

Dynamic and Principled: The Influence of Sir Anthony Mason

Barbara McDonald, Ben Chen
and Jeffrey Gordon (eds)
(The Federation Press, 2022)

Sir Anthony Frank Mason served as a judge of the NSW Court of Appeal, and as a justice, and later Chief Justice, of the High Court of Australia. Upon his retirement he then served as a judge of the Supreme Court of Fiji, President of the Solomon Islands Court of Appeal, and most influentially as one of the first non-permanent judges of the Court of Final Appeal of Hong Kong, the body which replaced the Privy Council on handover.

Over that time, he decided cases in the context of not one, but two, former British colonies attaining their judicial independence from the United Kingdom – the Australian Commonwealth and States, and Hong Kong.

In response to this life of achievement, much has been published. This latest work is a *festschrift*-like collection comprised of 23 essays analysing Sir Anthony's work as a judge, and the enduring quality of his jurisprudence. Its publication was supported financially by the Francis Forbes Society for Australian Legal History.

The essays which make up the book almost cover the full breadth of legal issues Sir Anthony considered while a member of the High Court. Having them drawn together in this way, thematically, rather than disparately through the *Commonwealth Law Reports*, brings home to the reader the considerable contribution he made to Australian law. Sir Anthony left almost no area of jurisprudence unexplored.

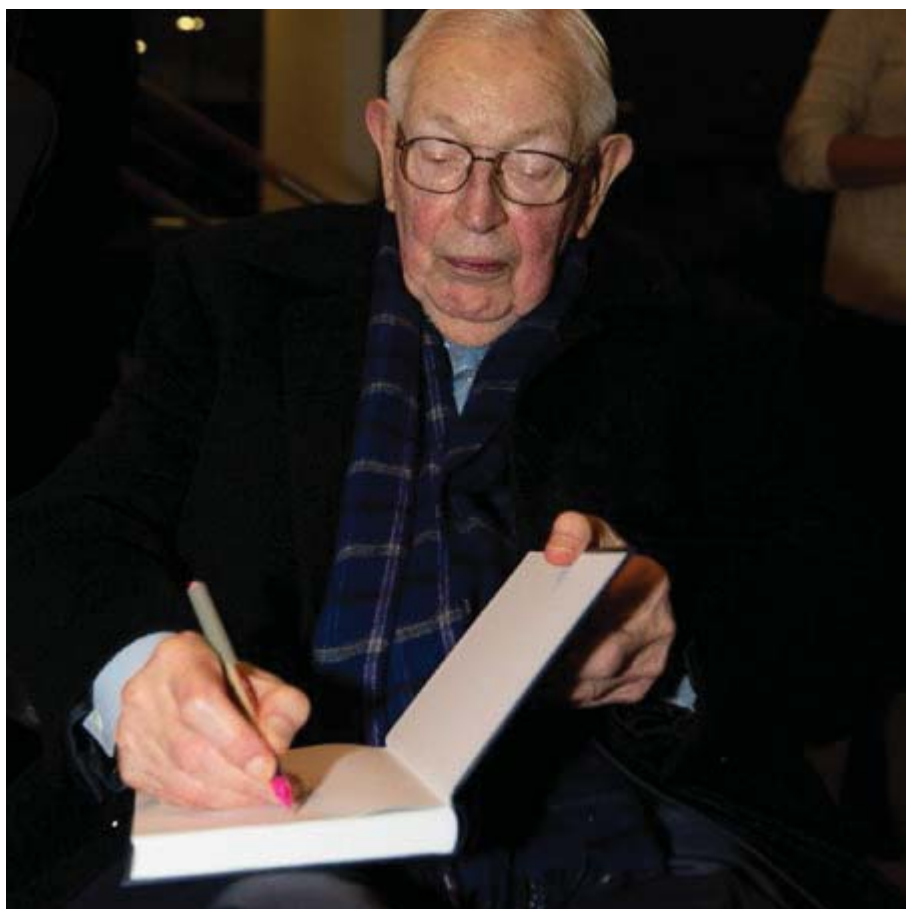


Left: Professor Simon Bronitt, Dean of The University of Sydney Law School
Middle: Sir Anthony Mason AC KBE GBM KC
Right: The Honourable Andrew Bell, Chief Justice of the NSW Supreme Court

Constitutional law, fairly obviously, looms large. Associate Professor Sean Brennan considers Mason's approach to constitutional interpretation. Professor Peter Gerangelos deals with the external affairs power, which underwent a vast blossoming as a plaitum of legislative power in the 1980s. Professor Anne Twomey explores the outer limits of the Commonwealth's nationhood power, and how Sir Anthony dealt with it. However, if it is possible to single out a case, one might settle on *Cole v Whitfield* (1988) 165 CLR 360. Section 92 of the Constitution is little litigated today, but formerly was a fecund

source of disputation. Professors Theunis Roux and Rosalind Dixon explain how Mason led the court in sweeping aside (with good reasons for so doing) over 80 years of conflicting jurisprudence, to settle on an interpretation of section 92 which is still with us today. As Gageler J has said, *Cole v Whitfield* marked a 'turning point in s 92 jurisprudence': *Palmer v Western Australia* (2021) 246 CLR 182, [28].

The field of private law receives ample treatment – chapters on contracts, torts, conflicts of laws, fiduciary duties, estoppels, trusts and unconscionable conduct.



Standing on its own is Professor Prue Vines' treatment of First Nations people and succession law. It considers the intersection of the important public law consequences of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, and the quasi-public, quasi-private nature of disputes about the distribution of the estates of Indigenous people. Coming at the end of the work, it perhaps points in a direction where the underlying architecture of our system of laws is preserved (as the High Court sought to do in *Mabo*) while recognising Indigenous customary law's part in that system.

