



The sky is the limit, and the sky is blue

Talitha Fishburn chats with Mark Higgins, the New South Wales Bar's award-winning formation skydiver.

Ironically, skydiving is a grounding pursuit for Mark. His approach is almost meditative. 'It forces you to be in the moment', he reflects. 'It clears your head of noise... At that critical moment nothing else exists but the immediate present'. When he lands, he smiles. For an enduring period of gathered euphoria. Contrary to popular belief, skydiving is not the pastime of adrenalin junkies. Some try it, but they tend to move on. Instead, it is a haven for the meticulous. It is a sport focussed on utmost precision, especially *formation* skydiving.

For every formation skydive, Mark devises detailed contingency flowcharts. This is no fly-by-night sport. He maps out every possible scenario, with a corresponding planned response. A Call To Action from 20,000 feet. This approach is vital where time to act is critical; seconds, or even less. For instance, scenarios such as a teammate not exiting correctly, premature openings, line twists, canopy collisions, environmental factors changing...the parachute not o-p-e-n-i-n-g... well, he has a backup for that one: contingency *numero uno*.

The focus on precision is not without



comparison to practice at the Bar. Both require precision in their delivery. Mark draws further analogies between skydiving and barristerial work. For instance, the need to plan, the need to prepare and the need to manage (occasionally) stressful situations. Unsurprisingly then, there is an Australian Lawyers Parachute Society, albeit, currently with only 10 members, most of whom are based in Queensland. Mark observes that it is hard to identify a 'type' of skydiver, but it is not uncommon for them to be drawn from the ranks of the military, special forces, emergency services and, perhaps curiously, IT. These occupations require precision, careful

planning and programming.

Most skydivers commence in their 20s. Mark is atypical in this regard. His first jump was in his 40s. He is a member of POPS, aptly acronymised as it stands for 'Parachutists Over Phorty Society'. The sport attracts longevity. To this end, Mark has jumped with an 86-year-old veteran skydiver who has jumped for over 60 years. Mark values the human capital of the sport's elders.

But utmost precision does not mean that accidents do not happen. Mark laments that on average, one person a year loses their life to skydiving in the skydiving circles known to him. This includes the life of his mentor who encouraged his entry to skydiving as well as a subsequent coach and three other friends. The losses hit Mark hard; he took time away from the sport on each occasion. But he resumed the sport by dedicating a period of advanced training with some Arizona based champions. Despite the fragility inherent in his sport, his passion has gone upwards, but he is ever alive to the realities of loss that characterise the sport, even at its highest levels. If accidents happen they are almost always catastrophic if not fatal.

Mark's formation skydiving serves as artistic installations of geometric patterns. There are various formation categories, for example, 4 way, 8 way, 16 way etc leading to 'Large Formations' or 'Big-Ways'. Mark's technique is 'flat'. This means belly to ground; aka Superman style.

The competitive scene is niche. But competition is hotly contested. Records are broken, and new ambitious goals are soon baked. The World Championships (held every two years) will take place for the third time in Australia in October 2018. Scanning the list of former world champions, most are drawn from either the United States of America or France.

The regime for national and world records is near militaristic. A week-long camp takes place involving at least double the required jumpers. Over the week, half the field is eliminated, leaving only the best. At 19,000 feet (and below) risk is unassailable. Mistakes cannot occur. Team solidarity is key.

The crown jewel of Mark's competition achievements occurred in June 2015 in Perris, California. Incredibly, it was a 119 person 'snowflake' formation. It is the current record for the largest group of Australian formation skydivers. It involved seven planes and thousands of hours of preparation. To qualify, the team were required to be linked together for at least 3 seconds; no mean feat at 200 feet a second from 19,000 feet. Mark's role was

'outer whacker' which required him to be on the very outer rim. The 'last say', so to speak. Not for the faint hearted! Training took three years in smaller groups before converging in California to take the plunge.

The sport takes daily maintenance. At a minimum, Mark does 50 chin ups, 100 push ups, 100 squats and 100 sit ups. All this in 15 minutes at 5 am. Formerly being a triathlete and champion swimmer, his discipline runs like Swiss clockwork. His actual jumping training takes place at his 'DZ' (dropzone) located in Goulburn every second weekend.

