THE AUSTRALIAN LAW JOURNAL

VOLUME 90, MAY 2016

RETIREMENT OF THE HONOURABLE PETER W.YOUNG AO, QC

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The Hon. Michael Kirby AC CMG[*]

[Photo of P.W. Young]

With this issue of the *Australian Law Journal*, Peter Young lays down his responsibilities as seventh General Editor. It was with words like these, in March 1992, that I paid tribute to sixth editor of the journal, Professor J.G. Starke QC.[1]

Joe Starke had served as editor of 'Australia's premier law journal' from 1974. He had succeeded in a most distinguished lineage: Mr [later Sir] Bernard Sugerman (1927-46); Mr [later Sir] Nigel Bowen (1946-61); Mr [later Justice] Rae Else-Mitchell (1946-58); Mr [later Justice] Russell Fox AC QC (1958-67) and Mr [later Justice] Philip Jeffrey (1968-73): the last who tragically died before his full promise could be realised.

[*] Justice of the High Court of Australia (1996-2009); President of the NSW Court of Appeal (1984-96); Editor in Chief, *The Laws of Australia* (2009-).

[1] Kirby, M.D., "Retirement of J.G. Starke QC. Sixth Editor of the *Australian Law Journal*" (1992) 66 ALJ 111.

Until now, the longest serving General Editor of the *ALJ* was Sir Bernard Sugerman. He took it from its foundation in the 1920s to the conclusion of the Second War, in an Australia that had already changed greatly including in the law. To Joe Starke and then to Peter Young fell the responsibilities of leading the flagship of the publisher into a new age of technological, social and professional change. The record of longest devotion has now passed from Sir Bernard Sugerman to Peter Young (19 years to 24 years). This is an extraordinary service for which the Australian judiciary, the legal profession and the community should be very grateful. If his successor as General Editor, Justice François Kunc, serves an equal time, his retirement will coincide with my centenary. I am looking forward to enjoying a 'hat trick' of celebrations.

Peter Wolstenholme Young was born the day before ANZAC Day in 1940. He was educated at the Sydney Church of England Grammar School and studied law at the University of Sydney where he graduated Bachelor of Laws in 1963. He was admitted to the New South Wales Bar on 3 May 1963, following in the footsteps of a grandfather who had been, a Crown Prosecutor. This grandparent maintained a diary from which, as General Editor, Justice Young would sometimes quote to demonstrate that, in the law, some things change but others stay exactly the same.

Peter Young's practice at the Bar did not take him in the direction of crime. Instead, he quickly became a safe pair of hands for commercial, equity and trusts litigation. I remember several important cases in which

he appeared before me in the New South Wales Court of Appeal. He was energetic, knowledgeable and well prepared as an advocate: qualities he would later take with him to the Bench and expect from others. But although intense and serious about his work, he preserved a whimsical sense of humour that would sometimes shine through. He took silk in 1979 and served on the New South Wales Bar Council from 1975 to 1985, rising to be Vice President in 1981-85. In that last year, he was appointed a judge in the Equity Division of the Supreme Court of New South Wales. There too he rose to the top: serving as Chief Judge in Equity (2001-09) and as a Judge of Appeal (2009-12).

In addition to this golden road of professional advancement, Peter Young contributed to academic law. He did so by serving on law school advisory boards (University of Sydney, UNSW and Newcastle); by writing respected texts (*Declaratory Orders* (1975, 1984); *Contracts for Sale of Land in New South Wales* (1982, 1985, 1986); *Civil Litigation* (1986) and *On Equity* (2009).) He also edited valued practice books and served on many professional and other bodies.

From his youth, he had been engaged in the activities of the Anglican Church in Australia. He served as a long-time member of his school council for many years; as Chancellor of the Anglican Diocese of Bathurst for more than a decade; and as a member of the Anglican Church Appellate Tribunal (including as President (2005-10). His professional life repeatedly evidenced, including as General Editor of

this *Journal*, the asserted virtues of the Church of England, stated in the opening of the *Book of Common Prayer*:

> "[I]t hath been the wisdom of the Church of England, ever since the first compiling of her publick Luturgy, to keep the mean between the two extremes, of too much stiffness of refusing, and of too much easiness in admitting, any variation from it".

Peter Young has been supported throughout his very busy life by his wife Pamela and their three children. As every regular reader of the *ALJ* knows, come Christmas he would invariably be found travelling overseas. Usually it involved a journey to a distant country but one within our legal galaxy. There his hugely inquisitive mind could be engaged in investigating aspects of law that were similar, and those that were different, when compared to the laws of Australia. There would be few judges or lawyers in this nation who have anything like the encyclopaedic knowledge that Peter Young built up concerning the big and small details of the law. Just to fulfil his duties as General Editor he had to read enormous amounts of material and to read widely. And then he had to prepare his notes on contemporaneous issues, supplemented by a legion of case notes, drawing new developments to the attention of the readership.

