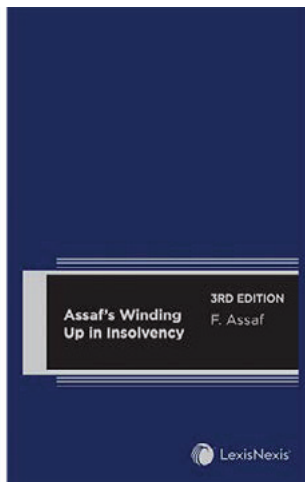


## BOOK



### *Assaf's Winding up in Insolvency (3rd ed)*

Farid Assaf SC (LexisNexis, 2020)

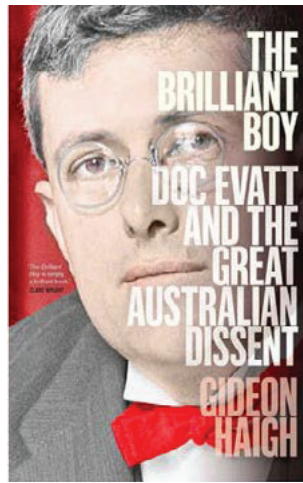
This is the third edition of a work that began life in 2008 under the title *Statutory Demands: Law and practice*, became *Statutory Demands and Winding Up in Insolvency* in 2012, and now goes by the eponymous title *Assaf's Winding up in Insolvency*.

As is apparent from the change in title, the scope of the work has progressively expanded, and while the book has certainly expanded in volume since its first edition it is by no means bloated. The latest edition begins with an overview of the law of winding up in insolvency (Chapter 1) before embarking upon an analysis of the concept of insolvency and the practical challenges in establishing insolvency (Chapter 2). A further new chapter has been added which provides a survey of cross-border aspects of winding up, as well as the winding up of Part 5.7 bodies (Chapter 12).

Despite the new title, the work remains one focussed very much upon winding up in insolvency in reliance upon the presumption arising from a creditor's statutory demand. Thus, as with earlier editions, the bulk of the book is occupied with consideration of the substantive and formal requirements of statutory demands (Chapters 3 and 4) and applications for setting them aside (Chapter 5). There is a comprehensive review of the case law as to genuine disputes and offsetting claims (Chapters 6 and 7), and setting aside for defects in the demand and other reasons (Chapter 8), costs and appeals (Chapter 9) and then the all-important application to wind-up a company in insolvency (Chapters 10 and 11).

This book remains a practical guide to the statutory demand process, and a comprehensive survey of the case law generated since its introduction almost 30 years ago. An attempt to grapple with the complexity of the statutory demand regime without consulting this text is a fool's errand. As a result of the ingenuity of practitioners (and not a little creativity on the part of the judiciary) new issues continue to arise, which justifies both the new edition and its bulk. This book deserves to be on the shelf of every insolvency practitioner.

## BOOK



### *The Brilliant Boy: Doc Evatt and the Great Australian Dissent*

Gideon Haigh (Simon & Schuster, 2021)

There is a surprising (and welcome) diversity of approaches to Australian judicial biography. There are, of course, many judicial biographies and autobiographies which provide a straightforward account of their subjects' legal triumphs as barristers and judges, ending with chapters on retirement, illness and death. But there have also been stylistic innovators, viewing their subjects through new critical or analytical lenses. Recent examples include Susan Magarey and Kerrie Round's *Roma the First* (Wakefield Press, 2007) and Penelope DeBelle's *Red Silk* (Wakefield Press, 2011).

H. V. 'Doc' Evatt has been the subject of more biographical works than any other Australian judge, including a recent comprehensive study in John Murphy's *Evatt: A life* (NewSouth, 2016). Gideon Haigh's new work on Evatt, *The Brilliant Boy*, hence faces formidable challenges in shedding new light upon its subject. This work nonetheless succeeds by viewing Evatt's life through a novel lens: as the author of one of the common law world's great dissenting judgments in *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1.

Haigh explores the factual, historical and personal background to the litigation in *Chester*, placing the tragic figure of Golda Chester – born Golda Gradowski, and named in the law reports as Janet Chester – at its centre. The death of Golda's seven-year-old son Max by drowning in a

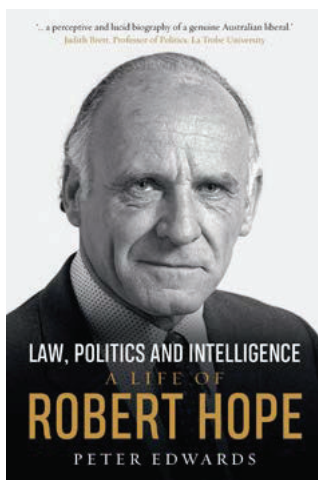
flooded trench, and her subsequent efforts to seek compensation for her nervous shock, suffered upon seeing his body lifted from the water, is not simply treated as a test of the compassion and legal skill of a High Court judge. This book vividly depicts the harrowing and lasting effect of Max's death upon his mother, upon his family and upon witnesses.

While this book is not just a retelling of the litigation in *Chester*, its report of Evatt's life is informed by its focus on that judgment. Its account of his family life emphasises his relationships with his mother and his children, and the deaths of his brothers Ray and Frank in the First World War. Its account of his role as artistic patron and commentator draws parallels between his modernist instincts (and resistance to cultural conservatism) and his willingness to expand the boundaries of the Council's duty of care in *Chester*. Most notably, the book's account of Evatt's brief and unhappy tenure as Chief Justice of New South Wales – normally a sad footnote in accounts of his life – emphasises that, even in a diminished state, he was still driven by concern for the welfare of children and by a steadfast belief in the correctness of his judgment in *Chester*.

But the triumph of this book is undoubtedly its treatment of the litigation in *Chester* and of Evatt's ultimate dissent in that case. The book recounts Evatt's judgment in detail – contrasting its passion and literary allusions against the 'affectless', 'bloodless', 'depersonalised' reasons of the majority. The book places Evatt's judgment in the context of a detailed account of the trial at first instance and against the backdrop of prior nervous shock cases, emphasising the significance of Evatt's departure from orthodoxy. Haigh's chapter on the *Chester* dissent – the best chapter in the book – cogently and forcefully explains complex legal debates. It succeeds both as textual analysis and as a compelling account in its own right.