For the vertiginous among us, including myself, speaking to Mark offers a vicarious glimpse into taking the plunge sans reality. It starts with a feeling of flying. Initially, almost in slow motion. The legs are engaged to manoeuvre the body. The upper body is still. The first 1,000 feet takes 10 seconds. Then, acceleration kicks in and you reach terminal velocity; every 1,000 feet takes 5 seconds. The force of the up wind pushing is intense. The freefall is for 60 seconds, then... the parachute opens...and you sit, suspended in the harness, coasting forward; a pull on a riser sends you spiralling, the centre of gravity changing as your body pendulums relative to the canopy. Then, spiral and steer, spiral and steer, spiral and steer, all the way down.

In Australia, the sport is governed by tight rules. A self-administering body known as

the 'Australian Parachute Federation' controls most civilian skydiving operations in Australia. With the approval of the Civil Aviation Safety Authority it sets the standards of operation, conducts competitions, issues licences, certifications and instructor ratings, conducts exams and distributes publications to keep members informed of current events and safety standards. Its 'Sporting Code' is detailed; 106 pages covering the minutiae of competition rules.

In October 2018, Mark will be nearing his millenary jump. The occasion calls for something special. The plans are still underway, but he is thinking of a 5 point 16-way formation in Goulburn with close friends. He has already celebrated a few friends' 1000th jump and, remarkably, one person's 10,000th jump.

For all its military precision, the sport has a comedic side. Mark has jumped in a tuxedo (though never in the *Wig & Gown*), nude, in only underwear, jumped with an inflatable pool toy, jumped from hot air balloons and even jumped close to someone jumping with a canoe, yes, a canoe. The sport also has an amusing street (or 'sky') talk. Charmingly, 'Blue Skies' is the salutation. It's like the Aloha of Hawaii. 'Sunset Load' is the last jump of the day.

Blue Skies!



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Greg Tolhurst

Dr Greg Tolhurst was appointed Executive Director of the New South Wales Bar Association in October 2016.

Who are the guiding influences for you in the law/ have had most of an impact upon you?

I prefer to use the term ‘inspired’ because to say someone influenced you suggests you seek to emulate them in some way. I have the same issue with music; there are musicians who inspire me but I cannot say they influenced me because if I practised all day, every



day, I still could not play a bar of what they play. The same is true in law.

So if we stick to those who have inspired me, my mentor for many years as an academic was Professor John Carter. John showed me how to go about - and how to enjoy - doctrinal legal research and is probably the cause of my lifelong unrequited love affair with the law of contract.

I have written a number of books with Professor Michael Furmston and have learnt much from him.

As a teacher for close to 18 years and coming from Sydney Law School one cannot help but be inspired by Ross Anderson. Everyone is inspired by Ross Anderson in their teaching; he is Mr Chips of the law school.

Professor Neil MacCormick’s writings really made me reflect about the law and legal reasoning more than any other writer and also why thinking about law is a good use of your time.

Many people across the university also showed me the importance of cross-disciplinary approaches to research.

At the judicial level, all of my students know how much of a fan I am of Dixon CJ. The list could go on and on, Lord Macnaghten, Lord Diplock, Mason CJ, there are many others. I’ve recently started to read through all the dissenting judgments of Windeyer J in contract cases, I think many of his dissenting views perhaps now reflect the law: I should try to finish that article. I would add that

a number of the judgments of McPherson JA of the Queensland Supreme Court were pivotal to my PhD.

During my time as tipstaff to the Honourable Justice Cripps I was inspired by many barristers who appeared in the Land and Environment Court and the NSW Court of Appeal. I don’t think it would be appropriate to mention names as many are still in practice.

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Do you think that academia has prepared you well for the rather obscure world of the Bar?

I disagree with the premise that the Bar is ‘obscure’.

I suppose that for those who have not had to use a barrister before it may appear to be an obscure world, much like that of a leading surgeon; until you need to use the services of a barrister the Bar is probably a world that people don’t know much about.

