Australian Arts Law Update

Hanging Judges and the Archibald Prize

The Hon Justice Michael Kirby AC CMG[*]

Hanging Judges

When I was President of the New South Wales Court of Appeal, my artistic gene was switched on by the appointment to the Court of Justice Roddy Meagher. His love and knowledge of art are legendary. And so was that of his late wife Penny, a considerable artist herself.[1]

Sitting next to Roddy Meagher in court, I would often pass him cartoons and sketches that I had drawn during the boring bits. Mostly, they portrayed barristers or fellow judges. Some of these appeared fat and well contented. Others were gaunt and wraith-like. One of them was always portrayed with a halo around his head. You will have to guess why.

Justice Meagher collected these brilliant, but amateur, works. I was looking forward to the day when they would be published by him and launched in a great art gallery. Sadly, they disappeared. Either they were stolen by a jealous colleague or, more likely, consigned to the waste paper basket by a cleaner who had even less taste in art than the average judge. It was a loss to art that ranks with the destruction of Graham Sutherland's portrait of Churchill. I may never get over it.

The common lack of judicial skills in deciding what is art is thus the theme of the first part of my talk. Art, and specifically portraiture, occasionally present legal problems. In a rule of law society, such problems have to be resolved, ultimately by judges. One might like it or lump it. But cases do not go away because judges, or others, doubt judicial suitability to decide the cases. Rightly or wrongly, in a society such as ours, contests of a legal character have to be decided by people like me.

Occasionally, the issues arise in the absurd context of *customs and excise* law. In October 1926, sculptures were sent from France to be exhibited in the Brummer Gallery in New York. They included large works by Constantin Brancusi. One of them, 'Bird in Space', was an object four feet tall. It was made of shiny and heavy yellow bronze. As a work of art, it was exempt from customs duty. But the United States customs officials were unimpressed. They applied an enormous tariff applicable to manufactured objects of base metal.[2] The gallery objected. The case went to the United States Customs Court. The judges pressed the gallery owner with questions based on their rustic experience:

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* Justice of the High Court of Australia. An address presented at the Art Gallery of New South Wales, Sydney, on 28 March 2006.

1 R P Meagher (Ed), *Penny Meagher, Painter*, Beagle, Sydney, 2001.

2 S Giry, 'An Odd Bird', *Legal Affairs*, September/October 2002.

JUDGE:	Simply because he called it a bird does that make it a bird to you?
OWNER:	Yes your Honor.
JUDGE:	If you would see it on the street you would never think if calling it a bird would you?
OWNER:	. . . (A contemptuous silence).
OTHER JUDGE:	If you saw it in the forest, you would not take a shot at it?
OWNER:	No your Honor.

Despite the ignorance manifested in these questions, the judges ultimately ruled in favour of the artist. They held that the work was 'beautiful and symmetrical in outline'. It was thus entitled to free entry to the United States. Heaven knows what would have happened if the judges had found the work ugly. Perhaps they would have felt the need to protect their fellow citizens from it.

Obscenity is another area where judges and artists have come together. To overcome accusations of obscenity, artists have often resorted to contending that their work has literary, artistic, political or scientific value. In *Pope v Illinois*,[3] a judge in Chicago had had enough. He instructed the jury that the work in question was without 'value'. The Supreme Court of the United States held that the jury needed to be told that a work, allegedly obscene, did not need to enjoy civic approval to merit protection from the criminal law. The proper inquiry was not whether an *ordinary* member of the community would find the work of serious value, although allegedly obscene, but whether a *reasonable* person would find value in the work, taken as a whole. This was a liberal decision of the Supreme Court. Whether it would still represent the law in the United States in these more conservative judicial times must be a matter of doubt.