But perhaps the overarching chapters at the beginning of the collection merit the

most attention. They situate Sir Anthony's jurisprudence in its historical context. They remind us of the relative novelty of matters we now take for granted. The principal feature of his time as a judge was the continued erosion, and eventual elimination, of appeals from Australian courts to the Privy Council. Once that Imperial appellate body retreated from the apex of judicial decision-making in this country, and the *Australia Acts 1986* (Imp and Cth) came into force, Australia achieved its undoubted independence (despite what some proponents of an Australian republic might continue to say). Similarly, the creation of a permanent intermediate appellate court

in New South Wales formed (with some little rancour) a body of judges which generated precedents that other courts could follow or apply. That became even more important once the special leave gateway was introduced into the High Court. No less important was the publication of textbooks on Australian law, rather than mere Australian supplements to English texts. These events helped shape a distinctly Australian body of law, and Sir Anthony helped to shape it.

Some of the essays in the book are intensely practical, perhaps of greatest interest to a member of the Outer Bar trying to formulate or defend a case (late at night). Professor Fiona Burns' contribution on private property law, or Associate Professor Hudson's essay on estoppels, fall into that category. Others are of a more academic and theoretical bent, suited perhaps to full-time academics or enthusiastic amateurs, such as Professor Roux and Dixon's examination of *Cole v Whitfield*.

The unfair criticism of a book such as this is one of omission. Much has to be excluded to keep it to a manageable size and price. Nevertheless, crime does not rate a mention. There is no essay on it; the word does not appear in the index. Cases such as *Weissensteiner v The Queen*; *Dietrich v The Queen*; and *Chamberlain v The Queen (No. 2)* were decided while Sir Anthony sat on the High Court. His contribution to this important field might have been addressed.

The law, ultimately, is about people. The people who shape it, and the people who are shaped by it. Litigants, solicitors, barristers, judges, parliamentarians, and interested observers. Each plays their role, and each contributes to the maintenance, and continued improvement, in both legal principles, and their application in the lives of everyday Australians. Whether they know it or not, Sir Anthony Mason's contributions to the law in their country has had an effect on all Australians. With respect, Gageler J summed it up stylishly on launching the book, saying:

'Sir Anthony, thank you for your honouring all of us with your presence. Thank you for your service to Australian law and Australian legal institutions. Thank you for your contribution through that service to our national development. But for you, the book we have come to launch would have no hero. But for you, our national story over the last half century would have had a different plot.'

Whether practitioner or academic, judge or law student, active or retired, there is material in this collection to interest—and indeed engross—many lawyers and members of the Bar.

RD Turnbull



What Podcasts To Listen To This Summer

Readers of this column of *Bar News* will be familiar with perhaps the most famous podcast of all time: the ground-breaking *Serial* which has been mentioned in this column more than once.¹ For those who have missed it, in 2014 it was the first ‘blockbuster’ podcast, breaking all download records. Countless subsequent podcasts have tried in vain to match both its popularity and its quality.

Serial, hosted by Sarah Koenig, told the story of a young man, Adnan Syed, 17 years old at the time of the events in question (1999), who was convicted of murdering his school mate and former girlfriend, Hae-Min Lee. Koenig’s painstaking exploration of the events, the police investigation and the ultimate trial captured the imagination of millions around the world and sparked renewed interest in the case. There were some attempts to reopen the case following the podcast but none succeeded. Then in September 2022, there was a sensational development: the conviction was vacated and Syed released from prison. Much of the media commentary credits the podcast with leading to this result.²

Shortly after his release, Koenig posted an update episode which, with the same precision that she devoted to the story in 2014, explains how it came about that the conviction was vacated and Syed released after serving 23 years, with prosecutors advising the court that ‘the state no longer

has confidence in the integrity of the conviction.’ The update episode was itself updated when prosecutors further advised the court that they would not seek to retry him.³

While the case and the podcast is interesting for its own singular story, in her 2022 episode, Koenig locates it within a flawed criminal justice system:

Adnan’s case contains just about every chronic problem our system can cough up. Police using questionable interview methods. Prosecutors keeping crucial evidence from the defence. Slightly junky science. Extreme prison sentences. Juveniles treated as adults. How grindingly difficult it is to get your case back in court once you’ve been convicted.

If you didn’t listen to it in 2014, don’t miss it now.

The *Serial* podcast, which started as an offshoot of the long running *This American Life*,⁴ is now part of the New York Times media organisation. Aside from the extraordinary success of its original 2014 podcast, simply titled *Serial*, this year they have also produced two outstanding new series.

The first, *The Trojan Horse Affair*,⁵ is set in England. It explores what was a local school board scandal that gained some national notoriety when, in 2013, an anonymous

letter was received by a city councillor in Birmingham, which has a large migrant population. The letter purported to document what was said to be an extremist Islamic plot to infiltrate Birmingham’s schools ‘Trojan horse style’ and indoctrinate students by running the schools on ‘strict Islamic principles, potentially with the aim of radicalizing students.’ The story became a media sensation: then Education Secretary Michael Gove accused then Home Secretary, Theresa May, of being soft on extremism. More than twenty Birmingham schools were investigated; no jihadist plot was found, though in the process, a number of people lost their jobs or positions on school governance bodies.

The podcast is reported by two (very different) people: an experienced US podcaster, Brian Reed, himself the producer/reporter of another (also recommended by your correspondent) *Serial* productions success, *S-Town*,⁶ and Hamza Syed, a local (Birmingham) doctor turned journalist who wanted to explore the matter more fully, not least because, despite many inquiries at various government levels, the identity of the person who sent the letter remained a mystery. The podcast is not only riveting for its content, but also raises interesting questions, including ethical questions, about styles of, and motivations for, long form investigative reporting. Some of the interactions of the two producers, and their

vastly different modes of inquiry, provide as much interest for the listener as tracking down the origins of the letter and following its outcomes. As the *New Yorker's* Sarah Larson put it, while it is a 'careful, moving investigation of a British scandal,' it 'works best when studying itself'.⁷

The Trojan Horse Affair was generally very well received, but at least one commentator has been highly critical of the focus on Islamophobia at the expense of other real concerns.⁸ Listen to its eight parts and decide for yourself.