Peter Young's association with this *Journal* began even before his appointment as General Editor. In 1990, he wrote his first article on

"Legal Language". [2] It was a thoughtful essay on multilingualism and the problem of interpreters. He even noticed a then recent decision of my own in *Gradidge v Grace Bros. Pty Ltd*, [3] I think it was one of the best I ever wrote: predicting quietly a key step in the reasoning in the great *Mabo* case[4] that he would himself draw to notice two years later.[5] Naturally, when I read his 1990 article, I thought it showed great prescience on his part. Especially because, as usual, he finished his article with what he took to be a summation of the emerging legal principles and trends.[6]

In the volume of the *ALJ* in which his appointment as General Editor was announced, he was already writing a section for Joe Starke on "Practical Evidence".[7] Not to be outdone, in one of his last observations on, "Recent Cases", Joe Starke called to attention a recent decision of Young J. in the Equity Division of the Supreme Court of New South Wales in *Hoogerdyk v Condon.*[8] In that case he had dealt with the measure of damages for a breach of contract to transfer a business name. Perhaps the ingoing and outgoing editors were exchanging professional courtesies. Changes in the office have been few. They are inescapably moments of significant transition.

Joe Starke was forced to retire from the post because of ill health.[9] On the eve of his 80th birthday, he had been required by medical advice to

[2] (1990) 64 ALJ 761, written with M.W. Young.
[3] (1989) 93 FLR 414.
[4] *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 42; 66 ALJR. For a note by Luke Beck on the "interpretive principle" see (2013) 87 *ALJ* 200
[5] See (1992) 66 ALJ 551 at 552 referring to *Mabo* [No.2].
[6] (1990) 64 ALJ at 775.
[7] (1992) 66 ALJ 37.
[8] (1990) 2 NSWLR 171, noted (1992) 66 ALJ 49.
[9] (1992) 66 ALJ 111 at 112.

step down. Peter Young was unique in his appointment as he had already attained judicial office. In accordance with the traditions of earlier times, Sugerman, Bowen, Else-Mitchell and Fox had retired immediately they were appointed. Peter Young came to the office with a full judicial load; but heroic energy. Clearly, he had a perspective of the law that was not confined to his daily bread in equity, trusts and mortgages. Obviously, he believed that he would bring to the task new and different qualities. And so he did.

In writing what the ancients would have called an "advertisement" on his hopes and expectations as General Editor, in the first issue to bear his name, he said:[10]

> "I will experiment to a degree for the remainder of this volume. I will add new features and modify others. I would appreciate feedback: I will listen carefully. My hope is that when I eventually lay down the Editor's mantle, subscribers will think that I left the Journal in a better, but certainly no worse, state than when I took over the Editorship."

His manifesto was not threatening. He recognised that the *ALJ* had a special role as an "historical record of legal activity in Australia". This was a significant function and, he stated, with characteristic candour:

[10] P.W. Young, "Editorial" (1992) 66 ALJ 179 at 180.

> "Unfortunately, the record in recent years has some significant gaps in it. These will be filled as soon as possible and the record maintained."

He also committed himself to bring to the attention of subscribers "significant recent developments in the law", which he saw as a primary function of the journal. He promised to publish more learned articles. He noted that some readers had told him "they think the *ALJ* has lost its way". They complained to him about the lack of articles by a variety of practitioners and from States outside NSW.[11] This was to be a themesong that recurred throughout the years he was General Editor. But, as he never ceased to point out, part of the problem of Sydney-centrism was the lack of submissions received from professional leaders in other States.

With characteristic energy, Peter Young set out to fulfil his promises. Because he was not at all sure that others would reach his own standards, he assumed an extra load of providing manuscript for entries on recent court decisions that he judged to be of general interest or utility. If a large number of the cases noted were decisions of the NSW Court of Appeal at the time, this was probably because, as a judge subject to appeal to that court, he was obliged to following its holdings and trends. In 1990, the New South Wales Court of Appeal was still the only permanent appellate court in Australia, other than the High Court. Not far into the first volume edited by Peter Young, he noted the

[11] (1992) 66 ALJ 179 at 180.

establishment of a Court of Appeal in Queensland.[12] And the appointment of its first president and members.[13]

