technology

Not really. Yes, there is always need for new legislation as society changes, but the law of murder doesn't have to change every time a new weapon is invented. Our old common law system has proved tough and flexible enough to deal with the advent of mail orders and telex machines. It has taken the growth of the Internet in its stride. There is no leading case that has found online contracts are not as valid as paper ones. (Again, with the exception of land.)

A few years back a former student was ordered to pay $105,000 for defaming a NSW school teacher on Twitter and Facebook. Liberal Party pollsters Mark Textor and Lynton Crosby sued former Labor MP Mike Kelly over a tweet.

'Identity theft' is not a new crime. Fraud involving impersonation is as old as the hills. The Bible tells of Jacob assuming the identity of his brother Esau in order to receive their father, Isaac's blessing, and take

Footnotes

1. See, for example, Australian Communist Party v Commonwealth (1951) 83 CLR 1.
2. Darby v DPP (NSW) (2004) 61 NSWLR 558.
3. Zanker v Vartzokas (1988) 34 A Crim R 11.
4. Ireland and Burstow [1997] 4 All ER 225.
5. Ryan D'Orta-Ekenaike v Victoria Legal Aid [1985] HCA 12.
6. Limitation Act 1969 (NSW) s 65; Real Property Act 1900, (NSW) Pt 6A.
7. Limitation Act 1969 (NSW) s 27(1),(2); Crown Lands Act 1989 (NSW) s 170.
8. Oscar Chess Ltd v Williams [1957] 1 WLR 370, Dick Bentley Productions v Harold Smith (Motors) Ltd [1965] 2 All ER 65.
9. Conveyancing Act 1919 (NSW) s 54A.
10. See Brinkibon v Stahag Stahl Un Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34.
11. Mickle v Farley [2013] NSWDC 295.
12. Michaela Whitbourn, ' "Bigger than Ben Hur": Mark Textor and Lynton Crosby's Twitter defamation case against former federal Labor MP Mike Kelly', Sydney Morning Herald (online), 12 December 2014.
13. <http://www.smh.com.au/nsw/bigger-than-ben-hur-mark-textor-and-lynton-crosbys-twitter-defamation-case-against-former-federal-labor-mp-mike-kelly-20141211-124u5h.html>
14. Genesis ch 27.
15. Australian Constitution s 128.
16. Australian Constitution Preamble, ch VI.
17. George Williams, Sean Brennan, and Andrew Lynch, Blackshield and Williams Australian Constitutional Law and Theory (Federation Press, 6th ed, 2014) 1339-

OPINION

NSW WOMEN STILL WAITING FOR ABORTION TO BE TREATED AS A HEALTH ISSUE

Pip Hinman

Women have again been let down by the majority of MPs in the NSW Legislative Council who voted down a Greens' bill to decriminalise abortion on May 11. The bill would also have enacted safe zones around abortion clinics.

The vote was 25 against and 14 in favour of Dr Mehreen Faruqi's Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 and it was greeted with cries of "shame" from the packed public gallery. Later, Faruqi said she was disappointed with the outcome and described those MPs who voted against the bill as "completely out of step with modern medical practice, community expectation and laws in almost all other states". She also said that the law would eventually be changed.

All five Green MPs, 8 Labor MPs and the Animal Justice MP voted for the reform. Every Liberal and National Party MP voted against it (even though they had been given a "conscience" vote). Faruqi first introduced the bill in August 2016. She said at the time that it was well past time for abortion to be treated as a health issue and that the law needed to be brought into line with majority thinking on this important and sensitive issue.

A Lonergan Research commissioned by the Greens in September 2015 found that 87% support abortion rights with more than half indicating that women should be able to obtain one at any time. Just 6% said abortion should not be allowed under any circumstances. Doctors and criminalists are keen for the change and are circulating their reasons in an open letter to NSW MPs.

The doctors say: "Abortion is a public health issue, but it remains a crime under sections 82, 83 and 84 of the NSW Crimes Act1900. One in three women in Australia will have an abortion in their lifetime and it is time to bring the laws in step with medical practice.

"Outdated laws such as this only serve to interfere with the practice of medicine. We implore you to take action now and get rid of this archaic law."