This book is a rewarding and accessible read. It is written for a general audience. It is not perfect; its account of the jurisprudence of Sir Frederick Jordan is too quick to ascribe to ideological blinkers what could better be explained by legal philosophy. But it succeeds in finding something new and valuable to say about its subject and his contributions to Australian law.

## BOOK



*Law, Politics and Intelligence:  
A Life of Robert Hope*

Peter Edwards, NewSouth  
Publishing, 2020

'Robert Hope deserves a place among the giants of Australian public policy and governance.

This generous tribute by Gareth Evans QC graces the back cover of Peter Edwards's biography of Robert Marsden Hope.

Evans goes on to mention the two public policies to which Hope made a seminal contribution. First, 'Laying the foundation for a coherent, effective and accountable national intelligence community' and second, 'describing how to identify and protect our natural and built heritage'.

Edwards's biography seeks to explain how a senior judge who never held a political or official position in a policy making institution could have wielded such influence.

Hope was born in 1919 on Sydney's north shore. He was a descendant of the Reverend Samuel Marsden, and a cousin of historian, Manning Clark. Hope entered Sydney University Law School in 1938. It would no doubt come as a shock that a man who 36 years later was appointed to inquire into the Australian Security Intelligence Organisation (ASIO) made two attempts to join the Communist Party, the same year he started at the Law School.

On his first attempt he failed to become a 'pink' card carrying Communist as he was not a trade unionist.

On the second attempt he went to the wrong address. According to Hope, this last attempt 'Was the end you might say of my far left wing career'.

In 1940 he enlisted in the AIF and was

sent to the Middle East. He completed his law degree in 1944.

In a ceremony in Sydney University's Great Hall his degree was conferred: 'In absentia, though his feat of negotiating seven subjects in less than six months while on convalescent leave after having suffered scrub typhus and with first class honours seemed to merit announcement by silver trumpets at least.'

On returning from the war, he taught at Sydney University Law School and joined the Bar. At the Bar he had a large practice finding plenty of landlord and tenant work.

He had considerable contact with another ex-serviceman, Gough Whitlam, both at the Bar and socially.

As a barrister he achieved success 'without spending the 60 or 80 hours a week for which the legal profession has long been notorious. His mind was so quick and concentration so intense during working hours that he seldom worked on evenings or weekends'.

His leisure time included squash, as well as sailing in the yacht Packadoo. This was owned by the father-in-law of Jerrold Cripps, a professional colleague, a future Court of Appeal judge, and perhaps his closest friend. He devoted considerable time and energy to his garden in Tryon Road, Lindfield in Sydney's upper north shore.

Hope took a keen interest in civil rights. He was elected president of the Council for Civil Liberties in 1967.

As a civil libertarian, he was concerned that anti-Vietnam demonstrators were being held in custody longer than necessary under police regulations. It would come as a shock to Gareth Evans that Hope's first foray into public policy was as a member of the Liberal Party.

One of Hope's regular drinking companions was John Atwill, a Liberal Party power broker. Atwill convinced Hope to join the Liberal Party so he could change the regulations. He became a member of the appropriate policy committee 'and the regulations were changed in about a fortnight'.

In 1969 Hope was appointed to the New South Wales Supreme Court, and in 1972 to its Court of Appeal.

The Court of Appeal had been established in 1966. Its creation had been opposed by a number of Supreme Court judges as it would give a select group a higher status than their colleagues.

Sir Gordon Wallace was the first president of the Court of Appeal. In Hope's opinion, his practise as a silk 'exceeded his capacity'. He was followed as president by Sir Bernard

Sugerman. Hope thought him 'a fairly good judge'. Sir Kenneth Jacobs succeeded Sugerman. Hope regarded him as an 'extremely good President'. Athol Moffitt then became president. In Hope's view, he 'had a fairly good knowledge of common law but was terribly tedious, he wrote endless judgments and was very pompous'.

In 1973 Hope was appointed Chairman of the Taskforce on the National Estate to advise on environmental policy. In this role, Hope made a significant contribution to conservation. He later became the foundation Chair of the NSW Heritage Council and remained at that post for 15 years.

When a vacancy occurred in the High Court in 1973, Hope was a strong contender. However, the position ultimately went to his friend, Sir Kenneth Jacobs the following year.

At the ALP National Conference in 1971, a motion to abolish ASIO failed by a single vote. Whitlam did not support the motion, but was unhappy with ASIO's performance.

As Prime Minister, Whitlam appointed a Royal Commission on intelligence and security, with Hope as the Commissioner. Hope's report, as Edwards wrote, 'laid the foundations for a more effective and accountable intelligence service'.

At 12:40 a.m. on 13 February 1978, a bomb exploded in a rubbish bin outside the entrance to Sydney's Hilton Hotel. Two council workers and a policeman were killed. The hotel was the then venue for the Commonwealth Heads of Government regional meeting. The media and public were profoundly shocked by what was regarded as an act of terrorism.

Prime Minister Fraser commissioned a review of the whole area of protective security in Australia. Hope headed this review. His influential report provided valuable guidance to governments on the structure and principles needed for counter-terrorism.

In 1983, David Combe, a former National Security of the ALP, was accused of compromising national security in dealing with a Soviet diplomat, Valery Ivanov. Hope was appointed as Royal Commissioner to examine the Combe-Ivanov affair.

Edwards provides an entertaining and informative account of the Commission's hearings which had a great cast at the Bar table. Ian Barker QC with Rod Madgwick appeared for Combe, Madgwick later became a Federal Court judge. Don Ryan QC (also later a Federal Court judge) was senior counsel assisting, with Jeremy Rapke (later a Victorian DPP) as his junior. Michael McHugh QC (later on the High Court

of Australia) was counsel for the Hawke Government; Neil Young as his junior. Stephen Charles QC (later a Victorian Court of Appeal judge) appeared for ASIO, with Alan Archibald (also later a Federal Court judge) as his junior.

In 1984, Athol Moffitt retired as president of the Court of Appeal. Hope became acting president, and a likely successor. However, the Wran Government appointed Michael Kirby as its president.

Hope did not let any disappointment shape his behaviour. Kirby describes Hope in the book as 'a marvellous colleague' and 'a true friend'.