As the first year of his General Editorship of the *ALJ* progressed, readers began to see some changes from the Starke era. The most visible was the near total disappearance of entries on international law. Joe Starke had written books on international law; but also on contract law[14] (the latter reviewed in the inaugural year, another possible instance of inter-editorial courtesy). Occasional articles with an international law flavour crept back.[15] Those of us who thirsted for a perspective beyond the antipodean mindset began to offer contributions of their own. I did so on a fact finding commission of the International Labour Organisation in which I participated, shown in a photograph (a kind of early selfie) with Nelson Mandela on the brink of the end of apartheid in South Africa.[16]

Eventually, Peter Young responded to the calls for more international material by engaging the assistance of Ryszard Piotrowcz to provide articles with an "International Focus". A decade after Justice Young had taken over as General Editor, Piotrowcz offered a reflective commentary on the case of "M.V. Tampa: State and Refugee Rights Collide at Sea". Like it or not, the law had greatly changed from the days when Peter Young's generation was taught at law school. Appeals to the Privy

[12] (1992) 66 ALJ 475. The Court of Appeal of Victoria was not created until 1995. See (1995) 69 ALJ 884.
[13] The appointment coincided with the appointment of Patrick Keane QC as Solicitor-General for Queensland. See 66 ALJ 476. He was later to be appointed to the Queensland Court of Appeal, the Federal Court of Australia and the High Court of Australia.
[14] See Review (1970) 53 ALJ 104 and (1992) 66 ALJ 544.
[15] See e.g. A.J. MacDonald, "Service of an Australian Originating Process in Japan" (1992) 66 ALJ 811.
[16] International Legal Notes, (1992) 66 ALJ 856.

Council were no more. English authority was of declining significance. Statutes increasingly held sway. And international law now increasingly intruded into relevance for Australian lawyers.

Peter Young kept to his promise to attempt a make-over of the *ALJ* to enhance its utility for practising lawyers. For example, he introduced very useful short articles of his own on highly practical subjects. Thus, he synthesised the law on affidavits and common problems that can arise from their use.[17] He continued to draw on the unrivalled expertise of Professor Peter Butt in his regular column "The Conveyancer".[18] Happily, that is a service that has continued right up to the present time and is likely to survive the immediate change of General Editor.[19] He began publishing again, as articles, public addresses of leading judges – a practice that had slipped out of fashion.[20] This was also a way in which he could include news and opinions from States of the Commonwealth other than his own, to quieten the critics.

Peter Young introduced completely new items on legal developments in regional Australia, including a substantial article on the law in Rockhampton.[21] He also introduced a new section on "New Zealand Legal Developments".[22] Most innovative of all was a new concept of

[17](1990) 66 ALJ 163, 298.
[18] See e.g. (1992) 66 ALJ 445.
[19] See e.g. (2015) 89 ALJ 355. Peter Butt has also helped to instruct the Australian legal profession in the use of plain language. See (1992) 66 ALJ 741.
[20] See e.g. Sir Frank Kitto, "Why Write Judgments?" reprinted (1992) 66 ALJ 787; A. M. Gleeson, "Access to Justice" (1992) 66 ALJ 270; Chief Justice David Malcolm, "Close of Legal Year in Western Australia" (1992) 66 ALJ 274.
[21](1992) 66 ALJ 620.
[22] As Stephen Mills provides (1992) 66 ALJ 821. Cf article by Justices Ian Barker and B.A. Beaumont (1992) 66 ALJ 560.

"Forum", designed to encourage practitioners to engage in active dialogue with each other about practical and theoretical problems of broad interest. He frankly confessed that, after the first column in that name, he was disappointed by the lack of response that it drew from the profession. [23] However, he published a number of letters, some of them quite critical of the *ALJ* and one of them suggesting that it should be renamed the "NSW Bench and Bar Journal". [24]

None of these innovations survived long, although a systematic attempt to meet the complaint about a NSW bias was the introduction of guest editorials. Judges from other jurisdictions were invited to take over the reins of editorship for a month or so. I even did this myself in Peter Young's first year. I think it has been a successful innovation. Still it did not escape anyone's attention that the switching of responsibilities coincided with the Christmas holidays of the Young family.

Although Peter Young was truly catholic in the wide frame of reference he accepted for contributions to the *ALJ,* and the subjects covered in the learned articles that he selected for a space in the journal, inevitably some of his personal interests would shine through. One of these was, predictably, his interest in religion and also the law as it affected religious bodies. Thus, in his first year as General Editor, he published an address by Sir Gerard Brennan of the High Court, originally given at an ecumenical church service at St Peter's Church in Canberra in

[23] Forum (1992) 66 ALJ 227 and 248.
[24] Letter by Peter F. Coldbeck (1992) 66 ALJ 753.