Another field of law that frequently involves judges judging works of art is the law of *copyright*. Typically, that law protects the creator's interest in works of artistic craftsmanship. Questions have often arisen as to whether a particular work falls within such a classification and is therefore worthy of copyright protection.[4]

Connected with this question are countless disputes over *taxation* law. In Australia, the former law of sales tax exempted works of art from its burdens. Many a time, judges have struggled over disputed questions as to whether a particular work is deserving of the description of artistic craftsmanship. In *Commissioner of Taxation v Murray*,[5] the Federal Court of Australia concluded that the proper test for determining whether a work was a 'work of art' was primarily an objective one. If the objective test left room for doubt, the doubt can be resolved by reference to the subjective impressions of the judge as to whether the work in question is 'utilitarian and artistically pleasing'. Lawyers tend to dress such issues up in words (the paint, oils and

3 481 US 497 (1986).

4 See, eg, *George Henscher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64. See also P H Karlen, 'What is Art? A Sketch for a Legal Definition' (1978) 94 *Law Quarterly Review* 383 at 399.

5 (1990) 21 FCR 435.

crayons with which lawyers work), to give them the appearance of certainty, objectivity and incontestability. However, often little more is involved than the aesthetic sense of the decision-maker who, ultimately, in a court, must be a lawyer sitting as a judge.

In the Federal Court, Justice Sheppard quoted Sir Zelman Cowen's description of the libel action brought by Whistler against Ruskin in 1878.[6] Ruskin had written of a painting by Whistler:

> I have seen and heard much of Cockney impudence before now, but never expected to hear a cockscomb ask two hundred guineas for flinging a pot of paint in the public's face.

Whistler won. But he only recovered nominal damage of a farthing. His costs must have been huge. Sir Zelman Cowen concluded, in words that ring down the years for the Archibald Prize:

> Whistler, though subjected to ridicule and attack in his own day, has now achieved well-merited recognition. The scorn poured upon the impressionists has now turned to praise. Those facts should serve as a warning to those who laugh to scorn contemporary art.[7]

Perhaps Whistler's mistake was bothering to sue Ruskin in a court of law, knowing, as he must, that this would necessitate relying on the opinion of judges or jurors who might sometimes hold 'barbarian' views, reflecting, in a sense, the diverse opinions of their fellow citizens.

On the Archibald Prize for *portraiture*, little is left to be said since the publication of the history of the Prize, *Let's Face It*.[8] As Edmund Capon says, in his foreword to that book:

> The Archibald Prize is indelibly etched into the history and psyche of twentieth century Australian art. Indeed, the Archibald is far more than an art award: it is the most improbable circus which, like so many imponderables, succeeds mightily against all odds.[9]

So far, there have been three major law cases about the Archibald Prize. Yet outside the courtroom, legal opinions have often been taken many times as to what J F Archibald's will requires. The first such enquiry concerned what was meant by 'resident in Australasia'. In 1921, Mr Langer Owen KC expressed the view that the precondition of residence meant that the artist must have a place or country which is the artist's home. This advice expelled, at first, the works of some famous artists, like Lambert and Longstaff. They worked in England, although they were undoubtedly regarded as Australians.[10] Notwithstanding this advice on the 'residency' question, Longstaff was awarded the Prize in 1925 for his portrait of the actor Maurice Moscovitch. The Trustees must have put art above Mr Owen's opinion. The point was not challenged in court.

Other disputes have arisen over what J F Archibald meant by saying that the Prize should 'preferably' commemorate a person 'distinguished in arts, letters,

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6 Z Cowen, 'An Artist in the Courts of Law' (1945) 19 *Australian Law Journal* 112 at 112.
7 Ibid, at 113.
8 P Ross. *Let's Face It: The History of the Archibald Prize*, Art Gallery of NSW, 1999.
9 Ibid, at 7.
10 N Borlase, *Quadrant*, March 1982, 51 at 53.

science of politics'. What did 'preferably' require? What did 'distinguished' mean? Again, these points have not come to judgment. So far.

The greatest battle was joined when the Archibald Prize was awarded in 1943 to William Dobell for his portrait of his fellow artist Joshua Smith.[11] This time a challenge was brought in the Supreme Court of New South Wales. It contested the opinion that the work was a 'portrait' at all. Mr Garfield Barwick KC assumed the burden of showing that it was not a portrait but a caricature. He propounded the thesis that these two concepts were completely contradictory.

