Judges Guilty Of Doctoring Court Transcripts

Summary:
August 2012 - Queensland Government aims to close down the State Reporting Bureau and to outsource the recording and production of transcripts for Queensland court proceedings - Dr Evan Jones reports

Article Information**Category:** Banking News
Banking Company: Banks in General
Bank Malpractice Type: Predatory Lending
Corruption
Unconscionable Conduct
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Date First Published: 20 Jul 2013

Posted ByPeter Brandson
6 Apr 2014 - 5:56pm





Dissent from members of the judiciary, including Chief Justice Paul de Jersey, led Brisbane-based John Salmon to write a letter to the Attorney General and Justice Minister, Jarrod Bleijie.

John Salmon worked for the National Australia Bank for 36 years, 1950-86. Soon after retirement he was asked to advise on a case being brought against his former employer. Salmon had seen

perennial peccadilloes within the NAB over the years, but he was shocked by what he was shown. He still is. That case (Somerset/Kabwand) involved diabolical corruption by bank officers. Yet the victims lost in court, both in the Trial hearing and on Appeal (only the Appeal judgement is publicly available – FCA 131, 21 April 1989).

Salmon subsequently became a close observer of bank malpractice/corruption and of bank litigation, especially in Queensland, and an adviser to bank victims. Salmon has noted some curious practices by Queensland judges regarding court proceeding transcripts. Judges will alter court transcripts to delete self-incriminating remarks; they will also prevent transcripts and judgements being made publicly available. It is for this reason that Salmon expressed support for the outsourcing procedure.

As examples, Salmon cites CBA v Muirhead, 3 April 1993, before Byrne J. Only after political leverage had extracted the hearing transcript from Byrne months after the hearing did the Muirheads discover that it had been dramatically redacted.

Again, McMinn v NAB, 17 February 2002, before Muir J, at which Salmon was present and taking notes. Alan McMinn informed His Honour (accurately) that he and his wife were the victims of NAB fraud. Justice Muir responded by saying:

> Litigants should be careful about making allegations against banks relative to fraud. It has been my experience that on the basis of 100 allegations of fraud against banks, 99 have no substance and cannot be sustained.

That display of manifest bias was removed from the transcript reluctantly made available to the McMinns.

Then there is de Jersey J, later CJ. de Jersey presided over a dodgy Westpac v Potts appeal in 1991-92 (below). The transcript of the lengthy hearing was never made available to the bank victim, and the judgement is also not publicly available.

On 22 March 2001, de Jersey granted summary judgement to the NAB over Troiani/Wide Bay Bricks (below). The Court Registry promised the 19 March hearing transcript to Sante Troiani. When Troiani returned the next day to obtain it, he was told that it was ‘no longer available’. Salmon claims in his letter to Bleijie:

… the fact is that the transcript of the NAB's Summary Judgement Application did take place, authority to release had been given, and the decision to release was subsequently rescinded. The only person to make that decision would be the Chief Justice, and he did so. **The reason for doing so was to protect his personal banker, the NAB.**

On 20 September 2001 in Bernstrom v NAB in far-off Cairns, de Jersey converted a suit by a NAB victim into a summary judgement for the bank. de Jersey allowed the bank’s barrister to question and mislead the victim’s son outside the court regarding a misrepresented document and then accept the barrister’s version into the court (and into the judgement). Salmon notes that where this segment of the hearing should be documented, the transcript of the hearing has inserted: ‘Portion of Recording Missing’. Bernstrom’s counsel advised Salmon that he had been “… completely ambushed by de Jersey”. The extempore de Jersey Summary Judgement (QSC 374, 20 September 2001) is not publicly available.

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But to the background of these peculiar practices. The late 1980s and early 1990s offered the spectacle of litigation by bank customers who had been sold loans denominated in foreign currencies (typically the Swiss franc, but also the US dollar). With dramatic devaluation of the Australian dollar against the Swiss franc (especially in 1985 following floating of the dollar in December 1983), a borrower would find that the loan principal itself had more than doubled – an unmitigated disaster. Although the typical FCL borrower litigant was unsuccessful in court, Westpac experienced four well-publicised losses during 1989-91 (Spice, Chiarabaglio, Ferneyhough and Thannhauser). The last three losses were all in Queensland. These rare but decisive victories followed from evidence that

successive Westpac managers Imhoff and Look were assertively flogging these toxic facilities to the unsuspecting.