January 1992: "The Christian Lawyer". [25] That address, suitable to its occasion of delivery, finished with a point of view that some might question in our secular Commonwealth. It said: "The nobility of our [legal] profession depends, in the ultimate analysis, upon our fidelity to God." [26] I know a few lawyers (even High Court Justices) who might challenge that proposition. But, in a diverse society like Australia, it was a viewpoint to which Peter Young was happy to give space.

If ever Peter Young saw a case in which a novel point of ecclesiastical law was mentioned he would write a case note upon it. [27] Often such cases probably appeared exotic to the average reader. As for example on the power of a bishop to command a priest to stop ringing the bells of his church at a high noise level, causing neighbours to complain. [28] But these and other whimsical cases, including quite regular publication of vocal criticism of his own work as General Editor, endeared Justice Young to those who cherished the broad perspective the law in which he so obviously delighted.

From the start, he was surprisingly interested in new technology. Thus, back in 1992, the facsimile machine was all the rage. So we could rely on the General Editor to bring to our notice some of the legal problems for contract law that were presented by this new device. [29] He urged us to contrast a judicial decision made by one of his colleagues with the old

[25] (1992) 66 ALJ 259.
[26] (1992) 66 ALJ 259 at 261.
[27] See e.g. the note on *Sturt v Farran* [2012] NSWSC 400 (Church discipline).
[28] *Silvert v Gardiner* [2002] TLR 16 noted (2002) 76 ALJ 618.
[29] Ibid, 30. "The Facsimile Machine" (1992) 66 ALJ 326.

authority by which a sealed envelope was usually not considered received until it was opened. [30] In an age in which citations from the *English Reports* were becoming much less common, even in Equity, it was somehow reassuring to be reminded of how those who went before had tackled analogous problems in a very different age.

As General Editor, Justice Young also kept experimenting. So did the publisher. The old binding, proclaiming that the journal was published by "The Law Book Company Limited", gave way to a spine with the symbol indicating that the mantle had passed to "Thomson Reuters". Still, "The Law Book Co. Ltd" remains on the spine of the *Commonwealth Law Reports*, presumably because its Editor, Mr J.D. Merralls AM, QC, forbids any change.

Differences in layout and typeface have accompanied the journey over which Peter Young presided. Ten years after his arrival, extremely bold typeface and large type was suddenly the order of the day.[31] Now, 20 years after that time, the typeface has shrunk again. But the layout looks neat and attractive. Although subscribers to this publication, like all others, are rapidly moving into digital format, the ever smaller print size doubtless still saves a number of trees.

Peter Young's comments on the law and its institutions probably reflect the values of those of his age, possibly with a slightly conservative point

[30] *Ibid*, citing *Arrowsmith v Ingle* (1810) 3 Taunt 234; 128 ER 93.
[31] See e.g. (2002) 76 ALJ xi.

of view. Thus, he notes a ceremony held to commemorate the 25th anniversary of the establishment of the Federal Court of Australia in 1977. Almost certainly that would never have been mentioned in the tense circumstances when that court first came on to the scene. In this sense, Peter Young has always been a legal realist. His huge experience, and the discipline he imposed upon himself to read and summarise thousands of cases for us, made him cautious about foolish resistance – but also radical change. Accordingly, when noting the academic criticism of the refusal of the High Court of Australia to abolish advocates' immunity from suits in negligence (as had been done earlier by courts in the United States, Canada and England and was later to be done in New Zealand),[32] he was unconvinced by the critics, as presumably, by my own dissenting opinion in the High Court decision to the same effect.[33]

> "As a judge with extensive experience as an advocate, one can appreciate the problems the advocate is facing. … The matter must be considered from a number of perspectives. Apart from the perspective of the consumer or client it is necessary to consider the position of the advocate and the perspective of the courts."

At the very time that he will demit office as General Editor of the *ALJ*, the High Court will have another chance to look at this issue. In the law, the final word is rarely written in stone. Which is probably just as well for a journal like the *ALJ.*[34]

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[32] *D'Ortha-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; 79 ALJR 755; 80 ALJR 1607.
[33] "Counsel's Immunity" (2002) 76 ALJ 82.
[34] See P.W. Young, "Authority of the High Court", Current issues, (2012) 86 ALJ 7 referring to *Western Export Services Inc. v Jireh International Pty Ltd* (2011) 86 ALJR 1; [2011] HCA 45. See also Keith Mason "The Distinctiveness and Independence of Intermediate Appellate Courts" (2012) 86 ALJ 308.