Having turned 72, the then compulsory retiring age for judges in New South Wales, he retired. However, he continued to sit on as an acting judge. He had an active retirement becoming New South Wales Law Reform Commissioner and maintained many links with 'a diverse range of organisations'.

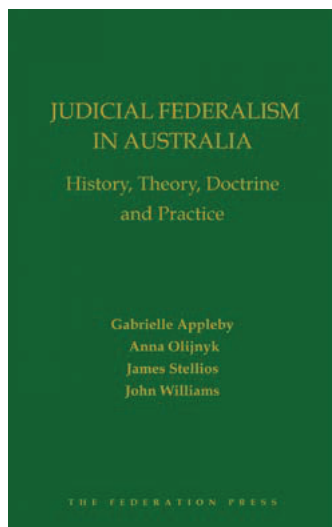
Throughout his life, Hope had enjoyed robust health; however, in late April 1999 Hope suffered a fall in his garden. This resulted in a severe cerebral haemorrhage. This injury occasioned his death on 12 October 1999 at the age of 80.

Edwards's book is a detailed analysis of the legal world Hope inhabited, and his contribution to civic life. A contribution which was guided, in the words of Murray Gleeson his former junior, by 'an acute mind and great depth of learning and above all a passion for justice'.

Malcolm Kerr OAM



## BOOK



### *Judicial Federalism in Australia: History, Theory, Doctrine and Practice*

Gabrielle Appleby, Anna Olijnyk,  
James Stellios, John Williams  
(Federation Press, 2021)

*This is an edited version of Brendan Lim's remarks that were delivered at a panel discussion book forum and launch hosted by the G+T Centre of Public Law on 8 October 2021. They are being cross-published on the AUSPUBLAW blog together with the other panellists' comments: <https://auspublaw.org/2021/11/book-forum-on-appleby-olijnyk-stellios-and-williams-judicial-federalism-in-australia>.*

History, theory, doctrine and practice. The subtitle of this splendid new book by Gabrielle Appleby, Anna Olijnyk, James Stellios and John Williams, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021), reminds us of the many different resources on which we can draw in understanding and in making choices about the constitutional rules by which we abide and the constitutional values which we seek to uphold. History, theory, doctrine and practice present different modalities of constitutional argument and reasoning. History, theory and doctrine are covered by other panellists. If only by a process of elimination, I therefore approach the book from the perspective of practice.

In *The Coming Commonwealth* (Angus and Robertson, 1897) [at 15], a young Robert Garran described Australian federalism as a 'compromise ... between the opposing forces of centralisation [and] local independence'. Those opposing forces do their work upon

various aspects of federalism, including judicial federalism. This book insightfully develops a rich description of the federal compromise in the judicial context as one between integration and diversification of the Australian court system.

The thesis pivots on the decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. Chapters 2, 3 and 4 deal with the pre-Federation colonial judiciaries, the Convention Debates, and the judicial landscape prior to *Kable*. A particularly valuable accompaniment to these chapters is the appendix of historical documents from the 1897 Judiciary Committee, which settled the drafting of Ch III of the Constitution. Chapters 5 and 6 deal with the so-called 'constitutional moment of choice' in *Kable* and the subsequent reception of that decision. Chapters 7, 8 and 9 reflect on broader implications of the *Kable* doctrine, especially outside the courts. The authors here consider the development of policy and legislative drafting, the work of tribunals and, broader still, the effect on community values associated with federalism and rights. The ambitious perspective of these chapters is enhanced by the innovative methodology of interviewing Attorneys and Solicitors General, government lawyers, advisers and parliamentary counsel about their professional perspectives on the influence of constitutional doctrine on their work.

From the perspective of practice, as distinct from history, theory and doctrine, one aspect of the *Kable* principle that receives somewhat less attention in the book is the role that legal argument has played in the 'moments of choice' at which the contours of the doctrine have been worked out. Reading a judicial decision with a careful appreciation of the arguments made by the parties is sometimes essential, almost always helpful, and never a bad idea. This practice provides a particularly informative angle on the development of the *Kable* principle.

Federalist tensions, such as that between integration and diversification of the courts, are commonly observed in constitutional litigation when the Commonwealth and the States take opposing positions. The Commonwealth and the States have the right to be heard in constitutional cases. They frequently exercise that right and so come to operate as repeat players in constitutional litigation, often advancing very long-term strategic interests that may transcend the outcome of the particular case at hand. Despite the federal tension between integration and diversification at the heart of the *Kable* doctrine, there has not generally been opposition between the Commonwealth and the States, and so the full federalism implications of the doctrine have been somewhat muted in the case law.

Mr *Kable's* challenge was initially framed



as one about the separation of powers in New South Wales. Attorneys-General for other States—Victoria, South Australia and Western Australia—all intervened to support New South Wales. The Commonwealth Attorney-General did not intervene at that stage. But during the course of the hearing, Sir Maurice Byers QC, appearing for Mr Kable, developed the ultimately successful argument based not on a separation of powers in the States, but on the implications of Chapter III. Notice of this new argument was given to the Commonwealth, which filed written submissions.

Those submissions are summarised in the Commonwealth Law Reports: (1996) 189 CLR 51 at 60-61. They seem to have been somewhat tentative or qualified, but squarely embraced the notion that the Commonwealth Constitution creates an integrated system of law which may impliedly constrain State legislative power. If one thinks about the issue in terms of integrity versus diversity, as the book draws out in great depth, the Commonwealth's submission can be seen to have pursued more integrity, less diversity. That may reflect the Commonwealth's interest in the existence of a system of courts that is fit to exercise federal jurisdiction.

The next major *Kable* case to reach the High Court was *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547. That case concerned not liberty, but property. It involved a challenge to a planning law which had the effect of approving a development, the approval of which was the subject of contentious litigation at the time the legislation was enacted. Again, other Attorneys-General—for South Australia, Victoria and New South Wales—perceived the case to be sufficiently significant that they should intervene in support of Queensland. The Commonwealth did not intervene.