John Olsen, then an art student who like all of his colleagues was 'wildly pro-Dobell, of course', remembers singing boisterously at parties of the time, to the tune of *Champagne Charlie*:

> William Dobell is my name,
> Painting portraits is my game,
> At distortion I'm just whizz, whizz, whizz
> I'll twist every face there is, is, is.[12]

The challengers considered that Dobell's portrait of Smith went a twist too far. The case was heard by a noble and sensitive Supreme Court judge, Justice David Roper. Despite Barwick's brilliance, the team for the Trustees led by Frank Kitto KC (later a High Court judge) won the day. Kitto was subsequently to become the father-in-law of Kevin Connor, whose portrait of Kitto won the Archibald Prize. Kevin Connor's visage is present again in the 2006 Archibald exhibition.

The decision of Justice Roper is reported in the law reports.[13] It is a clear decision, easy to read and to understand. It is as if the judge decided to drop as much legalese as possible and to speak directly so that the public and artists would comprehend his reasoning. He pointed out that the word 'portrait' had been used in Mr Archibald's will in a context that was addressed to 'eight persons, all highly qualified to express an opinion on the meaning of the word, as it is understood by artists'.[14] The judge was satisfied that, amongst artists, the word 'portrait' did not have a technical meaning, different from the ordinary meaning amongst the laity. He concluded:

> The picture in question is characterised by some startling exaggeration and distortion clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. It bears, nevertheless, a strong degree of likeness to the subject and is I think undoubtedly, a pictorial representation of him. I find as a fact that it is a portrait, within the meaning of the word in this will . . . Finally, I think that it is necessary to state my opinion of the claim that the portrait cannot be included . . . because it is proper to classify it in another realm of art or work — as caricature . . . or as fantasy . . . It is, I think, unnecessary to consider whether the picture could properly be classed as a caricature or a fantasy. If it could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classified as a portrait.

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11 The story is told in Cowen, above n 6 at 112.
12 J Hawley, 'A Portrait of Pain', *Good Weekend*, 18 August 1990, 19 at 22.
13 *Attorney-General v Trustees of National Art Gallery of NSW* (1945) 62 WN (NSW) 212.
14 Ibid, at 215.

To the end of his life, Sir Garfield Barwick was still bristling over this notable failure. He put it down to his own 'poor advocacy'.[15] He thought that he had good material to establish that the work was not a 'portrait' as required by the will. He concluded that he had tripped up the experts for the Trustees. Alas, many advocates, perhaps a few artists, fall in love with their own brilliance.

We now know that the prize of 1943 had a sad aftermath. Dobell hid the portrait in his Sydney apartment. It was partly eaten away by silverfish. Eventually, it was sold to an owner in whose possession it was burnt, almost to destruction. When it was restored, only 5% of Dobell remained.[16] Meantime, Joshua Smith felt cursed by the affair. He resented what he saw as Dobell's presentation of him as an ugly cartoon. Even 40 years later, he still choked up and shed heavy tears when he spoke of the portrait.

Nor did the traditional artists who challenged Dobell come off lightly. Donald Friend, a close confidant of Dobell, loved to tell the story of Mary Edwards, one of the challengers. According to Friend, she wore 'voluminous dresses and braided hair coiled like two telephone receivers'. One day she discovered an artificial penis in the garden of her home. A sculptor resident had hurled it out of a window instead of a bone, seeking to exercise his dog. Ever one to be easily alarmed, Mary Edwards called the police. She said there had been a murder and that she had the evidence.[17] But on this occasion, in 1943, the unconventional won the day in court.