In August 1991, Salmon was approached by a FCL litigant, Lionel Potts, for assistance. Potts had been successful against Westpac in the Trial hearing (judgement of Mackenzie J, QSC 415, 10 December 1990, not publically available), but Westpac had appealed. Westpac was then effectively insolvent. The 1987 'Westpac Letters', exposing the bank's duplicity, were publicised in February/March 1991. The Thannhauser case was being heard before Pincus J. during 1991, culminating in a devastating indictment of Westpac's modus operandi by Pincus in December 1991. Westpac would have been in total meltdown.

Everything about the Westpac Potts appeal process reeks of corruption. The appeal was heard over 4-7 November 1991, and the decision in Westpac's favour was handed down on 16 April 1992. The majority decision was made by de Jersey & Dowsett JJ (chums from Brisbane Grammar days). It is appropriate here to quote myself (from a March 2009 submission to a Senate Committee Inquiry into the judiciary):

This wretched judgement topped a wretched process. de Jersey's 2000-word judgment was centred on a proposition lifted from a High Court judge, Deane J., in Council of the Shire of Sutherland v Heyman, HCA 41, 1985, rejecting a house-owning couple's claim for negligence against their Council [de Jersey citing Deane]:

"Indeed, in a competitive society, the infliction of pure economic loss upon another will commonly be concomitant of the successful pursuit of personal advantage by the way of lawful conduct in that there can be discerned, in many commercial and financial transactions, a correlation between the attainment of personal gain for one's self and the sustainment of economic loss by another."

The original judgement was dubious, de Jersey's opportunist plagiarism scandalous. As exemplified by Gleeson et. al. in Berbatis [ACCC v Berbatis Holdings, HCA 18, 9 April 2003], pervasive inequality of bargaining power is necessarily pissed against the wall unless it is leveraged into the unequal pursuit of advantage (the biblical parable of the talents comes to mind). In de Jersey's hands, Westpac plays by the law of the jungle; we oversee the law of the jungle; and the hapless Potts is quite inappropriately a very sore loser.

The accumulation of precedent is presumed to be the rock on which a quasi-objectivity is established in the law. Here is an instance in which 'precedent' is cynically trawled from the depths for a corrupted outcome.

The victory was of significant import for Westpac. There were no more successful FCL litigation cases against the bank – Porter/Drambo as sacrificial lamb lost in 1992/96. It is instructive that 12 months after the Westpac Potts victory, Westpac wrote to one of its FCL victims (signed by Manager Legal, Caroline Flynn), informing them: "You will no doubt be aware of the Supreme Court of Queensland in Potts v Westpac Banking Corporation and the comment made by Justice Dowsett that, in reviewing the procedures adopted by Mr Imhoff in his meetings with potential borrowers, it was difficult to conceive of what more Mr Imhoff could have told a borrower to explain the ramifications of borrowing offshore".

Of course, Dowsett's reputed claim was rubbish. Imhoff had been exposed in Westpac's loss in Chiarabaglio. Title searches by Salmon highlighted that both Dowsett and Potts' senior counsel held mortgages with Westpac at the time of the Westpac Potts Appeal.

Since the Potts Appeal decision, Salmon has paid particular attention to the involvement and judgements of Paul de Jersey, appointed to the Queensland Supreme Court in 1985, and made Chief Justice in 1998. de Jersey had acted for Westpac (and has admitted being in receipt of a retainer) prior to his elevation to the bench.

Another Queensland case constitutes a large-scale scandal – that of Sante Troiani and his Bundaberg-based brick-making firm Wide Bay Bricks. There is no summary document on the Troiani story, but details are available in the author's 'Illusion and Reality at the

National Australia Bank Part II' (July 2011). The NAB induced Troiani to join it in 1993, slowly destroying the business from early 1996 onwards, until the business' foreclosure and judicial legitimation during 1999-2002. The sting operation appears to have been for the benefit of Troiani's larger competitor Boral, with whom the NAB had directors in common. de Jersey presided over the burial.