In the Commonwealth's absence, the High Court developed the *Kable* principle in a way that profoundly affected the Commonwealth's long-term interests. Although the challenge to the law was dismissed, the Court explained the operation of the *Kable* principle by saying that if a law could be validly passed by the Commonwealth Parliament consistent with the separation of judicial power at the Commonwealth level, then an equivalent law at the State level would not contravene the *Kable* principle (at 561-562). In other words, valid Commonwealth law implies valid State law. Left unsaid, but logically entailed by that proposition, was that invalid State law implies invalid Commonwealth law. This new way of describing the *Kable* principle gave the Commonwealth a significant interest in defending the validity of State laws: its own power to enact equivalent laws for federal courts would now be squarely at stake in *Kable* cases. And from that point

onwards, by-and-large defending State laws against *Kable* challenges is precisely what the Commonwealth did.

In not quite the next *Kable* case, *Baker v The Queen* (2004) 223 CLR 513, Mr Henry Burmester QC, appearing for the Commonwealth, expressly embraced the logic of *Bachrach*. He commenced his oral submissions by saying that the starting point for analysis in a *Kable* case is to ask whether the Commonwealth Parliament could have legislated as the State had done. With the issue framed in that manner, the Commonwealth's interest is clearly in defending the validity of the law. Thus, the polity with the strongest interest in an integrated conception of courts turned out to have an even stronger interest in defending the breadth of legislative power to innovate with respect to courts, judicial structures, and judicial procedures. So in case after case, such as *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, and *Hogan v Hinch* (2011) 243 CLR 506, the Commonwealth defended the diversity conception that might otherwise have been more readily associated with State interests.

Things changed in around 2009, which roughly coincides with a series of cases where *Kable* arguments began to have more success than they had in the preceding decade. In several significant cases, the Commonwealth intervened against the States and propounded a more integrationist view of the judicial system. This tended to occur when it was already clear that there was some relevant limitation on Commonwealth power, such that the Commonwealth had less of its own power at stake, and the *Kable* principle could function as a vehicle for extending a similar limitation to the States in service of the integrationist vision of the judicial system.

In *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, the successful argument was not that of the appellant but rather of the Commonwealth intervening. That case recognised by implication an entrenched judicial review jurisdiction of the State Supreme Courts substantially identical to the federal jurisdiction entrenched by s 75(v) of the Constitution. Commonwealth privative clauses had already been neutered in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, so there was no reason for the Commonwealth not to argue that the States were subject to similar limits.

In *Wainobu v New South Wales* (2011) 243 CLR 181, perhaps the most significant point of principle was advanced not by the successful plaintiff, but by the Commonwealth intervening. And substantive contradiction

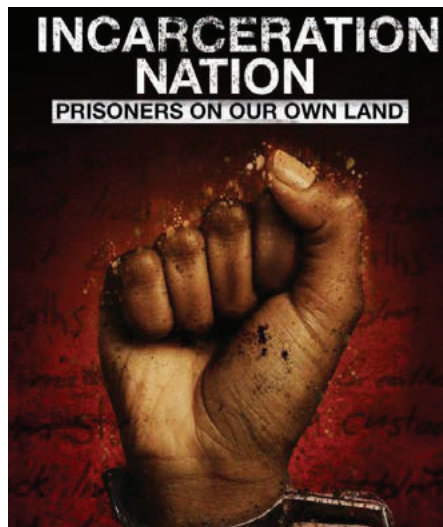
was provided not by New South Wales but by Victoria intervening. That case established that the incompatibility doctrine, which limits the powers that may be validly conferred on a federal judge acting in a personal capacity, has an equivalent companion doctrine in relation to State judges.

*Momcilovic v The Queen* (2011) 245 CLR 1 is another example. The Commonwealth argued that State courts, just like Federal courts, cannot exercise a legislative function that is blended with its judicial functions and, somewhat more subtly, that State courts, even when exercising State jurisdiction, must not be required to apply interpretive principles that could not also be applied in the exercise of federal jurisdiction. That particular argument did not need to be decided, but nonetheless illustrates the fertile grounds of potential divergence between Commonwealth and State interests about the extent to which Australian courts are integrated in one system.

There are some interesting exceptions where the Commonwealth did not seek to extend federal limitations to the States. I have in mind *North Australian Aboriginal Legal Service v Bradley* (2004) 218 CLR 146 and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 in relation to issues of security of judicial tenure. Each of those cases involved independent Commonwealth interests apart from judicial federalism. *Bradley* was a Northern Territory case which implicated the Commonwealth's legislative power under s 122 of the Constitution. And *Forge* was a case in which ASIC relied on the validity of the impugned law. Whether different positions might have been taken had the issue arisen in a different context cannot be known.

But these kinds of circumstances remind us of the various practical contingencies that can affect the arguments a party or intervener might make in a constitutional case. And those arguments in turn become their own contingencies on which the development of legal doctrine depends. The practically contingent nature of constitutional law means that it is important to understand not only the cases themselves, but also the history, theory, doctrine and practice that sits underneath a constitutional position such as judicial federalism. This wide-ranging book is a fine compilation, and a sophisticated synthesis, of those diverse resources and insights, which will be of considerable assistance in understanding the future development of the law in this field.

## DOCUMENTARY



## *Incarceration Nation*

*Incarceration Nation*, which recently screened on NITV, and is available on SBS On Demand, is a 90-minute documentary directed by First Nations award winning filmmaker Dean Gibson. At a time when Indigenous Australians constitute 3.3 per cent of the total population, they make up 29 per cent of Australia's male prison population, 34 per cent of the female prison population and 55 per cent of children in out of home care.

Despite the changes made, the good work and recommendations of the Royal Commission into Deaths in Custody, and the work done by First Nations activists, artists, family members and lawyers a further 474 First Nations deaths in custody have occurred since 1991.

So serious is this issue that there was a need in 2020 for the Legislative Council of the NSW Parliament to inquire and report on the high rate of Indigenous incarceration in NSW<sup>1</sup>. Why after all this time, expense and effort did the retiring chief magistrate, Judge Graeme Henson properly submit to this inquiry as follows<sup>2</sup>?

'Although significant resources have been dedicated to remedying the factors identified by the Royal Commission in the 30 years which have since passed, there has been little or no impact on the disproportionate rate of Aboriginal incarceration. Yet it remains clear that if the number of First Nation deaths in custody is to be reduced, governments need to grapple ... with the underlying causes of over-representation.