Law and criminology academics working at universities across NSW agree.

Their open letter to NSW MPs says:

"Abortion is a health and welfare matter, not a criminal issue. Women who have an abortion, and their doctors, should not face the risk of criminal prosecution."

Faruqi's bill sought to repeal the offences under the Crimes Act 1900 relating to abortion; abolish any rule of common law that creates an offence relating to abortion; ensure that doctors with a conscientious objection to abortion advise the person requesting an abortion of their objection and penalise those who fail to refer that person to another health practitioner who does not have such a conscientious objection or to a local Women's Health Centre; and to provide for exclusion zones, also known as "safe access zones", around premises at which abortions are provided.

All states (with the exception of Queensland) and both territories have now taken abortion out of criminal codes, even if the laws governing abortion vary in their restrictions. Most also have safe access zone laws too.

For years, some Labor MPs have been reluctant to support a change in the law arguing that any change in law is too risky as more conservative MPs may seize the moment to tighten up the legislation. However, attempts by MPs on the religious right to do this have proved unsuccessful: there is now a view that taking abortion out of the Crimes Act may make it more difficult for conservatives to enshrine foetal rights into law.

There is little disagreement about supporting the safety, well-being, privacy and dignity of people accessing abortion services, a provision of Faruqi's bill. A separate safe access zone bill introduced by Labor MLC Penny Sharpe is listed for debate in the NSW Legislative Council.

Faruqi said she would not give up, and the bill was "far from radical". The provisions in the bill are already operating in various parts of Australia effectively. Abortion will be taken out of the Crimes Act, she said, and women will be able to access reproductive health clinics without harassment in the future.

Pip Hinman is a long-term activist for women's rights. She is a member of the Socialist Alliance.

HOW TO BE A 'PROPER LAWYER'- A FEW TIPS FOR NEW LAWYERS

Clarissa Rayward

It seems not that long ago that I was three years into a five year law degree trying to work out how on earth I was ever going to actually be a 'lawyer'. A 'proper lawyer'- the sort that wears a fancy suit and shiny black shoes that would spend her days gazing out a big glass window, enjoying the expansive view from a tall story office. Well that was what my friends spoke of anyway.

The problem was, I didn't want to be 'that lawyer'. I wanted to be anything but that lawyer. But after already having had tossed in that architecture degree, I could not cope with seeing the disappointment on my Dad's face when I had to tell him I was doing it all over again!

So I decided I had better go and actually be a 'lawyer'.

THE BEGINNINGS OF THIS 'PROPER LAWYER'

Sixteen years ago it was a bit easier to land that first job in a firm and so I did. A very small firm with greyish brown walls, small windows and no expansive view. Not quite the glamorous setting my friends spoke of but it was a law firm and I had a job. I was soon to be a 'proper lawyer'. In those days we had a wonderful thing called Articled Clerkship. I was an 'Articled Clerk'! I of course had no idea what that meant but it sounded impressive and was obviously only one step down from being a 'proper lawyer', so I took the job!

I soon learned that 'Articled Clerk' was a fancy way of saying "general office dogsbody". The job description seemed to include no end of tasks and would have one also aptly known as 'Receptionist, Chauffeur, Luggage Handler, Glorified Office Assistant, Secretary, Filing Clerk, Girl (or boy) Friday and my favourite- Barista- of the coffee variety, not to be confused with the actual legal role of 'Barrister'. I was, by the end of my term, an expert in all things of the instant 'International Roast' coffee kind! Of course your pay equated to the high level skill required for your diverse role. In fact, I am certain that most Articled Clerks found themselves right where I was- earning less, working long full time hours, than they had at university thanks to the combined efforts of the Austudy program and their weekend hospitality job!

But did we complain- well yes, to each other- but no, not really. We accepted that we knew so little about the law that our skill set was best put to use trying to make coffee art out of the weekly Office Works delivery of the 1kg tin of International Roast and complimentary monte carlo biscuits!

Two and a bit years later I was of course a talented Barista (of the instant coffee variety), filing guru, dictation wiz and Girl Friday extraordinaire! I could answer your phone with the dictation headphones still running, typing those documents before

whipping that coffee art into shape. And, the best bit, I was now a 'lawyer'! A 'proper' one....