The latest series from *Serial* is entirely different. Released late in 2022, and comprising only three episodes, *We Were Three* is described by the *NY Times* as 'a story of lies, family, America and what COVID-19 revealed, as well as what it destroyed'.⁹ Rachel McKibbens, an American poet who lives in New York, gets a message from her brother telling her that their father had passed away. She travels to California to find out what happened and to see her brother. The podcast tells the story of the family, and the father and brother's refusal to be vaccinated and resistance to conventional medical treatments and ultimately their experiences with COVID-19. Some people might find it 'too soon' but the personal focus on this one family makes it far more than a story about the science denialism that has become so highly politicised, perhaps nowhere more than in the USA.

Also leaping out of recent headlines about current events is *Will be Wild*,¹⁰ described by its producers as an eight part series:

about the forces that led to the January 6th insurrection and what comes next. Through in-depth stories from a wide range of characters – from people who tried to stop the attack to those who took part – hosts Andrea Bernstein and Ilya Marritz explore the ongoing effort to bring autocracy to America, the lasting damage that effort is doing to our democracy, and the fate of our attempts to combat those anti-democratic forces. Because January 6th wasn't the end of the story, January 6th was just a practice run.

As one reviewer described it, it is 'grimly gripping.'

Let it be considered that this type of insurrection and support for autocracy and dictatorship is a new phenomenon in the US, generated by the election of Donald Trump in 2016, journalist, presenter of her eponymous primetime TV show on MSNBC, podcaster,¹¹ and holder of a doctorate in political science from Oxford where she was a Rhodes Scholar, Rachel Maddow, has just released her second podcast, *Ultra*¹² which takes no time at all

to get the listener totally engrossed. It starts with a US senator from Minnesota sitting in his office, sobbing uncontrollably, shortly before boarding a plane on 31 August 1940. The flight goes down minutes after take-off, killing everyone on board. In addition to the senator, that included an FBI special agent, another FBI employee and a federal prosecutor. As Maddow explains, the crash seems to be connected to the infiltration of the US Congress by a Nazi agent as part of an extraordinary plot by a number of people, including members of Congress (as well as Catholic priest Father Charles Coughlin who had a weekly radio broadcast with an audience of some 30 million), to overthrow the US government. There are eight episodes, only three of which had aired at the time of writing, but it promises to be too good to miss.¹³

While the podcasts discussed above all provide compelling listening, some might find them a bit depressing or even too earnest for summer listening. So here is a very brief list of some podcasts that do not engage with politics, history or the criminal justice system.

If you like opera, or want to know more about it, look no further than *Aria Code*,¹⁴ hosted by Rhiannon Giddens, herself a trained opera singer: each episode takes a famous aria and discusses it with (usually) three different interviewees, and concludes with a rendition of the song. That may sound bland, but it is anything but.

For those who love words, try *The Allusionist*,¹⁵ a podcast about language, by Helen Zaltzman.

If you are a fan of Bach's music, there is *30 Bach*, a podcast about the Goldberg

Variations.¹⁶ As the website tells us: 'There's piano, harpsichord, afro-Cuban jazz, free improvisation, Brazilian guitar and chamber music. Laughter, pain, and nanoscience. All inspired by one piece.' For fans of *Succession* (and if you are not, you should be), HBO's *Succession* podcast is great listening.¹⁷

Each week journalist and host Kara Swisher unpacks real world events that echo the saga unfolding on screen. Guests include top journalists, writers, psychologists, as well as some of the people involved in making the TV show. Plus, weekly power rankings from the latest episodes of *Succession* — Who's up? Who's down? Who made the week's biggest power play?

One on one interviews can be great listening if the interviewer is good at her/his job. Actor David Tennant (*Dr Who*, *Broadchurch* etc) has recorded several series of interviews released as *David Tennant Does a Podcast*.¹⁸ Other exponents of that genre include Marc Maron¹⁹ (the most famous was his interview with Barack Obama while the latter was president²⁰); the long-running NPR series *Fresh Air* with Terry Gross,²¹ who is perhaps the best interviewer of all time, or the equivalent series in Australia, *Conversations* with Richard Fidler and Sarah Kanowski.²²

And finally, if you really are a law nerd tragic and can't leave the courts behind for the summer, there is even a podcast with extracts of the Ben Roberts-Smith against the media defamation hearing, with actors voicing the judge, counsel and the parties and witnesses.²³

By Reg Greycar

ENDNOTES

1 <https://serialpodcast.org/>

2 <https://www.nytimes.com/2022/09/19/us/adnan-syed-murder-conviction-overturned.html>; <https://www.bbc.com/news/world-us-canada-62964216>; <https://www.theguardian.com/tv-and-radio/2022/sep/21/adnan-syed-serial-podcast-case>

3 <https://serialpodcast.org/season-one/13/adnan-is-out>

4 <https://www.thisamericanlife.org/>

5 <https://www.nytimes.com/interactive/2022/podcasts/trojan-horse-affair.html>

6 <https://stowpodcast.org/>: this is also highly recommended albeit it raises some interesting ethical questions about what can/should be reported

7 <https://www.newyorker.com/culture/podcast-dept/the-trojan-horse-affair-works-best-when-studying-itself>

8 Sonia Sodha, <https://www.theguardian.com/commentisfree/2022/feb/20/the-trojan-horse-affair-how-serial-podcast-got-it-so-wrong>: She says that by casting the blame entirely on Islamophobia, 'The Trojan Horse Affair' presents a one-sided account that minimises child protection concerns, misogyny and homophobia in order to exonerate the podcast's hero, a man called Tahir Alam.