As a student at Sydney University living in Wesley College in 1972, I met and worked with First Nations student Neville Perkins. I joined Abschol and then later ran an organisation called Student Action for Aboriginal Australians. I was a member of the committee to support the Aboriginal Legal Service. During this time, I met political activists and lawyers, including the late Peter Tobin. Peter was the first ALS Solicitor

employed in a country office, working in Brewarrina in 1973 with the late Stephen Gordon, the late Tombo Winters (both later colleagues of mine), and my former partner Roslyn Barker. First Nations people were legally represented, and the power of the police challenged and scrutinised. We all thought this would bring change.

I was a foundation solicitor with the breakaway Western Aboriginal Legal Service (the WALs) in January 1978. I spent five years in Dubbo, a year in Wilcannia and seven years in Broken Hill. I was privileged to work with many people, as we provided professional and steadfast legal representation to First Nations people in Western and North Western NSW. We were faced with high arrest rates and big lists at court. That is still the case now facing current ALS lawyers.

Arrests for the trifecta, offensive language, resist and assault police were common and where possible put to the test in court. The culture of policing First Nations communities has, it seems, changed little. I have recently appeared in a severity appeal in the District Court against custodial sentences for offences of intimidate, resist and assault police which contained the hallmarks of the old culture in the hands of young police for a 48-year-old appellant first arrested as an 11-year-old.

By the end of 1987 three of my former clients had died in custody. Malcolm Smith from Wentworth died in Long Bay gaol where he was serving a sentence following a conviction in a jury trial. Tiddas in 1993 sang the song 'Malcolm Smith' and Richard Frankland who wrote the song made a film about his life in 1992 called *Who killed Malcolm Smith?* Lloyd Boney died in the cells in Brewarrina following his arrest on a warrant. Archie Roach, adapting the words of his mother Priscilla, penned the lyrical and haunting song 'Beautiful Child' released on Charcoal Lane in 1990.

Mark Quayle died in the cells at Wilcannia in 1987 after his brother Greg took him to Wilcannia hospital because he was having alcohol withdrawal symptoms. Mark had worked with me as a junior field officer for 12 months and I had appeared for him in a minor matter. His first cousin the late William Bates worked with me for 10 years as the WALs field officer/office manager in the Broken Hill area. It was he who adapted the words of his father the late Jim Bates and created the slogan in 1985 'Always Was Always Will be Aboriginal Land.' My memory of seeing Mark with William in the morgue at Wilcannia on the day he died remains with me vividly to this day. ABC's *Four Corners* produced a program about his death.

These three men were among the 99 persons who died in custody during the 1980s, whose deaths were investigated and reported upon by the Royal Commission. Two teams of lawyers successfully sued the NSW government and the police for civil damages in nervous shock on behalf of the Quayle and Boney families in 1995. I was fortunate to be junior counsel for the Quayle family.

## The Great Genocide

*Incarceration Nation* takes us instructively back into history from the invasion; describing the tools of oppression used to secure possession in the form of massacres, displacement and marginalisation referred to by Anthony McAvoys SC as the great genocide. It tells us of the history not taught in schools; the use of restrictive legislation in each state and Territory, the use of the mission system, itself a form of historical incarceration, the apprenticeship system, stolen generations of children and stolen wages.

In their article in *The Conversation*<sup>3</sup> First Nations commentators Latoya Rule, Lilly Brown and Natalie Ironfield note that this documentary is '*relentless and emotionally demanding of its audience*, as it depicts the violent history of authorities against First Nations people stating that '*For non-First Nations people, Incarceration Nation has the potential to shake the very core of your understanding of what it means to be Blak on this continent.*'

Further these writers pose the critical issues raised in the documentary when they state:

*Incarceration Nation* weaves together historical records, archival footage, statistics, expert advice, and the testimonies of individuals with lived experience and families who have lost loved ones in custody.

For First Nations viewers and our advocates, aspects of this documentary stand within a powerful apparatus to expose the systemic, colonial underpinnings of Australia's 'justice' system.

This film has the potential to be a valuable resource attesting to an indisputable reality that First Nations people have always been acutely aware of: that Australia's carceral system is founded on a genocidal and colonial intent toward Aboriginal and Torres Strait Islander people. An intent driven by a desire for land.

For this documentary to move beyond identifying this problem – one consistently highlighted by First Nations people and communities – it requires non-First Nations people, particularly white people, to change.

The views of people with expertise and experience, including lived experience are aired in interviews. The voices of First Nations people who have lost family members who have died in custody or have experienced the terror of incarceration as children and adults such as Leetona Dungay, Dylan Voller, Keenan Mundine and Apryl Day are heard.

## Confronting Footage

Footage with graphic imagery from historical sources and in recent memory such as from the Don Dale Youth Detention Centre in Darwin is incorporated throughout the documentary. The footage is shocking still, even if viewed previously and it is designed to shock. Rule, Brown and Ironfield raise issues<sup>4</sup> in their review when they state that '*We don't believe this film was made for a Blak audience.*' They raise important ethical considerations about how violence



and incarceration, child removal and abusive events should be depicted, spoken about, told or written about without further harm to First Nations survivors and without fuelling further victimisation and majority society racism.

The documentary is itself a record of this history and it preserves the comments of those involved in it. The details of the premise of the documentary, that the incarceration of First Nations people today is an extension of the historical process, provides fuel for activism and reasons for young First Nations people to continue the history of resistance and to fight for change. The reality highlighted by the documentary is that once the dust settles around a current issue, for those in positions of authority, 'it is business as usual'.

### The Failure of Governments

There have been many reports on Closing the Gap on different aspects of the incarceration of men women and children in different states and Territories. Professor Don Wedderburn referred to the enormous amount of time and effort and money spent by governments to reduce the rate of imprisonment. Despite this it has risen to 16 times higher than non-Aboriginal imprisonment. He said, *'The whole thing has been an unmitigated disaster.'* Teela Reid refers to governments *'kicking the can down the road creating more reports where there is no accountability to enact the recommendations and no real change happening on the ground in our communities.'* As Anthony McAvoy SC observed, governments create reports to take the political heat out of an issue, *'then the report is left to wither on the vine.'*

The increase in the rates of incarceration and the proportion of First Nations people locked up was noted by First Nations barrister Joshua Creamer referring to a period commencing in the 1970s and extending to the present, during my time as a student, solicitor and barrister. In fact, since the 1991 Royal Commission First Nations people have doubled as a proportion of the prison population from 14 to over 28 per cent. The issue of recidivism is a vital one with First Nations solicitor Teela Reid raising the likelihood of another generation of young people lost to the system. In 2015-2016 the rate of recidivism for First Nations people was 76 per cent.