I have been around the law for a long time, and as a doctrinal scholar you are very much in touch with practitioners; there was no real culture shock, except of course for bench and bar dinners!

In some ways, there are strong similarities between academia and the Bar. A good academic, and a good barrister, doesn’t simply accept the law as it is. Rather they both question, evaluate and argue for clarity, for improvement and, for justice.

The work of the Bar Association on behalf of its members is not purely reactionary or bureaucratic.

We do not unquestioningly accept the law or the policies put to us – the association investigates, interrogates and champions meaningful law reform and access to justice.

I think the skills I honed as an academic are relevant to the work I do for the Bar Association.

What is your perspective of technology on the legal sphere and the impact of obsolescence thereof?

It is naïve to think the wave of technology currently impacting on legal services is cyclical and can be simply ridden out. However, history tells us that workplace revolutions result in more jobs being created than lost. Of course it can be difficult to work out exactly what those new jobs look like while you are living through a period of disruption. Artificial intelligence itself needs to be regulated – this is a growing area of law. The ‘Human Rights and Technology’ project recently launched by the Australian Human Rights Commission will be a significant piece of research on such regulation.

There will inevitably be other new areas of law and we need to think as a profession about what they might be and what skills our members will need to take advantage of these new areas. I recently saw a chart of areas of legal practice that did not exist 15 years ago. It was surprising how long it was.

Before I left the university I was working with Associate Professor Simon-Reay Atkinson, an engineer who studies complex civil systems. We were looking at cyber which now forms a type of stateless jurisdiction with a growing body of rules and customs. As a complex system, behaviour in cyber cannot be regulated by command and control rules, but one can influence behaviour in a network. We need to understand how you do that as it is a world where people are operating alongside some of the darker elements of society. The work made me think differently about the extent of what law is, what type of laws can influence behaviour, the role of lawyers in that world and their relationship to other disciplines.

AI is already impacting on legal work, we all know that. But from the reading I have done, it does not seem that what Nick Bostrom in his book *Superintelligence* refers to as ‘human-level machine intelligence’ will be attained in my working life. So there is no immediate concern that the creative aspects of legal practice, the advocacy, the applied philosophy, the careful moulding of legal argument will be replaced soon. This is the work of the Bar, perhaps the Bar will in fact be the last institution standing when all around have faltered.

Were you ever attracted to coming to the Bar?

I was never attracted to law! I only ever wanted to be a drummer in a rock n roll band! That did not go as planned, I say this was due to tendonitis but that probably camouflaged a lack of talent. But when you pursue something like that from a young age, I think I starting gigging around town at 15 or 16, it can have a remarkably negative

impact on your HSC mark, leaving you with few immediate options. So I found myself as an accounts clerk in an insurance company being pressed to study accounting (the name of the insurance company will remain withheld). I did accounting for about a year, and with respect to those who love accounting, it was not for me. I did law so they would leave me alone, and because they had not reacted positively to an earlier suggestion that they give me time off to study archaeology. I only said 'law' because earlier that day I ran into a school friend on the bus travelling into work and he told me about what was then the Supreme Court SAB and BAB exams. So I never sat down and considered what I might do with this legal qualification and when I did finish it the academic route opened up. If at that time I had a friend who was a barrister they may well have led me in that direction but I did not know any barristers, I only recall knowing two solicitors.

How did you enter legal academia?