Somewhere in amongst fine tuning my Girl Friday skills, I had also been running to Court every second day, meeting clients in prisons, being chased around shopping centres trying to keep the Channel 9 Current Affair team away from a newly infamous client, drafting urgent Court material for the return of young children, briefing counsel in many and varied court actions. I had somewhere in there actually learned the skills of a 'proper lawyer'.

THE MODERN DAY 'PROPER LAWYER'

Now I have the privilege of running a bustling little family law firm. Now, I am 'that lawyer', deciding the fate of new, young lawyers who look and sound a lot like me 16 years ago, trying to get their first break.

Right now, where I live, there are more students finishing law degrees than ever before. And yet, there are fewer jobs, than ever before, for these young graduates. Now, thanks to changes in our profession, the long lasting role of an Articled Clerk has gone by the wayside. Young graduates after 6 months of post graduate study are all of a sudden 'proper lawyers'- the fancy kind with nice suits and sparkly eyes (but without the ability to make International Roast Coffee Art thanks to George Clooney and his Nescafé pod machines lining office boardroom walls).

Each day I am hearing and seeing more and more of these 'proper' young lawyers struggling to find their first break. Our industry is competitive, how do they stand out from the crowd? I was not the girl at University with the highest marks, I was not the one running the social groups, the debating team or the Law Review. I was the girl that worked four jobs to pay my way through. But that experience taught me my passion.

When I first sat in my little greyish-brown office with the dusty floor and mouldy desk, I knew that there was just something about it, something about the people, something about the relationships that was just for me. I quickly experienced how challenging divorce can be for families. I also quickly learned that my skills, my knowledge, my values and my passion meant that I could help families through their separation in a 'better' way. My family and my relationships with others are the most important things in my life. There is no more important a relationship than between a child and their parents.

While whipping up International Roast lattes, I learned that the small comfort of a cream biscuit and a poorly made coffee could be enough to settle a scared client, to make them feel at home. I learned that my silly stories of my travels, my childhood and my then limited life learnings were enough to offer comfort.

I soon realised that I was not alone in my passion. I found mentors that shared my passion- senior lawyers, barristers, counsellors', psychologists, clients, business owners and friends and I watched, listened and learned. Law school can't and won't teach you the skills you will need for so much of your career. That highly competitive environment was never set up to teach its graduates the skills needed to actually work 'with' people and yet these are the skills that most of you will need to be able to survive in the modern day law firm.

FOLLOW YOUR PASSION (LEGAL OR NOT!)

Sixteen years later and I now run a team of young graduates becoming 'proper lawyers'. Will they start their careers as proper lawyers knowing the world? Of course not- but what they will know is their passion and how to find their way to creating a career that aligns with their dreams.

I am not sure we are teaching our graduates to find their passion let alone follow it. But do. And don't give up. Don't be afraid to take that first step wherever it might be and just start. Carve your career by finding your mentors, show them respect and they will share their knowledge, their wisdom. Your job as a lawyer will be so little about the law. It will be about people, your clients, their fears, their concerns, their worries. Learn about your clients, learn about people and learn about your colleagues. And most of all learn about yourself. In a career that can from the outside be seen as stifling you will find so many talented, creative, interesting people finding ways to make a difference for others.

Check out
https://www.thehappyfamilylawyer.com/
for more articles

Event Review

HPAIR
August 2017

Sam Marsh

Sam Marsh, student, reflects on her time at the: "Harvard Project for Asian International Relations" (HPAIR), and concludes that the future of the planet is in safe hands.

I was honoured to be selected by the Academy of Western Sydney University to attend this prestigious conference. There were over 2000 applications to attend and only 600 students were selected. These students heralded from all over the Asia-Pacific region, including the Philippines, Japan, Bangalore, to name a few, as well as the United States; there were over 60 countries represented.