9 <https://www.nytimes.com/2022/10/11/podcasts/we-were-three.html>

10 <https://wonderly.com/shows/will-be-wild/>

11 Her first podcast was the compelling 'Bagman' about former Vice President of the US, Spiro Agnew: <https://www.msnbc.com/bagman>. She has also published the book and it is soon to be released as a film: see <https://www.focusfeatures.com/bag-man>.

12 <https://www.msnbc.com/rachel-maddow-presents-ultra>

13 For a summary, based on an interview with Maddow, see Joe Pompeo: <https://www.vanityfair.com/news/2022/10/rachel-maddows-podcast-is-a-history-lesson>.

14 <https://www.wnycstudios.org/podcasts/aria-code>

15 <https://www.theallusionist.org/>

16 <https://www.thirtybach.com/> (thanks to Hamish Bevan SC for the recommendation).

17 <https://www.hbo.com/succession/article/hb-os-succession-podcast>

18 <https://www.david-tennant.com/podcast>.

19 <https://www.wtfpod.com/>

20 https://www.wtfpod.com/podcast/episodes/episode_613_-_president_barack_obama

21 <https://www.npr.org/podcasts/381444908/fresh-air>

22 <https://www.abc.net.au/radio/programs/conversations>

23 <https://www.theguardian.com/australia-news/series/ben-roberts-smith-v-the-media-podcast>



MOVIE

*McEnroe*

(2022)

For those lucky enough to have watched John McEnroe play tennis in the 1980s, this documentary by UK filmmaker Barney Douglas goes some way to explaining the person behind the famously explosive on-court antics. For those who weren't, it provides both a timely counterpoint to the reams of column space devoted to the antics of Australia's own 'superbrat' of the court and a glimpse into what is widely considered to have been a golden era of tennis.

The film takes the viewer on a journey through McEnroe's childhood, tennis career and personal life. Part-documentary, part-biopic, it is peppered with interviews with McEnroe himself, his brother Patrick, his current wife Patty Smyth and some of his children. Importantly, it gives the viewer an insight into the relationship between McEnroe and his domineering, perfectionist, lawyer father who, in becoming the 18 year old's manager, deprived him of a father precisely when he most needed one. There is also the suggestion that McEnroe is neurodivergent – something which may or may not have contributed to his reactions to the world he was operating in. It shines a light on some of the inner demons which plagued McEnroe both on and off the court, without attempting to rewrite the narrative or absolve him of blame.

Technically speaking, this documentary is patchy. Some of the devices it employs miss the mark. Some of the graphics seem misplaced, the music choices odd. What it does do well though is use archival footage (some of it previously unseen) from some

of the biggest matches in tennis history – including the US Open and Wimbledon – as well as home video footage from McEnroe himself, to demonstrate just how exciting this era of tennis was and McEnroe's place in it.

Among all the long hair, the terry-towelling and the headbands, viewers are treated to footage of McEnroe's long-time nemesis and close friend Bjorn Borg whose Nordic-cool stood in stark contrast to McEnroe's hot-headed-New-Yorker temper tantrums. It includes their famous 1980 Wimbledon singles final duel – McEnroe's first, at which he was booed as he walked onto Centre Court, which featured a gruelling 20 minute tiebreaker in the fourth set during which McEnroe saved five championship points and which is often described as the best Wimbledon final in history. We see Jimmy Connors trading the No.1 ranking with Borg, McEnroe and Lendl and of course McEnroe's now famous 'You CANNOT Be SERIOUS' outbursts at various umpires (which became so iconic he later used it as the title of his autobiography). But the footage does not stop on court or in the locker room. We see McEnroe and Vitas Gerulaitis living life large – seemingly just as busy off-court partying at Studio 54 and jamming on stage with Keith Richards. On a much more sobering note, we also see some of the impact of this lifestyle and inner turbulence on McEnroe's personal life. We also learn what Borg and McEnroe – both now in their 60s – make of their younger selves and the choices they made in their lives with the benefit of hindsight.

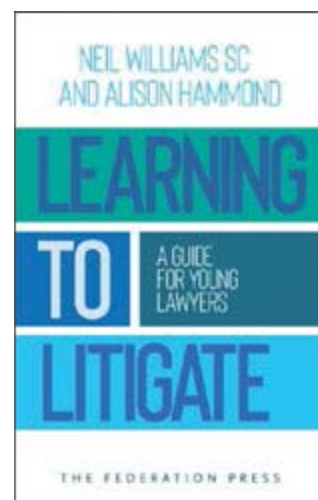
Ultimately this film gives you an understanding of how, despite his demons – or perhaps because of them – a relatively small, skinny kid from suburban Queens became one of the most compelling sporting icons of all time, winning three Wimbledon Championships, four US Opens and becoming the only male tennis player in history to hold the No.1 ranking in both singles and doubles simultaneously. It may be uneven in its execution, but it is a reminder of just how breathtakingly talented – and troubled – the original bad boy of tennis really was.

McEnroe is available for digital download from 26 October 2022.

Sarah Woodland



BOOK

*Learning to Litigate*

Neil Williams SC and
Alison Hammond
(Federation Press, 2022)

Advocacy can be intimidating. As the Honourable Susan Kiefel AC notes in her foreword to Neil Williams SC and Alison Hammond's recent text for newcomers, it also is sometimes difficult for more seasoned practitioners to recall just how daunting the 'world of litigation' can be for young lawyers.