The length of sentences imposed on First Nations prisoners is often less on average than the rest. In 1987 when I was the Western Aboriginal Legal Service Solicitor based in Broken Hill the average length of all sentences imposed in that Local Court circuit was a bit over four months. Current statistics show that up to 45 per cent of First Nations prisoners serve sentences of six months or less.

### Imprisonment Vested Interests

The documentary addressed the cost of incarceration in an ever-expanding correctional system over the much smaller cost of providing community supports and post release programs which are virtually non-existent.

A privately run correctional facility, Clarence, has been built recently near Grafton, the largest facility of its kind in the country, housing up to 1700 inmates. Two facilities have been built near Wellington since 2006. The documentary highlighted the business of imprisonment. The calls for law and order to gain votes, the locking up of people and the creation of vested financial interests for local business and employment, all create an institutional edifice of incarceration with entrenched stakeholders.

### Systemic Bias

Professor Don Wedderburn and others spoke of the systemic bias of the system of justice against First Nations people. Key drivers of incarceration are poverty and disadvantage with factors contributing to this being social exclusion and racism, substance abuse, employment, housing, education, health and disability. There are underlying factors of experience of trauma including intergenerational trauma, being in child protection, family violence and/or sexual abuse. The fastest growing group being incarcerated in Australia are First Nations women, a group where, in 2017 in WA, up to 90 per cent are survivors of family and other violence.

In addition there are further integral factors in the relationship of First Nations people with the justice system such as recidivism, previous contact as an adult or juvenile, contact with police and the courts, access to legal assistance and prevailing legal policy settings which drive the processes.

### Culture of Racism

The commentators assert that the culture of policing is racist and that First Nations persons were historically seen as perpetrators. This they argue is still the case today. Edited snippets of footage of a number of violent episodes involving various police forces underline these issues. First Nations people are seven times more likely to be charged and appear in court. Where there is such a wide discretion to arrest being exercised, as Professor Wedderburn notes, this is the biggest risk to systemic bias. The Northern Territory with its system of so-called 'paperless arrests' and mandatory sentences is held up as an overt example.

In NSW as a young solicitor I appeared in 1978 before Clerks of the Court in Wilcannia and Brewarrina for Aboriginal people in custody charged with being drunk in a public place on days when the Court of Petty Sessions did not sit. That offence under the *Summary Offences Act* NSW was repealed in February 1979 and replaced with the *Intoxicated Persons Act* which set up a regime of proclaimed places where people who were intoxicated in public could be taken. Yet we are confronted with the Victorian case of Ms Day in the documentary who was taken off a train and died in the police cells at Castlemaine in 2017 having been arrested for the offence of public drunkenness,

some 38 years after the offence had been abolished in NSW.

### Justice Reinvestment

The documentary emphasises the need for change. It points to justice reinvestment programs targeting child support, schooling, employment and reduced substance abuse as vital. Allied with this approach is the taking of money out of prison building and investing it in community-based orders which keep people out of custody and reduce the number of people going to prison. Commissioner Mick Gooda explains this concept saying that there is no quick fix and these things take time and the building of relationships.

Justice reinvestment at work is seen in the Maranguka Program in Bourke. Alistair Ferguson, for whom I once acted, is the AJAC officer liaising between the community and the police in a regular process, who helped set up the project. The project has seen a substantial change in both policing and rates of offending in the Bourke community where a high proportion of the population are First Nations people. There has been an 18 per cent reduction in major offences a 34 per cent reduction in non-domestic violence related assaults reported, a 39 per cent reduction in domestic related assaults reported, a 39 per cent reduction in people proceeded against for drug offences and a 35 per cent reduction in people proceeded against for driving offences. Yet this program only cost \$561,000 in 2016-2017, not much more than the cost of locking up a child for 12 months.

The cost of Indigenous incarceration was put in the documentary at \$9.7 billion in 2020, rising to \$19.8 by 2040. If the rate of incarceration was reduced to equality with the general population by 2040 that cost would be reduced by \$18.9 billion, costing only \$900 million.

Teela Reid challenges people to step outside their own comfort zones to help move the process of change forward in some way by showing up every day in their personal and professional lives to try and dismantle the legacies of oppression the past. She says at the end of the documentary that *'Business as usual in this country is over. If we are serious about reducing Indigenous incarceration. We need to get very serious about being uncomfortable with the status quo.'*

**Eric Wilson SC, Public Defender**  
Member of the NSW Bar Association  
First Nations Committee

### ENDNOTES

- 1 The Legislative Council of NSW Select Committee on 'The high level of First Nations people in custody and oversight and review of deaths in custody,' reported in April 2021.
- 2 Ibid page 6.
- 3 *The Conversation* August 30, 2021 *Incarceration Nation* exposes the racist foundations of policing and imprisonment in Australia, but at what cost?
- 4 Ibid.

## Summer podcast guide for Bar News

- There is little more conducive to engaging with a long form podcast than a beach to walk along, headphones in one's ears slightly muffling the sound of the sea. Some podcasts, such as those that review books<sup>1</sup> or keep us up to-date with what is happening in popular culture,<sup>2</sup> or in politics<sup>3</sup> are great for, say, a daily commute when our attention spans are relatively limited. But summer gives us an opportunity for some deep dives into complex storytelling.
- True crime makes up a particularly significant part of the podcast universe. It was, after all, *Serial*<sup>4</sup> that in 2014 introduced the concept of the podcast to a large part of the world that had not yet discovered its joys. Typically, the long form true crime podcast takes an unsolved mystery (or at least one where the presenter takes issue with the resolution) – often involving a gruesome death – and reviews and questions it, sometimes talking with police; lawyers; witnesses; and occasionally (particularly in the US), jurors.