I registered for the "Security and Diplomacy" stream and heard from three renowned specialists; the Honourable Bob Carr, Dr Luke Nottage (Co-Director Australian Network for Japanese Law) and Dr Carl Ungerer (Head of Leadership, Crisis and policy Management Programme at the Geneva Centre for Security Policy). Each panelist provided insight into various aspects of the current Asian "Power Play" and the effect of the rising middle class in both India and China, and its long-term effect on prosperity within the region.

The most interesting and stimulating component of this 5-Day conference was the "Impact Challenge" with UNICEF. In teams up to 8 students from across the Asia-Pacific region we were entreated to create an advice to the Minister for Immigration and Border Protection asking him to reconsider the border protection policies, in particular the "Stop the Boats" policy, in light of the recent September 2016 New York Declaration. 194 countries affirmed that it is the "political will of the world to save lives, protect rights and share responsibility on a global scale", with respect to asylum seekers.

There are other programs throughout Australia designed to assist refugees to assimilate better into the community, and we recommended that similar programmes be incorporated. One such program in Perth known as the "First Home Project", provide subsidised rental accommodation, which not only provides refugee families with a home, but also rental history, which can be a major barrier for refugees.

Of course corporates have key political influence and the more involved they are in programmes such as these the more likely they are to influence politicians. Perhaps the "Stop the Boats" position, which goes against our international obligations including the Refugee Convention and the Convention on the Rights of the Child, will become a thing of the past, and we will implement a more humanitarian response.

This conference was one of the best I have ever attended as a student of Western Sydney University. These students are hungry to better the world and are up for the challenges that they face. I have made some wonderful new international friends and look forward to keeping in contact with them online.

For the full article log on to
www.daretoknowpublications.com

First Year Law Retreat: The WSLSA Prepping our First Years for Success at Law School

Over the weekend of 4-5 March 2017, the Western Sydney Law Students' Association (WSLSA) hosted the First Year Law Retreat at Camp Wombaroo, 1.5 hours south of Sydney.

Thirty-five eager new recruits attended this overnight retreat and walked away invigorated and empowered.

During the retreat, the First Years participated in a range of activities designed to prepare them for the rigors of law school. Students straight from high-school (plus a few with a little more experience) engaged with one another and made lasting friendships. The attendees had a fantastic time participating in activities including time management, study skills, note taking and mental health sessions.

Our First Years also thoroughly enjoyed preparing and participating in the Witness Examination sessions. Students spent several hours preparing their arguments to present before a judge on the final day. Four students walked away with $150 gift-vouchers for their efforts, and all students found the activity lots of fun.

The definite highlight of the retreat was the Alumni session, attended by Jared Bennett, Dr Elfriede Sangkuhl and Deng Adut. Deng, 2017 NSW Australian of the Year, provided our keynote address and spoke on the power of resilience and commitment. He encouraged our First Years to remain focused on the goal of completing their law degrees, regardless of the obstacles that come their way. Deng emphasised that learning self-discipline as a law student will maintain them throughout their careers.

For more great opportunities like this, be sure to sign up to the WSLSA on Facebook and Orgsync!

Applying for Scholarships; Insights from the Applicant, the Donor, and the University

Student, Lucinda Borg, sits down with Bartier Perry Lawyers and the University to explore the scholarship application process

Lucinda Borg

Making the leap of faith to apply for a scholarship can be a tough decision. Having gone through the process myself, I remember not knowing what to expect, nor what was expected of me. Regardless, I thought it was worth applying for, and on reflection, it was one of the best decisions I have made during my studies.

To help guide future applicants, this article will examine the three perspectives involved in the scholarship process: the perspective of the applicant, the donor and the University. The first section will break down the steps in applying and interviewing for a scholarship based on my experience as an applicant. The second section is an interview with Bartier Perry Lawyers, the donor of the Bartier Perry Scholarship, discussing their role within the scholarship process and their relationship with recipients. The third section is an interview with the University's Donor Relations Officer to share their insight in facilitating the scholarship process and their advice to students applying. This article should provide a well-rounded view of the process and give any student who is interested in applying the courage to take the plunge!

I. The Applicant

1. **Get confident!**

The first step is being confident. Remember that scholarships are based on finding students who show potential. Recognise all your achievements, including marks, work and volunteer experience, and use this to your advantage throughout the application process.