Those who have followed Justice Young's writings will know his ready willingness to listen to a new argument. His preparedness to mould and adapt the law to new challenges. His understanding that change is an imperative in the modern age.[35] They will also know that he has been possessed throughout his service with a gentle sense of humour and an ironical view of the law that he was faithfully recording and describing, month after month.

In one of his comments in "Current Issues" titled "My Vacation",[36] written in 2002, he records his holiday journey to the United States, Canada, England and elsewhere. He mentions how intrigued he was on reading "in an article headed that Canadians were the fifth most honest business people in the world, that the first four for honesty were, in order, Australia, Sweden, Switzerland and Austria." As a taxonomist of thousands of cases of fraud and dishonesty, one can see in the mind's eye a judicial eyebrow silently raised. But there is also his personal modesty. This is not always a strong characteristic of a top performing legal practitioner. Constantly trying to stimulate his professional colleague into some new reflection on the rules with which they work, Peter Young recently recorded the books that he thought deserved the highest honour in the Australian legal profession. In this list he included the most recent edition of Meagher, Gummow and Lehane. He observed, ruefully, that his own notable text "*On Equity"* (which he had written to meet professional feelings at the time that MG&L was

[35] (2012) 86 ALJ 308.
[36] (2002) 76 ALJ 529.

excessively opinionated and less practical that required in mundane lawyering) would not make it. Perhaps, he speculated, his book might find its way into the list by 2050.[37] Yet, there are many who would place it in the list right now. This is another astonishing achievement, given that the book was written whilst he was doing so many other important tasks; including as a judge and as General Editor of this journal.

In recent years, those who have been following Justice Young's comments in the *ALJ* will have noticed increasing references to retirement and old age. Thus, his career as a full time judge expired on 23 April 2012, the day before his 72nd birthday. His main lament was that the issue of the journal would, as a consequence be a little behind schedule. His main hope was that he would "learn how to manage my time in retirement".[38] He has been given to commenting more vocally on the errors of modern media to which he is now increasingly exposed. He reminds any readers who might have forgotten of the injunction to display a kindly treatment of the elderly, written in the book of in *Ecclesiastes*.[39] And he questions compulsory retirement of judges at 72, although finally concluding that this (and not 75) is probably warranted by public policy.[40]

The wish that Peter Young expressed at the outset of his service as General Editor has been more than fulfilled. The regular parts have landed on our desks, or popped into our computer screens, every

[37] (2012) 86 *ALJ* 661 at 662.
[38] (2012) 86 ALJ 359 at 363.
[39] Ch3: 12-14 cited (2012) 86 ALJ 438.
[40] (2012) 86 ALJ 511.

month, faithfully on time. Even in the age of digital legal reporting, this is a prodigious achievement. The *ALJ* has remained the flagship and journal of record of the Australian legal profession. There is nothing quite like it in England. Nor even in the continental common law jurisdictions that have every reason to create such a platform for the legal profession such as the United States, Canada, India and Nigeria. We alone in Australia have been fortunate enough to have the *ALJ*. Peter Young has helped to keep it going and to adapt to fast changing times. And he shares the credit with the editorial staff at Thomson Reuters and specialist sub-editors. On the *ALJ* they were skilfully led by in-house editors of supreme tact, beginning with Dorothy Bransfield as production editor, succeeded by the ever vigilant Cheryle King.

Although it is a word that Peter Young would never himself use, the *ALJ* is truly 'iconic'. It was born at exactly the same time as that other Australian icon, the Sydney Harbour Bridge was opened. It has witnessed enormous changes in our country, the world and the legal system. Through it all, Peter Young, as our helmsman, has steered us through the tempestuous seas. Peter Young now hands the bridge of the vessel over to his colleague, François Kunc, of whom we have great expectations. He has stayed the course. He deserves respite and the gratitude from us who have been his beneficiaries. On behalf of the publishers, his co-workers, the readers and the broader legal profession of Australia I express a sense of gratitude and profound admiration.

But what for the future? Peter Young will doubtless write a new book. Perhaps on Equity and Technology? Perhaps on ecclesiastical law? Or maybe he will take inspiration from Barry Jones's latest blockbuster *The Shock of Recognition.*[41] Perhaps he will turn to new fields to conquer. Perhaps to music (non church organ variety). Or to the great works of literature, for which there has been too little time. And as for the future of the *ALJ*, safely delivered to its new General Editor Kunc, it is assured. It will adapt to the present and the future; but yet recognisably continue with its tried and tested features. It will approach its centenary in 2027 with renewed confidence.

[41] Allen and Unwin, Sydney, 2016.