In September 1983, Justice Michael Helsham,[18] in the second case, concluded that a painting by John Bloomfield of Tim Burstall did not qualify because the artist had never met the subject. In Justice Helsham's view, the reference in J F Archibald's will to a 'portrait' meant a work that was painted from life. In fact, the portrait in question had been painted from a photograph. Whilst acknowledging that the judge had assembled some compelling reasons for saying that painting from life was a requirement of Mr Archibald's will, a distinguished legal commentator, in the Australian Law Journal, concluded that, there being no express requirement to that effect, 'an equally compelling case can be made to support a conclusion that the [Bloomfield] portrait should not have been disqualified'.[19] He remarked:

> [I]f a live sitting were the primary criterion, there would be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens in, respectively, the Victorian National Gallery and the Australian National Gallery at Canberra. These must have been painted on the basis of images in a mirror; is there any distinction of significance between a photographic image and a mirror image? A self-portrait cannot possibly be done from a live sitting.

The decision in the Bloomfield case was condemned in the legal text as 'being in conflict with the inherent factors of artistic creation'.

On 9 July 1985 Justice Philip Powell, in the third case, ruled that the Archibald Prize should be retained in perpetuity by the Art Gallery of New

15 G E Barwick, *A Radical Tory*, Federation Press, Leichhardt, 1995, pp 48–50.
16 Hawley, above n 12, at 19–28; cf D Bagnall, *The Bulletin*, 4 May 2005.
17 Hawley, above n 12, at 22.
18 *Bloomfield v Art Gallery of New South Wales*, Supreme Court of NSW, (unreported, Helsham CJ in Eq, 23 September 1983); cf R Coleman, 'Why courts are being asked to chart the Archibald Prize's future', *Sydney Morning Herald*, 8 March 1982, p 7.
19 J G Starke, 'Literary and Artistic Competitions' (1984) 58 *Australian Law Journal* 52 at 53.

South Wales.[20] In response to a challenge after the death of Gladys Archibald, the last surviving beneficiary of J F Archibald, the judge decided that the Prize could continue as 'a good and charitable bequest'. This meant that the capital of the bequest would be transferred to the Trustees of this Gallery rather than to the Australian Journalists' Association, whom Archibald (one-time editor of *The Bulletin*) had named as the residuary beneficiary. Justice Powell declared that the object of the bequest was 'the continuing production and exhibition to the public of portraits of high quality, painted by artists resident in Australia'.[21] He rejected the journalists' submission that the Archibald Prize had become so irrelevant that it 'was like giving a prize for cave painting'. Justice Powell ruled that 'those who came but to stand and stare must learn something'.

There is another, fourth, case involving a claim that has followed the award of the 2004 prize to Craig Ruddy.[22] As that case is pending, I will say no more about it. It concerns whether the winning portrait of David Gulpilil was a 'painting'.[23] It is listed for hearing in May 2006.[24] So watch this space.

The contribution of the Archibald Prize to the popularity of art in Australia in general, and to portraiture in particular, cannot be denied. Even the controversies that have surrounded the prize winners, and the other portraits chosen for exhibition, are generally a good thing. The great liberal Justice of the High Court, Lionel Murphy, famously defended agitators and trouble-makers. He declared in a case brought against the Aboriginal activist, Percy Neal, that 'Mr Neal is entitled to be an agitator'.[25] In the realm of art, the lesson of most of the Australian cases on painting and law is that judges have normally held that artists may also be agitators. They may be creative. They may push the envelope. They may do strange and challenging artist things. They may be odd and unconventional. They may be, dare I say it, queer.

I honour artists — winners and non-winners. They come from the world of the spirit. It is a wonderful experience, for which I will always be grateful to J F Archibald and his prize, that I have come to know a number of them. As a citizen I cherish them and their marvellous works. I acknowledge my debt to this Gallery, its Trustees, the Director and the workers and volunteers for presenting us annually with this circus, this provocation, this stimulation and this controversy. Such events and controversies should always be present in the world of the spirit. The Archibald Prize is no exception.

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20 Explained in Ross, above n 8, at 148.

21 Ibid, at 86.

22 *Johansen v Art Gallery of New South Wales Trust* [2006] NSWSC 577 (unreported, 14 June 2006, BC200604259). See *Sydney Morning Herald*, 23 July 2004.