2. **Research**

Research is fundamental to your application. By selecting the right scholarship to apply for, you will be able to explain to the scholarship panel how you are the most suitable candidate.

Western Sydney University offers a range of scholarships focusing on different criteria. The University website breaks down the categories of scholarships to help you sift through those you are eligible for. When reading through the descriptions for each scholarship, make a list of:

- the degree/s the scholarship is aimed towards
- the purpose of the scholarship and, possibly, why it was created
- the qualities and experience the recipient should possess
- the aspirations which the recipient should share
- the donor of the scholarship (for background research)

When researching scholarships, it was clear that the Bartier Perry Scholarship was the one I most connected with as it was aimed at females who demonstrate leadership skills. Early on in my degree, I was involved in various executive roles in clubs and societies, and I felt that this experience would demonstrate that I was a suitable candidate.

3. **Application**

Your application should be a clear and compelling overview of who you are, your skills and future aspirations. Each section should align with the criteria of the scholarship you are applying for and demonstrate how the scholarship would support you and your goals.

Start your application by introducing yourself and broadly touching on your skills, experiences and initiatives. You should think about what personal qualities you want to focus on in demonstrating how you are most suited to the scholarship. Your application should then address the criteria of the scholarship and how your skills fulfil them. Provide evidence of your skills by using examples. The STAR method is one way of conveying skills in a specific and meaningful way.

Before submitting your application, proof read it thoroughly. You should ask another person to read it to ensure that there are no errors and that your application demonstrates that you are a suitable candidate.

4. **Interview**

Prepare for the interview by reading over your application and think about potential questions you could be asked. These questions can include:

- Why are you the most suitable candidate?
- What are the challenges you have faced throughout your studies?
- How will this scholarship help with your studies and goals?
- Why did you decide to study law? What are your passions?
- Where do you see yourself in 5 years?

My interview was with a panel, including a Bartier Perry representative, a staff person from the Advancement and Alumni Team and one member of the law school. I remember feeling nervous with the thought of facing a panel. However, all panellists were welcoming, and were genuinely interested in learning why I was a suitable candidate. Before the interview, I conducted further research on Bartier Perry Lawyers with the aim of holding an engaging conversation when discussing the firm and their involvement in the scholarship.

Your answers do not need to be scripted, but do practice saying your answers out loud and prompt yourself to highlight key areas. If you are asked a difficult question, remember to keep calm and take your time (maybe have a sip of water) while thinking about an answer.
You should also prepare a list of questions before the interview to demonstrate your interest.

5. **Offer**

After your interview, you will be notified on whether or not you were successful. If you do not receive an offer, do not be discouraged, and contact the University for feedback. If you are successful and accept the scholarship offered, I encourage you to take all opportunities afforded by the scholarship. Keep in mind that you are now a representative of the scholarship and the University.
Receiving the Bartier Perry Scholarship has given me many opportunities throughout my studies. I have had the benefit of visiting the firm's office in the CBD for functions and have personally met the Chair, David Creais. My scholarship has also helped me financially, allowing me to focus on my studies and lead social initiatives.

II. The Donor - *Interview with David Creis (Chair of Bartier Perry Lawyers*

1. What inspired Bartier Perry to fund the Bartier Perry Scholarship offered at Western Sydney University?

Corporate social responsibility is an important element of the Bartier Perry culture. It is an element that we are keen to maintain and develop (examples are our adoption of a corporate social responsibility policy and the establishment and support of a CSR Committee). Since we believe that education is the foundation of every great society, providing opportunities to acquire valuable knowledge and skills is a fundamental social responsibility.
Also, Bartier Perry has had a long standing relationship with Western Sydney University, both as a legal adviser and donor of academic prizes, which we are keen to foster and grow. This includes looking for ways to partner with Western Sydney University to drive initiatives focused on contributing to the community and providing access to a quality education to enable students to confidently enter the workforce and make a difference in their chosen profession.
So, when we were invited to offer scholarships to four deserving students for the duration of their studies, we saw it as a means to

- Make a positive investment in the future of the legal profession in particular, and society in general,
- Encourage and support 'less privileged' students from Western Sydney,
- Build a stronger relationship with the University, and further one of the core ambitions of our corporate strategy, being the cultivation of a long term commitment to excellence through a dual focus on performance and development.