Though readers of *Bar News* are no strangers to this world, we expect this new book to have a worthwhile place on most barristers' shelves. Readers and junior juniors will benefit from practical descriptions of techniques and skills. More senior juniors, including tutors, are provided with a concise summary of matters that early-year peers need to know but might but not find obvious. Senior counsel may benefit from a reminder of difficulties that junior advocates can face, as well as from the book's broader reflections on navigating the stresses and excitements of our profession with a life both inside and outside of the law. Any solicitor or law student who reaches out to counsel for advice about contemplating a move to the bar could also be sensibly steered to this text.

In addressing the essential subject matter which its title indicates, and the proffering of practical and technical advice on coming to the Bar, practising at the Bar and a life at the Bar, the book fills a (surprising) gap in the modern printed literature in this country.

The book is organised in three sections.

The first section addresses how to establish a career as a litigator, including guidance on selecting areas of practice, ethical and etiquette fundamentals and developing professional and commercial instincts. The advice is direct

and practical – there is a checklist of essential questions for 'simple' court appearances, suggestions on how to approach devilling and guidance on developing new areas of practice. The section also contains broader reflections on issues such as identifying areas that accord with a person's capacity to manage emotionally-charged conflict and navigating complex social interactions.

The second section addresses advocacy techniques. It is, perhaps unsurprisingly, the book's longest. The 12 chapters step through pre-trial and in-hearing essentials, including dedicated chapters on persuasive written and oral argument. It is apparent throughout that the authors consulted widely in order to distil lessons that will be useful to practitioners from a variety of practice areas and in various Australian jurisdictions. A chapter on criminal practice credits work prepared by a number of leaders in that field and acknowledges the assistance of Tim Game SC in reviewing it, together with chapters on witness examination, in draft. An overview of appellate court listing patterns and work habits gratefully acknowledges the input of former Presidents of the Queensland and Victorian Courts of Appeal.

Developing mastery in examination-in-chief and cross-examination can take a great many years, and as the authors acknowledge, there are now more limited opportunities for many advocates to develop these skills than was the case even in the quite recent past. The expert guidance given in chapters on these topics should prove useful even for counsel whose litigation instincts are otherwise finely honed.

The final section of the work addresses the 'bigger picture' of managing professional relationships and a career in litigation within a broader life. Advice on being a good junior should be helpful for new barristers as well as those seeking to support their development. Observations on how to plan and maintain a rounded life that incorporates a demanding and successful advocacy career are relevant to every person in our profession. The authors' backgrounds as a very senior silk and an 'under 5' new barrister mean that the book has benefited from two important and very different vantage points.

The authors of this review, like the authors of the book, are both practitioners at the NSW Bar. However, the focus of the book is

not limited to litigating in NSW; rather, in terms of the practical and technical guidance it offers, it is directed to a national audience. For example, it explores the pathways to the Bar in each state and territory and its commentary about litigation procedure and technique embraces practice in State and Federal courts. Accordingly, the text should be useful to counsel, solicitors and law students interested in litigation across the country. We are not aware of any previous work that has drawn together lessons on modern Australian litigation in such a practical, careful and comprehensive way. Both reviewers have worked on matters listed in many Australian states and territories, and we expect many Australian litigators will have similar experiences across their careers. This book may be a valuable resource in continuing a national discussion about how to develop programs for entry into the profession and support early-career litigators in a unified way across the country.

Reviewed by Robert Hollo SC and Claire Roberts



BOOK



A Kind of Magic

Anna Spargo-Ryan,
(Ultimo Press, 2022)

Melbourne writer Anna Spargo-Ryan's latest work is fittingly entitled *A Kind of Magic*, because it really is a kind of magic. It is described as 'a memoir about anxiety, our minds, and optimism in spite of it all', which in many respects undersells what lies between the covers.

It begins with a trigger warning, advising the reader that the book discusses 'psychosis,

anxiety, trauma, depression, suicide and therapeutic processes' (and, it must be said, much more besides). It is not intended as a 'trauma dump'; rather, the author's hope is to bring 'feelings of camaraderie, companionship and empathy'. If this is too much you are encouraged to 'close the book' and 'get under your comfiest blanket and stream episodes of a show you like.' However, what follows is such a beautifully and sensitively written exploration of memory, identity and mental illness that I would encourage everyone to get under the blanket and at least dip one's toe into the first few chapters before deciding whether to read or stream.

The book is loosely structured. Some chapters (identified by months of the year) describe present day experiences with a new therapist. These are interspersed with chapters (identified by a particular facet of mental illness) which combine anecdotes from the author's past with commentary upon mental illness. The narrative is not chronological, nor does it claim to be entirely reliable, which only serves to emphasise the central themes of the book – the non-linear and fallible nature of memory.

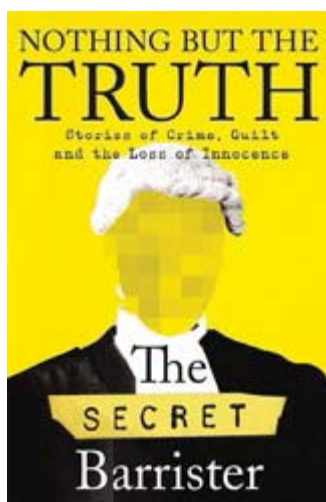
The author's lived experience with mental illness and her various interactions with family, employers, and the medical profession provide the narrative framework

for an insightful philosophical and psychological discussion of identity, a critique of social attitudes towards mental illness, and in particular the inadequacy of the language we use to discuss, diagnose and describe mental illness.

As the reader progresses through the book they are taken on a journey, the author's journey, piecing together the relationship between memory (in all its fallibility), time and self-identity. It is those relationships that comprise an individual's reality, yet that reality that becomes fractured with mental illness. It is not all gloom, however, as the author describes the magic of piecing oneself back together.

While this book examines serious issues, what makes it such a pleasurable read is that these discussions are expressed in accessible and non-academic language, as they are drawn from the author's personal recollections. The accounts of the author's panic attacks and dissociative episodes are particularly compelling; a combination of unorthodox grammar and syntax induce in the reader the very disordered and rapid thoughts being described. The writing moves seamlessly between witty, self-deprecating, frightening, and urgent. It is difficult to put down, and impossible to forget.