Complete happenstance. I never intended finishing law, I did 18 months, put on a backpack, and headed off overseas. Much later I was sitting in a pub in London with people I had been travelling with and it dawned on me that they had all finished University before they travelled. I thought I should head home and at least finish the qualification I had started. But I had no plans as to what I would do with it. I studied hard and my best friend's mum took pity on me and cooked me dinner every Sunday night. Their next door neighbour was Professor John Carter who started to take an interest in my marks and when I finished he asked me what I intended to do. I replied 'no idea but I liked international law. I might do a masters in that'. He smiled a 'that will be a passing interest' smile - and offered me a job as his researcher on the second edition of *Contract Law in Australia* with Professor David Harland. He brought me over to the dark side of commercial law. But having a diploma in law rather than a degree, I did not think I had much of a chance of obtaining an academic position so I entered practice as an in-house solicitor. Later my partner enrolled to do a PhD at Cambridge and so off we went to the UK. Sir Anthony Mason had recently retired from the High Court and was teaching Comparative Constitutional Law there and I got to know him. I understand his reading list was the largest Cambridge had ever seen! Anyway two minutes at the photocopier one day with Sir Anthony changed everything. He gave me two pieces of advice. He asked what I was copying and I referred to the particular case I was copying. He said 'I wouldn't bother'. I didn't and it saved me a lot of time! He then asked me what I was doing and I told him that a mutual friend of ours (Professor NE Palmer) had asked me

to deliver a paper at a conference on export licencing of moveable cultural heritage. I said I would have to say no as I knew nothing about the topic. He said 'you should say yes'. I did the paper! Giving your first ever conference paper to a group of scholars, many from Oxford and Cambridge, and surviving, gives you a bit of confidence. It also resulted in the publication of some of my first papers which focussed on cultural heritage and that,



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together with art law more generally, is a field I have enjoyed ever since although it did not become my academic research area. I also got a position as Sir Jack Beatson's researcher on the new edition of Anson's. He said to me one day 'you really like this academic work don't you?' I replied 'yes' and he said 'well you should do it'. Between them I was inspired not to manufacture limitations. We returned home, I applied for a job at UNSW business school. I got it, I was teaching. I then applied for a casual position at Sydney Law school. I got it. I did a PhD after our first child was born but we had number two and three while I completed it. I think I had graduated by the time number four was born. Life was complete chaos but exciting. I ended up with a full time position at Sydney University Law School and there I remained for 17 years. Loved it.

Was there a key reason to move from an academic chair to a job as the Bar's next chief executive?

I had been taking on more administrative and managerial positions at the University, various Associate Dean Roles, Pro-Dean and Acting Dean. I found I enjoyed the work; it was intellectually stimulating to develop ideas with colleagues, whether they be new degrees, new units of study or other programmes, work them through various university committees and then implement

of Executive Director on my desk and said 'much of this sounds like what you have already been doing here'. I applied and three interviews later got the job.

What is your perspective on the notion of 'One Bar', the NSW Bar which unites town and country? (e.g. Newcastle, Orange, far North Coast right down to the Victorian border). How do you see it developing in the future?

The notion of 'one Bar' has always been important and remains so. Indeed the future of the Bar will depend in large part upon that notion. There are a lot of challenges facing those who provide legal services. For barristers some of those challenges might be faced individually and some as chambers operating as a business unit.

But other challenges may need to be faced by the profession as a whole requiring us to come together as the NSW Bar and at times the Australian Bar. Grappling with the challenges and opportunities presented by changing technology, ensuring diversity and building international practices are examples. And the notion of 'one Bar' allows the Bar Association to take the lead on some of these challenges.

Of course some sections of the Bar face discrete challenges that require nuanced and targeted solutions, which is why the Bar Association maintains area of law committees

and sections. Our Committees comprise 309 barristers, which represents around 10 per cent of all practising barristers who give up their time to work for their colleagues as one bar.

The Sydney Bar asserts that it is the leading Bar in Australia. What are your views on that? (the number of barristers, the number of cases in the Supreme Court and Federal Court)

I don't know if it would be appropriate for me to comment. It is what it is! We all know that! To say otherwise would be fake news. I let the evidence speak for itself.

But one serious point which I alluded to before is that sometimes the Bars will need to come together and be represented as the Australian Bar. To that end I do think we need to put some energy behind ensuring we have a well-funded and strategic oriented Australian Bar Association. I have seen over the last 12 months under Noel Hutley's Presidency that the ABA is positioning itself to take on a more strategic role for the benefit of all the Australian Bars.

What are your impressions on the rising number of new barristers?

How do you envisage the Bar fitting into the new world? (several new universities with law faculties)?