A barrister belatedly obtained for Troiani by his solicitor dropped out overnight (he happened to be the husband of one of de Jersey's judicial colleagues). That barrister recommended to Troiani's solicitor one A J H Morris (it transpires that Morris was a friend of de Jersey). Morris advised Troiani that his presence at the 19 March hearing was unnecessary, so Troiani was oblivious to the character of the judgement against him – hence the crucial importance of the hearing transcript that had mysteriously become not available.

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Chief Justice Paul de Jersey is an institution in Queensland. His articles on legal matters have appeared in the State media. His opinions are regularly reported, as are his professional and social to-ings and fro-ings. Reporter Tony Koch raised an eyebrow (Courier-Mail, 23 November 2002) when de Jersey turned up at Premier Beattie's 50th birthday celebrations, thrown by a government contractor and socialite, attended by the 'top 40' State power elite. Said Koch:

What Beattie does with his time, how he chooses to celebrate his birthday, and with whom are issues for him and his own conscience. But perhaps the Premier … also should give some thought to how it looks from the viewpoint of the battlers he purports to represent.

Nevertheless, said Koch:

It is enormously refreshing that the state has in Chief Justice Paul de Jersey as person of the highest integrity and repute who also is prepared to involve himself in public issues and to subject himself and his fellow judges to public scrutiny.

Prior to Salmon's letter to Bleijie, Salmon has long attempted to engage relevant parties on the manifest problems with bank litigation in Queensland. There follows a selective chronology, spread over a decade.

15.8.2002 Salmon sends a 29 page dossier to Queensland Chief Justice de Jersey, outlining some questionable practices in legal processes with respect to bank customers and/or guarantors, accompanied by recommendations for reform. The dossier is returned without comment, albeit numerous staple holes indicate that is has been photocopied.

16.8.02 By coincidence, the Chief Justice is reported (Hedley Thomas, Courier-Mail) as wanting to see "the establishment of an independent body completely separate from the Law Society to thoroughly investigate complaints against lawyers." "[Said de Jersey:] 'allegations of conduct which involve unethical behaviour inimical to the core of our professionalism' were very disturbing. … He said there was a 'risk that public confidence in the performance of the profession will be eroded'."

16.9.02 Salmon sends the 29 page dossier to Chief Justice Black, Federal Court of Australia. Salmon notes that the FCA presides over bankruptcy petitions from the banks, and that bankruptcy is perennially achieved by unconscionable means. Key among Salmon's recommendations is that the FCA enforces an assertive regime of bank document discovery, and that judge banking affiliations be disclosed.

24.9.02 The FCA's Registrar replies to the effect that document discovery procedures are in good working order (ludicrous), and that the matter of judicial interests is covered in the Australian Institute of Judicial Administration's publication Guide to Judicial Conduct (it isn't). All gloss and self-satisfaction.

3.12.02 Salmon writes a follow-up letter to de Jersey. "I am disappointed to be informed that

you will not address even the more blatant socially unacceptable concerns within the recommendations which were placed before you. … [These] were accumulated over fifteen years of experience in litigation involving banking institutions, and I believe their diligent acknowledgment deserved attention." There was no response.

11.12.02 Reply from Attorney-General Rod Welford (Beattie Labor), having received copy of the dossier sent to de Jersey. Welford notes that Salmon "makes some serious allegations". Welford also claims: "There are appropriate processes in the legal system to enable appeals from decisions and to ensure that proper procedures, such as disclosure of documents, are followed"; the Banking Ombudsman is there to handle complaints; etc.

3.1.03 Letter from Evan Jones to A-G Welford, claiming that his optimism and confidence in the system is entirely misplaced.

5.2.03 Welford to Jones. Welford expresses sympathy for bank customers who have suffered from the inordinate power of banks in the bank-customer relationship, but claims that "regulation of the banking system is constitutionally within the exclusive jurisdiction of the Commonwealth Government and only the Commonwealth Government and its parliament can adequately address the conduct of banks and their regulation in the way you seek." Salmon's dossier concerned the Queensland court system's partisan treatment of bank litigation, an issue within Welford's jurisdiction.