Dominic Villa SC



The Secret Barrister, Nothing but the truth: stories of crime, guilt and the loss of innocence

The Secret Barrister
(Pan Macmillan, 2022)

The Secret Barrister is an anonymous blogger and a junior barrister specialising in criminal law in the courts of England and Wales. This is their¹ third book. The first two books dealt with the many problems besetting the English criminal justice system and this is no different. Indeed, the situation in the English and Welsh courts has deteriorated to tragic farce. Members of the Criminal Bar Association – sole traders, independent practitioners not employed by anyone – have, since April 2022, been engaged in escalating industrial action to get legal aid fees raised to a sufficient level that junior barristers might earn above minimum wage.

Barristers. On strike. In order to secure funding for criminal cases in a system so broken that there is a backlog of over 60,000 cases in the Crown Court. With the consequence that increasing numbers of defendants were bailed because they were unable to secure counsel for their trials.² The industrial dispute was recently resolved with an agreement on a rates increase, but without further commitment to the proper funding of the criminal justice system, a resumption of action has not been ruled out.³

The problem has clearly not been solved. The Secret Barrister has recently reported multiple trials from 2019 being adjourned due to 'lack of court time' having already been adjourned more than once. This is not due to industrial action but the combination of courts being closed and sold

off, insufficient recruitment of judges and barristers leaving the profession.⁴

Through much of the strike period,⁵ the Justice Secretary was Dominic Raab. He refused to meet with the Criminal Bar Association. He was, during his tenure, fond of making comments attacking defence lawyers,⁶ disparaging judges for making decisions against the government,⁷ and criticising sentencing and parole decisions deemed soft on crime,⁸ all classic tropes in the genre of law and order politics.

These were views shared by the Secret Barrister during their youth and their time at university. In this book, they interrogate perceptions that the criminal justice system favours the rights of criminals over those of victims and makes society less safe, by tracking the evolution of their views through their experience working as a criminal lawyer.

Nothing but the Truth is a memoir of the Secret Barrister's early career, commencing with the Bar Course and recruitment process, and capturing perfectly the exquisite embarrassment of early attempts at legal argument and the agonising process of applying for pupillage (far more labour-intensive and soul crushing than the Australian experience, due to the English practice of allowing several times more candidates to sit the very expensive courses than there are pupilages available).

The next sections address pupillage, and the confronting realities faced by a junior barrister negotiating for the first time the listing practices of the criminal courts, where trials are more likely not to run than to run and a significant part of a barrister's income depends on the 'returns' system designed to manage the downstream effect on other barristers' diaries. The Secret Barrister recounts the panic and adrenaline of running multiple cases unsupervised in the magistrates' court having received the briefs moments before.

Having secured tenancy, the Secret Barrister then turns to life as a barrister proper. Amusing stories about chambers life are interspersed with accounts of some of the clients they have represented. Some deserving, some undeserving, some whose stories are funny, some devastating: for each the Secret Barrister reminds the reader that criminal justice is about people and how their lives run up against the law.

The final chapter speaks to the crisis identified at the beginning of this review. Entitled 'all falls down', it charts the decline of the Secret Barrister's professional experience due to the increasing dysfunction at the Crown Court, the result of chronic

underfunding of the police, the Crown Prosecution Service, legal aid and the court. One of the features of this is the fact that prosecutors and legal aid counsel are paid a low fixed appearance fee with no allowance for preparation, and when trials are adjourned and returned because counsel is no longer available, the preparation of that case is wholly unpaid. And the sheer number of ways that a trial can go off due to administrative failure is astonishing. Delays between alleged offence and trial are now between three and four years. Those delays cause at best inconvenience and at worst despair to the ordinary people forced into a system that barely operates.

The Secret Barrister tells of the personal responsibility they feel when accounting to the court for the latest prosecution failure, when it is not their fault, or the police's or prosecution service's fault, but the fault of successive governments that are wholly uninterested in funding a criminal justice system that works, and only interested in the political capital to be gained by publicly decrying that system as being 'soft on crime'.

Throughout, the Secret Barrister describes how their early perceptions about crime and punishment are demolished by their observations of how legal practice actually works and how it affects the people drawn into it. From early discoveries that 'jackpot' payouts by ambulance chasing personal injury lawyers are in fact the barest of compensation for life-altering catastrophic injuries, extracted painfully from insurers; to the shock of a first encounter with a provably innocent client, remanded for several months before his case collapsed; to indignation that the 95% of criminal cases heard in the magistrate's courts are hopelessly disorganised while the bar for adjournments is set so high that illness and even death is no excuse not to proceed; to the realisation that for some offenders non-custodial alternatives are a better way to achieve community safety than a merry-go-round of short custodial sentences, but for others, not even that will work.

What makes the book so very enjoyable is the Secret Barrister's skill at communicating their personal experiences so as to bring the reader along with them. Two themes emerge throughout the book. The first is relentless self-deprecation: of the author (an early attempt at a plea in mitigation is described as 'something like a concussed Brian Sewell retching up a nineteenth-century thesaurus'); and of the many absurdities of their chosen profession (there are repeated vignettes of pitfalls suffered as a result of following the Crown Prosecution Service's

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varied instructions about what to do with the documents they brief at the last minute).