23 Ibid.

24 The case was heard on 29–30 May 2006 in the Supreme Court of New South Wales before Hamilton J and the decision was reserved (Judgment was handed down on 14 June 2006, dismissing the plaintiff's claim; see the **editor's note** at the end of this paper).

25 *Neal v R* (1982) 149 CLR 305 at 317.

Portrait of the Artist

But what it is like to be the *subject* of an entry for the Archibald Prize? I am glad of a chance to describe this because this is the first time that I have actually become a hanging judge.

Although a number of very accomplished portraitists have painted portraits of me, including Judy Cassab, Ralph Heimans and Rodney Pople (another finalist in 2006), none of them, if they submitted, was chosen for display. It is painful for the subject of the portrait as well as for the artist, not to be hung. The rejection goes straight to the heart. Losing in the final is less hurtful. At that stage choice is inevitably difficult. However, the subject shares an intense experience in the preparation of a portrait. From the moment of the decision to paint is made, the artist and the subject are locked together in a special bond. So it has been between me and my artists. A friendship is created that endures long after the hullabaloo of Mr Archibald and his prize have passed into a faded memory.

I made contact with Jo Palaitis in 2005, after viewing her marvellous portrait of Prime Minister John Howard and Mrs Howard, that hangs in that other great artistic institution, the National Portrait Gallery in Canberra. The Howards' portrait is near Ralph Heimans' portrait of me. The juxtaposition of the two works put me in mind to revive my friendship with the artist which began in 1983 when Jo Palaitis executed her first portrait of me. So we met over coffee. She proposed a second portrait. I agreed at once. Thus the journey began anew.

Every artist has particular techniques. For Jo Palaitis, intense discussions with the subject seem almost as important to her art as the sketches, the drawings, the photographs and the painting that come together in the finished portrait. Before she began work, she wanted to know more about me. We talked about law and social justice. About minorities and friendship. About our families and our respective partners, Ed and Johan. As we talked, I noticed that she had fixed her eyes on me. She was staring at me with an intense stare that I had seen before. It is somewhat other-worldly. It is as if there are extra genes in the human genome of a gifted artist. They have the uncanny capacity to translate appearances in the external world into paint, perspective and colour on canvas or board. Every now and again she would note down a phrase that I had used or a thought that I had expressed. How can such ephemera be converted into tangible shapes and lines and forms?

We talked about portraits that we both liked. I mentioned a portrait I had seen many years ago in the Rijksmuseum in Amsterdam. I first visited that great treasure house in 1969 with Johan. Just inside the entrance, before one comes to the marvels of the Golden Age of Netherlands painting, are stunning works by painters from outside Holland. In pride of place amongst them is a portrait by Goya. It is a portrait of Don Ramón Satué. It is subtitled 'The Spanish Judge'. Considering all the judges I had known, this title drew me to Don Ramón. I have renewed his acquaintance on all my subsequent visits to Amsterdam. We are now quite close friends.

The brochures explain how Goya, like many painters of his era, accepted a theory about portraiture: that there are two sides to the human face. Those sides display, respectively, joy and grief; softness and hardness; kindness and

cruelty. So there it was in the face of the Spanish judge. Two sides to his face, portraying the ambivalence of human personality.

Jo Palaitis obtained a reproduction of Don Ramón's portrait and we talked about it some more. In the past, most of her works have been, like her earlier portrait of me and of the Howards, bright — with copious pastel colours, full of detail. More often than not, flowers and objects add vibrant shades and contrasts to the appearance of the human subject. But Goya, presented his judge in austere, sombre simplicity. Against a pure black background, the judge appears in a vest, with white ruffles at his neck and a red cummerbund. He is of a certain age. Not old and venerable, but certainly past the glory of his youth. 'There are so many blacks', Jo Palaitis warned me. 'Lawyers love black', I said. 'Perhaps they would like a portrait done in this idiom and pay oodles to acquire it. Impoverished garrets for portraitists are all very well. But sales are good too'. Disdainfully, Jo Palaitis ignored these remarks.