Reg Graycar



### West Cork

As its name suggests, *West Cork* comes from Ireland<sup>5</sup>: a Parisian woman, Sophie Toscan du Plantier, who had a holiday house in a remote part of West Cork, was brutally murdered in 1998 while alone at the house. The series was originally released in 2018, but was updated with a new episode in 2021,

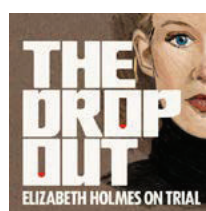
after an interesting new development (no spoilers!). Louis Theroux apparently described it as 'possibly the best true crime podcast of all time'<sup>6</sup> and it was also very favourably reviewed by the *Sydney Morning Herald*.<sup>7</sup> While a podcast can create quite a colourful word picture, it sometimes leaves us wanting to see the literal pictures. As it happens, shortly after the 2021 episode aired, Netflix released a three-part documentary that provided that context, though after the detailed and nuanced exposition of the podcast, it seemed, not surprisingly, a tad superficial.<sup>8</sup>



### Suspect

As Nicholas Quah, a reviewer for *Vulture.com* put it, 'In the year of our Lord 2021, you can't swing a cat without hitting a true-crime podcast'. But in his view, *Suspect*<sup>9</sup> may be the best of the year.<sup>10</sup> For anyone with even a passing interest in issues of criminal justice, this one is hard to miss. We all have some

sense of some of the issues that plague the criminal justice system in the US. This series raises many of them including racism and racial profiling and how those phenomena influence police investigations; and the increasing reliance on DNA evidence and some of the dangers of assumptions made about it. *Suspect* also, somewhat disturbingly, takes us behind the ways in which jurors approach their task, in ways rarely if ever available to us in Australia. Like *West Cork*, *Suspect* is a long but utterly compelling and expertly told story, clearly prepared over years by skilled investigative journalists with a background in investigating the use of DNA evidence.<sup>11</sup> It concerns the aftermath of a murder in 2008 of a young software engineer, Arpana Jinaga, in a suburban apartment complex outside Seattle, WA, following a Halloween party thrown by her and others. There are nine episodes: highly recommended for those beach walks.



### The Elizabeth Holmes and Theranos juggernaut

In 2019, the podcast *Pop Culture Happy Hour* (highly recommended for keeping up with what is happening in movies/television and yes, occasionally, podcasts too) had an episode about Elizabeth Holmes and her startup: Theranos.<sup>12</sup> As the webpage for that

episode tells the story:

*'Nothing fascinates the world like a meteoric rise. Except, of course, for a spectacular fall. The story of the Silicon Valley startup Theranos and its young founder Elizabeth Holmes has both. And the coverage it's received has been huge. There's the book Bad Blood: Secrets and Lies in a Silicon Valley Startup, the podcast The Dropout, and the HBO documentary The Inventor: Out for Blood in Silicon Valley. Today we look at three ways of telling the same story.'*

The podcast they were referring to, *The Dropout*,<sup>13</sup> was released in early 2019 by ABC media (the US version) and documented the rise (and fall) of Elizabeth Holmes, who after dropping out of Stanford University, founded Theranos when she was 19 years old. Theranos was a start-up that promised to provide the world with a new and revolutionary form of blood testing said to be able to be undertaken from a single pin prick, rather than by extracting blood via the more established use of drawing blood from veins with needles. Theranos and Holmes attracted the interest of prominent supporters and investors such as Bill Clinton and Rupert Murdoch respectively. The company's board included a number of well known establishment figures such as Henry Kissinger, Jim Mattis (retired Marine Corps four-star general); George Shultz (former United States Secretary of State) and others. Holmes appeared frequently in media profiles and hagiographies, including on the front cover of *Forbes* magazine as well as in many promotional stories (or infomercials). This all came crashing down, not least due to some highly skilled investigative reporting by *Wall Street Journal* journalist and author John Carreyrou, ultimately published in his book *Bad Blood: Secrets and Lies in a Silicon Valley Startup* (Bad Blood).<sup>14</sup> *The Dropout*, which was released in 2019, told the story of Holmes and Theranos in six episodes. But it has returned in 2021 with new episodes now that Holmes is on trial. In fact, the trial, which started in August 2021 and is ongoing at the time of writing, prompted renewed interest, even in Australia, where the local *60 Minutes* program did a story on it.<sup>15</sup>

John Carreyrou, the author of *Bad Blood*, has also launched a podcast in 2021 which is following the trial: it is called *Bad Blood: The Final Chapter*.<sup>16</sup> Meanwhile, the HBO documentary is still available to stream and a mini-series is apparently being released in 2022.<sup>17</sup>

As an aside, for those who have been following the TV series *Impeachment* about the Bill Clinton impeachment, those events also gave rise to a nuanced and thoughtful podcast in the series *Slow Burn*, produced by Slate: also highly recommended.<sup>18</sup>

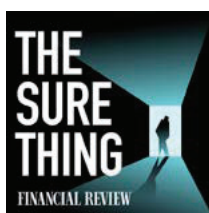




### *I'm not a monster*

As the BBC blurb for this BBC/NPR Frontline joint production put it: 'How did an American family end up in the heart of the ISIS caliphate? Over four years, journalist Josh Baker unravels a dangerous story where nothing is as it seems.'<sup>19</sup> *The Times* gave this series a well-deserved five star review<sup>20</sup>. It is expertly crafted and engagingly presented. It tells a

story both truly shocking (think ten-year-old manifestly American child appears in ISIS video threatening the life of the US President) and ultimately on the other hand, unremarkable for those familiar with the stories of women experiencing domestic violence and abuse while trying to raise their children. Another riveting long form tale that will keep you compelled as you move through the episodes.



### *The Sure Thing*

While those listed above are all from other countries, lest it be thought that Australians don't make podcasts, the final 'true crime' recommendation for this summer is *The Sure Thing*,<sup>21</sup> a podcast made by the *Australian Financial Review* and its journalist Angus Grigg with involvement and assistance from Professor Clinton Free of Sydney University

Business School, an expert in white collar crime.<sup>22</sup> This is the story of an insider trading prosecution of two men, one of whom worked at the Australian Bureau of Statistics (ABS), and the other at the National Australia Bank foreign exchange desk. They came up with a scheme where they used data from the ABS before it was public to make trades, though as the podcast reveals, they each did so in different ways. They were eventually apprehended and charged: both pleaded guilty and were sentenced to terms of imprisonment. Only Chris Hill, the former ABS employee, spoke with the podcast, which also heard from various sources including police and other investigators. Hill also recently appeared on an episode of ABC's *Australian Story*, which, at thirty minutes, could not really do more than skim the surface by comparison with the comprehensive and nuanced treatment of a multi-episode podcast.<sup>23</sup>

Reassuringly, not all podcasts are about true crime. There are two more long form but entirely different summer listening suggestions.