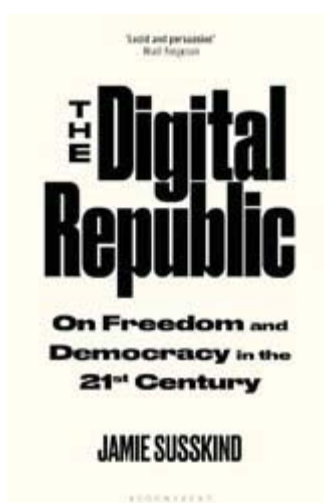
The second theme is rising awareness that justice often won't be done. Among the many episodes of frustration at the systemic problems with the criminal justice system, the Secret Barrister recounts individual episodes in which they grappled with the moral implications of a particular outcome achieved for a client or an offender. These are the most powerful parts of the book, and strike at the heart of the tensions within the adversarial system – the idea that, even where law and principle are adhered to, the people involved in criminal trials won't always get a fair or even a safe result.

It is too much to ask that the Justice Secretary or Attorney-General descend into the middle-tier courts and observe first-hand the collapse of the criminal justice system created by a succession of budget cuts. This book is a handy substitute – a first hand account of what it is like to try to achieve justice in circumstances that conspire against it, not by design, but by neglect. The power in the book lies in the accounts of what this does to our fellow barristers, but also what it does to regular people. People who vote.

Reviewed by Catherine Gleeson

ENDNOTES

- 1 In my review of the Secret Barrister's first book I surmised that they were possibly a man. A familiar account of judicial bullying in this book leads me to believe that the opposite may be true. For safety, I will use the third pronoun.
- 2 *Director of Public Prosecutions v- Crown Courts at Bristol and Manchester (Minshull Street)* [2022] EWHC 2415 in which it was held that there was power to extend custody time limits in the context of counsel being unavailable due to the industrial action, but that the period in which that was a sufficient cause to extend time limits was limited to the last week of November 2022, by which time the unavailability of counsel would become 'chronic and routine:' at [78]-[80].
- 3 'Criminal barristers in England and Wales vote to end strike action' *The Guardian* 11 October 2022 <https://www.theguardian.com/law/2022/oct/10/barristers-in-england-and-wales-vote-to-end-strike-action> (accessed 25 October 2022).
- 4 <https://twitter.com/BarristerSecret/status/1584110650166763524> (accessed 25 October 2022).
- 5 and now, Raab having been reappointed to the Justice ministry by the third UK Prime Minister in office this year.
- 6 'Bar Council chair criticises 'thin-skinned' Raab for not meeting him' *The Guardian* 30 December 2021 <https://www.theguardian.com/politics/2021/dec/30/bar-council-chair-criticises-dominic-raab-meeting> (accessed 25 October 2022).
- 7 'Dominic Raab 'I'll overhaul the Human Rights Act to stop Strasbourg dictating to us' *The Telegraph* 16 October 2021 (accessed 25 October 2022) <https://www.telegraph.co.uk/politics/2021/10/16/dominic-raab-sets-plans-overhaul-human-rights-act-reform-judicial/>
- 8 'Dominic Raab rebukes Parole Board for release of Baby P's mother' *The Guardian* 6 May 2022 <https://www.theguardian.com/society/2022/may/05/mother-of-baby-p-peter-connelly-to-be-released-after-parole-board-decision> (accessed 25 October 2022)



*The Digital Republic:
On Freedom and Democracy
in the 21st Century*

Jamie Susskind (Bloomsbury Publishing, 2022)

In *The Digital Republic*, UK barrister and academic Jamie Susskind discusses the need for an effective mechanism by which large corporations and governments can be held accountable for the collection and use of our personal information via internet platforms. Susskind proposes a system of internet regulation based on the republican model of governance. That is, with accountability at its core. He states:

'For the republican, freedom lies in the ability to challenge the decisions of even the mightiest powers.'

The need for greater corporate accountability for data collection, use and protection was highlighted by the recent data breach that resulted in the private details of around 9.7 million Optus customers being leaked. That event followed significant public concern around the use of facial recognition technology in Bunnings and Target retail stores.

Susskind provides a cogent critique of the dominant free market and technocratic paradigm of internet regulation, the key principles of which are freedom of choice and consent. He points to how consent is rendered illusory with the click of a button, where more often than not internet users do not read the lengthy set of terms and conditions when given the opportunity to do so before clicking 'Agree' to access a digital platform. People invariably proceed without reading the terms, whether to save

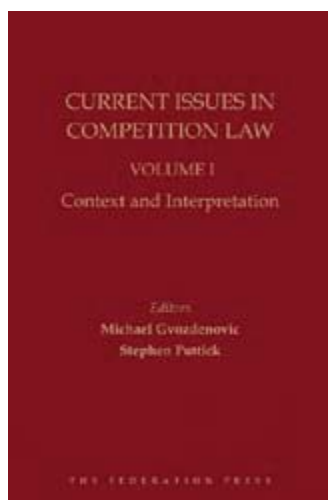
time, for convenience, or because there is no reasonably practicable alternative to accessing the desired or necessary products and services. That brief exchange gives a superficial sense of freedom of choice which masks the power imbalance between large corporations and governments compared to the individual consumer in terms of control over their personal data after clicking 'Agree'.

Self-regulation is inadequate because it allows too much scope for self-interest to prevail. Republican governance requires power to be devolved into the hands of independent statutory bodies and individuals, providing them with the means to enforce standards of behaviour. An example of the former would be data protection audits carried out by an independent statutory body. An example of the latter would be the creation of a statutory tort of privacy as proposed by the Office of the Australian Information Commissioner in its submission to the government review of the *Privacy Act 1988 (Cth)*.

Another accountability mechanism would be the creation of an independent tribunal for the resolution of disputes concerning data collection and use. Large amounts of private data are collected using algorithms. Susskind suggests that a Tribunal with specialist knowledge would be well placed to determine disputes arising from the use of 'high stakes algorithms'. High stakes algorithms are those which have serious social importance and share the following traits: (1) a significant impact on the lives of those affected by its use; (2) involve value-judgments which are inherently moral or political; and (3) the decision-maker is in a position of relative power over the person who is the subject of the decision. The types of disputes suitable for determination by a specialist tribunal might include where algorithms collect and organise data in a manner that reproduces social prejudices or misinformation to the detriment of an individual.