2. What were Bartier Perry's thoughts when deciding to create a scholarship aimed towards women who demonstrate leadership qualities and/or are involved with community service activities?

Bartier Perry understands the benefits of a diverse workforce at every level, and recognises the need to promote women in the workplace and to increase the number of women in leadership roles in order to achieve an essential constituent of that diversity. We also see firsthand the beneficial impact that well-educated, ethical lawyers have in the business and wider community.
Accordingly we set out to support and inspire public-spirited female law students in their developing years who aim to pursue their passion for law and to positively impact the legal profession, and to encourage them to set their eyes on leadership positions. To do this, in setting the parameters for the Bartier Perry Scholarship, we took the view that not only should the recipient be a female law student with an intention to pursue a career in law, but that she should also have demonstrated a commitment to the wider community and possess leadership qualities.
It is hoped that donees fitting those criteria will be high performing and hard working yet well balanced students, with a social conscience and the potential to lead.

3. What are the qualities you are looking for in a candidate?
In no particular order:

- Leadership potential
- Intelligence
- Excellent communication skills
- Integrity
- Commitment to community
- Social awareness
- A commitment to pursuing a career in law
- Excellent academics
- Diligence

4. How do you hope that the Bartier Perry Scholarship will help the recipient in their studies and their future career?

On a practical level we hope this scholarship will allow the recipient to better concentrate on her studies by removing a significant financial burden, and the associated distraction that funding that impost would otherwise entail.

We also hope that the Bartier Perry Scholarship will inspire, motivate and give courage to our scholarship recipients to pursue a successful career in law, to become strong leaders and advocates for a diverse workforce and the needs of the wider community, and to demonstrate the benefit to society of vibrant and ethical lawyers.

III. The University - *Interview with Vanessa Smyth (Donor Relations Officer)*

1. What is the process of selecting a candidate?

Depending on the scholarship, some are awarded based on application and some may have interviews.
Similar to a job application, the application is ranked according to the criteria and an assessment is then made to either invite the applicant for an interview (if this scholarship needs an interview, such as if there is work experience) or the applicant is sent an email making an offer.

2. What makes an application stand out?

Very simple! Clear, concise and to the point, and above all making sure you answer the criteria. For example, if a scholarship asks for a passion in a particular industry, make sure you talk about that.

3. What types of experiences do you look for in an application?

All life experiences!! We are generally looking for well-rounded applications, talking a bit about family, social and academic life. But above all making sure that you answer the criteria.

4. What do you look for during the interview stage?

My main piece of advice here is to prepare like you're coming for a job interview.

- Research the donor if you can (no matter if it's an individual or an organisation).
- Think about the criteria and rehearse verbally with a friend some answers to the questions.
- Be yourself.
- Dress neatly (doesn't need to be a suit, but needs to look professional).
- Don't stress! The panel won't bite!

5. What advice would you give students reading this piece when applying for a scholarship?

Be yourself, talk about your passions and make sure you answer the criteria and provide evidence. For example, if the criteria says you need to work as a volunteer, providing evidence of that experience (sorry that's 3 pieces of advice!)

6. In your experience working with recipients, what opportunities can scholarships provide?

Scholarships can be amazing opportunities, such as:

- Being able to meet your donor and having opportunities to able to learn and network with each other.
- Meeting other students form different courses at events that you will be invited to.
- Of course the financial benefits! Donor funded scholarship funding can usually be used on whatever you see fit; for some people this might be buying a car, or a laptop or might be to help with day to day activities such as groceries or university supplies or could be to make payments to HECS.


EVERYONE HAS THE RIGHT TO LIVE AND STUDY IN A SAFE AND SUPPORTIVE ENVIRONMENT
Sexual harassment and assault is Never OK. We encourage you to report and seek support:
In an emergency call 000
Seek confidential support, advice and counselling 24/7 from the national hotline: 1800 737 732 (RESPECT)
#NeverOK
NEVEROK.ORG/LGBTIQ