14.4.03 Jones to Welford: "I have confronted that there are two worlds in the financial arena – the world of officialdom in which everything is held to be in perfect working order … and the world in which incompetence and corruption are systemic and the victims find that all the doors to the world of officialdom are closed. It is something like American foreign policy … Why do they hate us, say the Americans (as they sortie off on their next bombing raid)?"

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22.11.05 Chris Foley, Independent Member for Maryborough, delivers a speech to the Queensland Parliament on the Troiani/Wide Bay Bricks affair (the Bundaberg-based business was in Foley's electorate). Foley claims:

The sad and sorry saga of the Troianis' treatment by the NAB, as set out in a submission from the Troianis and which I table here today with supporting appendices, is a tale of alleged treachery, deceit, unconscionable banking and business practices, and the unscrupulous manipulation and abuse by the NAB of our legal and justice processes aimed deliberately, it is claimed, at deceiving the courts and destroying the Troianis. They have all but succeeded.

6.2.06 Salmon 37 page letter to Queensland Attorney-General Linda Lavarch, regarding Troiani/Wide Bay Bricks.

24.2.06 Salmon 23 page letter to A-G Lavarch, again devoted to the Troiani story.

8.3.06 Chris Foley delivers a follow-up speech in Parliament, tabling material provided by Salmon. Foley claims:

The submission from Mr Salmon raises very grave allegations of misconduct not only against the National Australia Bank but also against senior counsel and the top echelons of the Queensland Supreme Court judiciary. It calls for a top-level inquiry into the procedures and conduct of the Supreme Court and the judiciary in dealing with litigation involving banking institutions, including our banks specifically.

31.3.06 A-G Lavarch delivers speech in Parliament defending de Jersey CJ in the light of questions raised in Foley's speech regarding bank litigation under de Jersey's jurisdiction. Lavarch tables a letter from de Jersey in reply to Foley's claims (based on Salmon evidence), dated 23 March. The de Jersey letter deflects Salmon's claims.

11.4.06 Rob Davis ('Watchdog on judges', Courier-Mail):

The Federal Government has done nothing to hose down speculation that an independent judicial commission -- to consider complaints against federal magistrates and judges -- could be on the way. Law Council of Australia president John North has expressed the support of the legal profession for the proposal, pointing out 'there is currently no mechanism that deals with complaints of judicial negligence, physical or medical fitness, incompetence or misbehaviour'. In Queensland, the Crime and Misconduct Act provides for the investigation of complaints warranting dismissal, subject to a protocol protecting judicial independence worked out with the Chief Justice. Section 61 of the Constitution of Queensland Act 2001 provides for a tribunal to deal with such matters. ...

Queensland is blessed with a judiciary and magistracy of a high standard and we are very well served by them despite some ill-informed and ignorant criticisms from sections of the media and populist politicians ...

8.5.06 Salmon letter to Labor Premier Peter Beattie. Salmon claims that the tabled de Jersey letter dissembles on all issues under contention. On the non-availability of the crucial Troiani hearing transcript, the de Jersey letter states:

It is not necessary to record a court hearing in the 'Applications' [i.e. Summary as opposed to Trial] Jurisdiction unless oral evidence is given, which was not the case here. ... It is wasteful of the resources of the State Reporting Bureau if proceedings in the Summary jurisdiction are unnecessarily recorded. I cannot now recall whether or not I specifically indicated that the proceedings not to be recorded. If I did, it would have been for that reason.

In the letter to Beattie, Salmon refers in minute detail to the Doneley family litigation (farming foreclosure, 1992-98) presided over by de Jersey. Barrister Morris appears again; here he was leveraged in as Trustee of a Doneley family holding company in September 1997, after which point the NAB acquired a tidy sum from forced sale of the Doneley property, the most valuable freehold portion (involving water licenses) of which the bank held no security. The sale netted $3.3 million, of which the NAB garnered almost $1.9 million; the leasehold portion over which the NAB held security was worth at best $500,000. The key Doneley hearing judgement, QSC 7367 of 1998, is not publicly available. (The Doneley sons later sued Morris, to no avail.)

There appears to have been congratulatory correspondence from Morris to de Jersey. de Jersey replied to Morris in a brief letter on 14 December 1998 (tabled by Foley in Parliament, 8 March 2006): "I was delighted to hear of the good outcomes in the Doneley case. You may rightly regard your own contribution to this as little short of monumental. I have already told you how extremely valuable I found your submissions – from which as you know I shamelessly plagiarised in preparing my judgement! Thank you very much for writing to me. ...". Salmon recalls that the plagiarised portion comprised the best part of a page within a 25 page judgement.