Susskind's book is a thoughtful and thought-provoking look at the way we interact through online platforms today and the resultant power those platforms have to shape and influence our behaviour, opinions and identities. There is a justified urgency in his call to impose a system of regulatory standards and institutional safeguards that protects the privacy of our personal data, not only to avoid malicious exploitation, but to maintain a degree of control over our digital identities consistent with democratic principles.

Reviewed by Sean O'Brien



Current Issues in Competition Law

Michael Gvozdenovic and Stephen Puttick (Federation Press, 2022)

A question that often lurks in construing Part IV of the *Competition and Consumer Act* is: where do we begin? Do we begin with economic principle, which provides the rationale for a statute that prohibits, and in some cases criminalises, the activities of commercial actors because of the potentially adverse outcomes for the Australian economy? Do we begin with the object of the *Competition and Consumer Act* – quoted many times by contributors to this two-volume collection – ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’? Or do we begin with the text? That is, as Perry Herzfeld SC persuasively argues in his contribution ‘Statutory Interpretation from *Visy* to Today’ in Volume I, the conventional, appropriate and only necessary starting point for construction of the provisions of Part IV. Of course, the text is also, as Herzfeld notes, where the High Court in *FCT v Consolidated Media Holdings Ltd* said that the task of statutory construction ends.

The tension that can arise between a perspective that begins with the text of the statute and one that begins with the economic principle thought to be intended to be embodied in that text is a healthy one for developing a better understanding and evaluation of the scope and success of Part IV’s prohibitions. The editors of both volumes of this collection, Michael Gvozdenovic and Stephen Puttick, have assembled a diverse array of viewpoints in

the 23 essays written by leading practitioners – economists, lawyers, judges, regulators and academics – of Australian competition law.

Among those viewpoints are many contributions that, in different ways, add to the healthy tension from differing perspectives and illuminate aspects of contemporary Australian competition law. Sometimes the lighting is at a sweeping conceptual level (most notably Jill Walker’s swaggering survey of the intersection of economic thought with the text of Part IV in ‘An Economic Perspective on Part IV’) and sometimes on a focussed point (for example, a number of the essays touch on the meaning of ‘likely’ in Part IV and the judgment of the plurality of the Full Court of the Federal Court in *ACCC v Pacific National* which settles, for the moment, that ‘likely’ in the text of the statute means something other than literally ‘likely’).

Volume I, titled ‘Context and Interpretation’, offers a variety of contributions on the philosophy, regulatory structure, critical statutory elements and likely future challenges for competition law in Australia. Volume II, titled ‘Practice and Perspectives’, contains essays addressing aspects of three particular kinds of competition problems: arrangements between competitors, misuse of market power and mergers.

The level of ambition among the essayists varies a great deal. Some contributors have sought to draw together contemporary thought or arguments on an issue. For example, Cento Veljanovski’s ‘Cartel Damages: Quantification, Uncertainties, and Future Approaches’ is a very useful and readable assessment of methods for quantifying cartel damages. A number of the essays argue for a new or refined approach to an issue of policy or legal application. Not all of the arguments are persuasive but almost all of them are interesting. Deniz Kayis and Rob Nicholls’ ‘Immunity Policies: Uncertainty, Irregularity, and Effectiveness’ is an excellent evaluation of an important practical issue for competition enforcement and offers a considered alternative to the ACCC’s current policy.

A few of the essays direct attention to a way of looking at an aspect of competition law that perhaps seldom receives much thought. Puttick’s ‘Competition Law at the Limit of Common Law and Statute’ is a useful reminder that competition law is a creature of statute, almost an alien to the common law, and yet borrows from the common law to make operational the more general machinery of civil contravention like rules of attribution and inchoate and

accessorial liability. Occasionally there is a sense of an author re-fighting a past (perhaps lost) battle but nevertheless the process of analysis remains informative. For only one of the 23 essays does the ambition of the attempt substantially exceed the execution.

There are a few standout pieces among the interesting collection. Herzfeld’s essay on the process of statutory interpretation for Part IV of the Act is one of the strongest both for clarity of thought and expression. Walker’s offering of ‘one economist’s perspective’ on competition law is terrific, interweaving economic theory and technique, provisions of the statute and exemplar cases from Australian competition law. Justice Michael O’Bryan’s essay, ‘Section 50: Should the Burden of Proof be Shifted?’ is a thoughtful and delicate rebuttal of calls for change to the burden of proof in mergers. But to note those three particular contributions is in no way to diminish the quality of the other essays in the two volumes.

The editors have not sought to assemble an encyclopaedia of Australian competition law. Necessarily that means that there are at least a couple of significant current issues in Australian competition law that do not receive substantive attention in the collection. This is not a criticism, merely an identification of the necessary limits of a slim two volume collection on Australian competition law. The editors have achieved what they have set out to achieve, which is to make a holistic contribution to several debates.

And in any event, as many of the essays implicitly remind the reader by rehearsing the history of reform over a short period of time, predictions about what will be of significance even in the near future in competition regulation are seldom accurate. Felicity McMahon and Jacqueline Downes, in ‘Recent Developments in ACCC Review of Media Mergers’ in Part 3 of Volume I, provide a particularly striking example of the dangers of such predictions when they point out that for the Foxtel/Austar in 2012 and the Foxtel/Ten merger in 2015, ‘the ACCC was reluctant to take into account the potential impact of streaming services on traditional [subscription TV]’. A fundamental pursuit of modern life, television viewing, has been transformed in only a few years.

Regardless of whether what appear now to be the pressing current issues in Australian competition law remain so in a few years, this collection provides valuable insight and stimulation for the development of thinking in the field.

Michael Hodge KC