The artist thought about the concept, one somewhat different from her usual style. Eventually, I could see that the idea had taken root. And so, by discussion between artist and subject, over and over again as we discussed it, the concept of the portrait was born.

When, at her home in Sydney, in company with artist friends, Johan and I saw the finished work, we were at once struck by it. Bill Leak, an Archibald finalist several times himself, declared in favour of it. Getting praise from fellow artists is like getting concurrences in the High Court. The portrait appeared to me more angry than I feel inside. Yet perhaps the artist recognises, better than I do, the feelings of the inner heart. Maybe the many injustices in the law and in life, witnessed over 30 years as an Australian judge, take a toll that the professional office-holder learns to suppress. Obedience to the law obliges the limits of the judicial function. Yet being a party to apparent injustices can sometimes make even a judge angry. Jo Palaitis has captured, and expressed, that feeling.

Johan told me to look more deeply at the portrait. And so I did. There are many moods and feelings there. He saw in the face the multiple emotions that he has come to know over the 37 years we have been together. And so I too began to see the two sides of my face. The compassion of the individual. The necessity, sometimes, to do hard things as a judge.

As I stared at this work, with every vein and wrinkle and hair and blemish recorded for all to see, I came to marvel at the skills of the artist and to wonder at her talent. In the age of photographs, something more than a likeness is needed in a portrait. This one burrows deep under my blemished skin. It detects and reveals moods and emotions that are part of my inner being. For this, I honour Jo Palaitis. I honour all artists, whose works, hung and unhung, capture a human visage but reveal, as well, the subject's emotions in a way that *Agfa* and *Eastman Kodak* never could.

Francisco José de Goya y Lucientes could probably not have imagined how, two hundred years later, his portrait of a grand official would inspire an artist and subject so far from Madrid. He would, I think, be very pleased at the mysterious ways that artistic inspiration work. And so am I.

Interestingly, a famous American judge, Oliver Wendel Holmes Jr, singled Goya out for specific mention in giving a warning about the danger of judges

imposing their subjective opinions too readily on the multiple qualities of art. He said:

> It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Monet would have been sure of protection when seen for the first time.[26]

These were wise words from a great American judge. Generally speaking, the judges of Australia have followed them. Whether artists themselves, Gallery Trustees, newspaper critics and citizens have done so I leave it, as a hanging judge, to others to judge. Art and law but rarely intersect. It is probably best to keep it that way.

The safest place for art to meet judges is when the judge is a sitter, as I was, proudly, for the portrait that was a finalist for the 2006 Archibald Prize.[27]

Editor's note: Subsequent to Justice Kirby's address, judgment was delivered on 14 June 2006 in *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577. Hamilton J rejected the challenge to having awarded the Archibald Prize to

26 *Bleistein v Donaldson Lithographing Co* 188 US 239 at 251 (1903).

27 In May 2006 the Bar Association of New South Wales and the Law Society of New South Wales acquired Jo Palaitis's portrait of Justice Michael Kirby. It is to be presented to the Supreme Court of New South Wales to hang in the President's Court in Sydney where Justice Kirby presided 1984–96 before his appointment to the High Court of Australia.

Craig Ruddy for his portrait of David Gulpilil. In essence, he applied the reasoning of Roper J in the *Dobell* case, stating at [29]:

> The relevant category in the Dobell case was the category of 'portrait'. Here, the opinion or judgment was as to whether or not the work was 'painted'. The defendants say that the principle enunciated by Roper J applies, so that the opinion formed by the trustee could not be set aside by this Court, unless 'founded upon a wrong basis of fact' or 'not truly an opinion upon the question to which the mind[s] of the trustee[s] should have been directed' . . . I have reached the conclusion that minds may well differ as to whether, if the picture must be placed in a single category, that category should be 'painting' or 'drawing'. But, in view of those matters, I find it impossible on any objective basis to exclude the portrait from the category of a work which has been 'painted', which is the real issue here.

The result stands as further evidence of the often cautionary approach judges take to issues of artistic quality.