Salmon reminded Beattie that, during a by-election campaign in March 2006, Beattie had declaimed: "I am very serious about probity, I am very serious about honesty."

3.7.06 Premier's Office to Salmon. It is noted that the Attorney-General, in a 17 May 2006 letter, advised "that she had thoroughly investigated the issues that you have raised and is satisfied that no further investigation is warranted."

1.8.06 Salmon letter to Premier Peter Beattie. Salmon reiterated that the evidence indicated that de Jersey "has been party to corrupted proceedings", especially involving litigation in which the NAB was a party. "Serious formal complaints of misconduct against the Chief Justice were referred direct to the Chief Justice for a response – which personal response was then accepted without question ... then tabled in rebuttal in the State Parliament ... with a final comment and judgement by the Minister that 'no further action was intended'." "I would suggest that legal and judicial propriety was breached ...".

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11.2.10 Salmon sends 75,000 word dossier to the Queensland Crime & Misconduct Commission (CMC) regarding claimed improprieties in bank litigation in which Paul de Jersey has been involved, with particular reference to five cases (Doneley, Freeman, Troiani, Bernstrom, McMinn), all involving de Jersey's personal banker, the National Australia Bank.

18.2.10 Salmon sends same dossier to Attorney-General Cameron Dick (Bligh Labor), and a follow-up letter, 16 March. The A-G replies, 23 March, recommending that the dossier be sent to the CMC. The A-G's office replies again, 15 April, noting: "The Attorney-General does not propose to undertake any of the actions that you request. I can assure you that the Chief Justice has the full support of the Attorney-General."

26.3.10 The CMC replies to Salmon, claiming that "Under the Crime and Misconduct Act 2001 … the CMC's authority to investigate the conduct of judicial officers is limited by section 58(2) of the Act to investigating misconduct of a kind that, if established, would warrant the removal from office. The CMC does not consider your concerns, if proved, would fall within its jurisdiction."

22.4.10 Salmon sends further letter to the CMC, seeking reassessment of his dossier.

23.4.10 Salmon sends further letter to Premier Bligh. The Premier's Office replies, 28 May, recommending that the dossier be sent to the Parliamentary Crime & Misconduct Committee (PCMC). "The PCMC is the correct avenue through which to pursue a complaint when you are dissatisfied with the CMC's actions."

1.6.10 The CMC replies that Salmon's complaint will be subject to review. The CMC replies again on 8 June, noting: "We remain of the view that the concerns you raise are not within the CMC's jurisdiction. … I also advise that the CMC will not conduct a further review of its decision."

21.9.10 Salmon sends condensed version (12,000 words) of previous dossier to the PCMC. The PCMC replied on 23 September, noting: "The Committee does not act as an appeal body against determinations made by the Commission … The jurisdiction of the Committee is limited to the conduct of the Commission and its officers."

15.10.10 Salmon sends follow-up letter to the PCMC. The PCMC replies, 18 October, indicating that it would seek material from the CMC with respect to Salmon's material raising concerns about the conduct of de Jersey.

23.11.10 The PCMC replies again. "… having regard to the nature of your complaint, the evidence you presented to support your complaint, the jurisdiction of the Commission and its need to have proper regard for judicial independence and the immunity from suit for actions taken, or words said in a judicial capacity – the Committee does not consider the Commission acted inappropriately in its assessment or handling of the matters you raised with it."

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And there the matter rests. The Queensland court transcript recording/production contract was handed to Auscript, whose takeover of the role began on 22 April. Auscript's website formally guarantees accuracy, but whether it can guarantee that judicial tampering is a thing of the past is another matter.

There is transparent evidence of judicial impropriety in bank litigation cases in Queensland (albeit Queensland does not have a monopoly here), but there is no mechanism by which such impropriety is investigated and corrective measures taken. Nobody in authority in Queensland is prepared to touch the hot potato.

Source URL (modified on 6 Apr 2014 - 6:36pm): https://mail.reformnow.com.au/node/138