The recent Bar reading course had one of its largest ever cohorts. We do not know why so many at this time are seeking to come to the Bar. Overall the numbers at the Bar have not risen sharply.

Diversity remains a major issue. While female law students have outnumbered male students for decades and the male/female ratio of solicitors is reflecting that as an overall figure, we are still not seeing these figures represented at the Bar. The first year and one to five year figures show that there is a problem with attracting (and retaining) women to the Bar.

As I said, law schools have been producing large numbers of graduates for some time now. I understand that generally 50 per cent of those graduates say that they never intend to practise law. So you can only assume that a law degree is seen as valuable for many careers. Similarly engineering has become a much more general degree with many going into other walks of life such as banking. What we are not seeing at the NSW Bar is a large number of new graduates sitting the bar exam. The vast majority have been in practice for some time. So I am not seeing the large numbers graduating university as impacting on the Bar at the moment.

Where further thought could be focussed is helping members with planning for life after the Bar, that is, using the skills they gained from a law degree and years of prac-

tice in alternative pursuits, a thing that 50 per cent of current graduates already perceive from having a law degree.

As regards fitting into the new world, the Bar is the new world. We speak today of the gig economy, a world where efficiencies are obtained by companies and individuals entering into short term contracts for work and services. That is the Bar; the Bar is very much then 'on trend', and it can deliver the

the Bar Association does with the judiciary, government and other stakeholders.

No other Bar Association does all of this to the scale that the NSWBA does. In addition to this there is the need to deliver on the strategic plan initiatives. As I said in the annual report last year, a large focus has been to review many in-house systems to see where we can find efficiencies in order to create the capacity to help the Bar Council



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efficiencies and savings that companies and individuals seek from that economic model. I know it is counter-intuitive to 'brief early' but it does result in savings and we need to communicate that message. But the solicitor branch of the profession is seeking to sell 'retain early' too, we are both trying to communicate a similar message and perhaps we can work on that message together.

Have there been any immediate challenges/concerns and improvements which you have identified?

The New South Wales Bar Association carries a diverse portfolio. From professional development (bar practice course, bar exam, CPDs lectures and conferences); practice support services (library, member services, benevolent fund, growing demands for more platforms such as secure document storage); advocacy (developing policy and championing meaningful law reform, submissions to government and stakeholders, speech writing, media and communications); professional conduct (certification, statutory obligations and complaints); operations (finance, HR, IT facilities, events, data and analytics etc). In addition there is silk selection, Bar Council elections and a significant number of events each year including working with the ABA to develop the national and international conferences. Not to mention the extensive liaison and engagement work

and committees on the work of the strategic plan. In saying that I do not want to suggest that I put efficiency and optimisation above all other considerations. To do so can result in an organisation that cannot adapt and change. If you look at organisations that have truly stood the test of time (e.g. Bologna (1088), Cambridge (1209), Oxford (1167), Harvard (1636), Stadsbank van Lening (1614), Barclays (1690), the Royal Navy, the Bar and the Inns of Court, the Vatican, the Barone Ricasoli winery (1141) and the Shepherd Neame Brewery (1698) there are some common features. Those who study this such as Professor Scott E Page point to diversity of people and ideas (best served when there is a willingness to adapt to a growing awareness of the what 'diversity' encapsulates) and having a certain level of slack in an organisation to allow for experimentation, adaptation and to make an organisation robust. A complete list would not contain many businesses that have been driven solely by principles of efficiency. Rather longevity is based on collaborative social influences which drive decision making and taken over time rather than hard coordination rules and control systems that merely drive decisions 'now' and 'in time'. I put aside the apparent relevance of having a good cellar that the above list might suggest.

The strategic plan itself has numerous initiatives but in order to achieve those initiatives you need an end point. For example, the objects of the Bar Association are set out

in the Constitution but if you were to try and summarise many of those objects you might say that the role of the Bar Association is to safeguard the rule of law and support the administration of justice in NSW through a sustainable cohort of high quality independent practitioners at the Bar operating with integrity and thriving in a changed legal environment. From that you then have to ask, 'what would success look like'?