### *In Plain Sight*

Some of *Bar News*' readers will be fans of Robert Caro's extraordinary multi-volumed biography series about Lyndon B Johnson, four volumes of which have been published with the fifth widely anticipated.<sup>24</sup> While Lyndon Johnson is a fascinating figure, what is less widely known is how accomplished

and interesting was his wife, Lady Bird (Claudia) Johnson. Earlier this year, Julia Sweig published *Lady Bird Johnson: Hiding in Plain Sight*<sup>25</sup> and Sweig has also released a related podcast, *In Plain Sight*,<sup>26</sup> the blurb for which provides:

*In Plain Sight: Lady Bird Johnson uncovers Lady Bird's surprisingly powerful role in the Johnson presidency and provides history-making revelations about Lyndon B. Johnson's time in office. Told in the former first lady's own words from over 123 hours of her audio diaries — most of it never-before-heard — 'In Plain Sight' reveals how one vastly underestimated woman navigated the politics and polarisation of her era to become one of the most influential members of the Johnson administration, even if we never knew it. ...*

As the blurb indicates, what makes this so compelling is hearing from Lady Bird Johnson herself: she kept both tape recordings and written diaries and they have only recently been released, facilitating Sweig's research and writing, and enlivening the podcast in a way that would not have been possible without the audio recordings.



### *Dolly Parton's America*

Last but by no means least, the podcast that won the most 'best podcast of the year' awards in 2019 is *Dolly Parton's America*.<sup>27</sup> As the *New York Times* put it when it came out, 'Is There Anything We Can All Agree On? Yes: Dolly Parton'<sup>28</sup>. There are so many reasons to listen to this. First, it is made by

an extremely accomplished journalist/podcast maker: Jad Abumrad, who has produced and hosted the award winning podcast, *Radio Lab*, for many years. It was *Radio Lab* that created its spin-off series, *More Perfect*,<sup>29</sup> which told stories about the US Supreme Court and some of its key decisions over several seasons.

If you listen to the podcast you will get to hear some fascinating interviews, great music and you'll also come to understand how it was that Dolly Parton donated money for the development of the Moderna COVID-19 vaccine.<sup>30</sup> But there is so much more: it is a wonderful series about a complex, multi-talented and fascinating American icon: a perfect summer antidote to all the gruesome crime you may already have listened to. And there is of course a playlist to go with it.

*Enjoy The summer!*

### ENDNOTES

- 1 e.g., <https://www.nytimes.com/column/book-review-podcast>
- 2 See <https://www.npr.org/podcasts/510282/pop-culture-happy-hour>
- 3 For the US, see for example <https://www.nytimes.com/column/the-daily>; for Australia try <https://7am.podcast.com.au/> or <https://www.abc.net.au/radio/programs/the-signal/>
- 4 <https://serialpodcast.org/season-one>
- 5 <https://www.westcorkpodcast.com>
- 6 <https://www.irishmirror.ie/showbiz/irish-showbiz/louis-theroux-labels-popular-irish-24200033.asp>
- 7 <https://www.smh.com.au/culture/tv-and-radio/is-west-cork-one-of-the-greatest-true-crime-podcasts-since-serial-20210611-p58061.html>.
- 8 'Sophie – A murder in West Cork' <https://www.netflix.com/au/title/81094755>
- 9 <https://wonderly.com/shows/suspect/>
- 10 <https://www.vulture.com/article/suspect-podcast-review-true-crime-wonderly.html>
- 11 One of them, Matthew Shaer had previously published about it: <https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/> and was approached about this case.
- 12 <https://www.npr.org/2019/04/30/718663783/elizabeth-holmes-and-theranos-in-pop-culture>
- 13 <https://abcaudio.com/podcasts/the-dropout/>
- 14 <https://www.penguinrandomhouse.com/books/549478/bad-blood-by-john-carreyrou/>
- 15 <https://www.youtube.com/watch?v=BgNfrDXr7uA>
- 16 <https://www.threecunnysfour.com/show/bad-blood>
- 17 <https://www.hbo.com/documentaries/the-inventor-out-for-blood-in-silicon-valley>; the mini series, also called 'The Dropout', starring Amanda Seyfried as Holmes, is apparently to be released in 2022: see <https://www.imdb.com/title/tt10166622/>
- 18 <https://slate.com/podcasts/slow-burn/s2/clinton>. Season 1, also highly recommended, is about Watergate and Richard Nixon.
- 19 <https://www.bbc.co.uk/programmes/p08yblkf>
- 20 <https://www.thetimes.co.uk/article/im-not-a-monster-podcast-review-a-bomb-dodging-bone-chilling-drama-97kzqv6kd>
- 21 <https://www.afr.com/podcast/the-sure-thing>
- 22 See <https://www.afr.com/companies/financial-services/let-s-be-smarter-not-harder-on-white-collar-crime-20210330-p57fam>
- 23 <https://www.abc.net.au/austory/the-accomplice/13555466>
- 24 For a list of Caro's books (four of which are the Johnson series), see <https://www.robertcaro.com/the-books/>. For a recent story about the 86-year-old author, see <https://www.newyorker.com/magazine/2021/11/01/why-robert-caro-now-has-only-ten-tipewriters>
- 25 <https://www.penguinrandomhouse.com/books/234331/lady-bird-johnson-hiding-in-plain-sight-by-julia-sweig/>. For a review see <https://www.nytimes.com/2021/03/11/us/politics/lady-bird-johnson-diaries-lbj.html>.
- 26 <https://abcaudio.com/podcasts/in-plain-sight-2>
- 27 <https://www.wnycstudios.org/podcasts/dolly-partons-america>
- 28 <https://www.nytimes.com/2019/11/21/arts/music/dolly-parton.html>
- 29 <https://www.wnycstudios.org/podcasts/radiolabmoreperfect>
- 30 This video is a bit of a spoiler! <https://www.youtube.com/watch?v=jf0N8EK6W4>