That is not an easy question to answer. Indeed it is not an easy question to answer in a single entity like a company, it is more difficult when you are thinking of around two and a half thousand sole practitioners. But it is necessary to find a way of having the conversations that seek to answer that question so that you know how to approach the initiatives in the strategic plan or at least where to hedge your bets. Working out how to do that has been a challenge, there are a lot of moving parts, but we have made much progress and there will be more to follow on this.

What are your opinions of the importance of the Bar and where it sits in our society and also in preserving it as an independent 'private Bar'? Do you have any observations or perspectives on that notion?

When addressing the Bar Readers Course the President, Arthur Moses SC often quotes from Dixon CJ's swearing in speech as chief justice of the High Court on 21 April 1952 where his Honour said, '[B]ecause it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual'. It is difficult to express the importance of the Bar any better.

That independence and the cab rank rule are essential to our legal system. I recently watched Tom Wilkinson's portrayal of a barrister in the movie, 'Denial'. It was a perfect example of the importance of that independence.

Not too long ago I was sitting at a table with a group of leading commercial solicitors and the topic got onto, 'if I got into real trouble with my bank and I needed very sophisticated legal advice, could I go to one of the large law firms to get it'?

There was a general consensus that it would be difficult to get such advice because of the conflicts of interest that are likely to arise with the banks being clients of the firms. Now they may or may not have overstated the position, but the question does not arise when you discuss the Bar because of that independence. Any person can brief a leading banking barrister.

How has your perception of barristers changed, if at all, from being an academic to being the executive director in charge of the Bar? Were there any preconceptions before you came?

I do not think it has changed. I have been around the law, lawyers and barristers for a long time and my preconceptions were simply of a hard working group of people who work in a highly stressful environment where people's liberty or financial security is in their hands each day.

I was reassured and encouraged to find that this was in fact the reality of life at the Bar.

I probably appreciate their life a little more, particularly on the criminal law, family law and personal injuries side as these were not my areas of practice or research.

What is the 3-5 year plan for the Bar and what do you envisage to this rather 'cloistered world' of the Bar?

I wouldn't describe the Bar as 'cloistered'. Like the judiciary and police force, many of our members see far too much of the dark side of humanity. The work barristers do in representing clients in all fields of law very much puts them 'out there' in the world.

The long term plan is all in the strategic plan. The Bar Association staff will strive to work with the Bar Council and its Committees to implement the initiatives in the strategic plan while carrying out the day to day functions of the Bar Association.

Does the executive director hazard a guess how the role of barristers will change given the numbers and the changing face of the law? (Technically, the Bar has not increased in size as much as people think.)

I hope it does not change! The independent referral Bar is crucial to the administration of justice and that role needs to be protected. It is difficult to predict the optimum size of the Bar and the nature of advocacy keeps developing. We have seen a rise of the inquiry of late and barristers are uniquely equipped to work in those arenas. But it is important to communicate the extent of what advocacy entails. We know it transcends the court to mediation and arbitration, but a large part of what barristers do is manage risk and help clients make strategic decisions in difficult, disruptive and stressful situations. That important skill is one that clients need to tap early and is why the message of 'brief early' is so crucial. There is an important session in the upcoming Australian Bar Association and New South Wales Bar Association national conference on this topic. The session is entitled 'Effective Triage of Major Multi-faceted Disputes – positioning clients to survive the feeding frenzy' and is being moderated by Elizabeth Cheeseman SC with a panel

comprising Caroline Cox (Group Corporate Counsel BHP Billiton), Neil Young QC and Reay McGuinness (Webb Henderson). But of course that skill transcends commercial work to every type of matter that barristers are involved in.

Finally I think the escrow account that is now being developed with the National Australia Bank and should be rolled out in early 2019 will give our members a lot more flexibility as to how they wish to run their practice.

We speak today of the gig economy, a world where efficiencies are obtained by companies and individuals entering into short term contracts for work and services. That is the Bar; the Bar is very much then 'on trend', and it can deliver the efficiencies and savings that companies and individuals seek from that economic model.