
THE LAST WORD ...

fake news; a compound *noun*, late 19th Century. A type of hoax or deliberate spread of misinformation or disinformation, be it via the traditional news media or via social media, with intent to mislead in order to gain financially or politically. See also the related concept of *alternative facts*.

President Trump has accused major US media outlets of propagating fake news. He and his subordinates have been accused of the same practice. (*Who doth protest too much?* White House counsellor Kellyanne Conway, when challenged about White House Press Secretary, Sean Spicer's assessment of the number of persons who attended President Trump's inauguration, stated that Spicer had provided "alternative facts". The interviewer shot back that: "Alternative facts are not facts. They are falsehoods."

In the context of litigation, disputed facts are common. Whatever be the facts, real or alternative, they will be resolved by the judge, or in serious criminal trials by the jury, using principles relating to the standard or onus of proof. Appeals are often against the "findings of fact". However, there needs to be a substantial basis for overturning findings of fact. This is particularly the case when a finding is based upon credibility of witnesses; see *Devries v Australian National Railways Commission* [1992-1993] 177 CLR 472 at 479. Sometimes the facts found are so "glaringly improbable" as to call for appellate intervention; see *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844. Some findings of fact can be so unreasonable as to amount to an error of law. Sir Harry Gibbs in *Aafjes v Kearney* (1976) 8 ALR 455 at 460 stated there will always be an error of law when there is no evidence to support a finding. He went on to say:

Moreover, there will be an error of law if the Commission has acted "upon a view of the facts which could not reasonably be entertained" or ... if "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal".

How the public can weigh up the real facts concerning a political issue, as opposed to what might be wrong, false, or at worst, a hoax, requires attention and judgment. Another example of disruption caused by technological advances is the decline of the power of the mainstream media controlling and filtering news and opinion. Social media, especially *Twitter*, circumvent statements and opinions of the media's proprietors and journalists.

During the era of the Soviet Union, the Communist Party published two major newspapers, *Pravda* and *Izvestia*. *Pravda* translated from the Russian language as Truth and *Izvestia* as News. However, critics of the regime joked that what was said to be the truth in *Pravda* wasn't news, and what was said to be the news in *Izvestia* wasn't the truth.

The legal profession is about to engage in a touch of social engineering.

The peak body of solicitors' and barristers' associations, the Law Council of Australia, has published its Orwellian-sounding National Model Gender Equitable Briefing Policy (the Policy) with a target date of 1 July 2018. The Policy's aim is to bring "about cultural and attitudinal change within the legal profession with respect to gender briefing practices." In support of the Policy, the Law Council states, continuing the doublethink, that it is committed to take measures that ensure a level playing field for all members of the legal profession. The Policy encourages all persons or entities who brief or select a barrister:



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1. to make all reasonable endeavours to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area;
2. by 1 July 2018:
 - a. to brief or select senior women barristers accounting for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers;
 - b. to brief or select junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers;noting the need to adjust these targets to reflect local conditions; and
3. to provide a confidential report to the local Bar Association, Law Society, or directly to the Law Council, by 30 September each year with respect to the measures taken to implement these targets.

In 2018, the targets will be reviewed to reflect the reporting provided by the Policy adoptees.

It is intended that by 2020 women will be briefed in at least 30% of all briefs and receive at least 30% of the value of all brief fees, in accordance with international benchmarks concerning the retention and promotion of women.

The Policy can be adopted by briefing entities, and by clients of briefing entities. The targets are not mandatory, however those who have adopted the Policy will have their names published. Barristers are encouraged to adopt the Policy in the use of senior and junior counsel and in the passing of briefs to other barristers.

The targets are relevant, because, on the raw figures of women at the Bar, the Policy will mean more work for women barristers and consequently less work for male barristers. In September 2015, a New South Wales Bar Association press release stated: “Currently women make up just over 20% of the Bar, and less than 10% of its senior members.”¹ The NSW Bar Council adopted the Law Council Policy in September 2015. What does the Law Council have to say to male barristers previously briefed by large firms or clients, who have been taken off the briefing panel because of their gender? Some level playing field! All this at a time when depression is a real problem among members of the Bar. In the past few years I have personally known three male Sydney barristers who have committed suicide, financial pressure being an overwhelming factor with one of them.

The Policy recognises that other groups, beyond women, may reflect “broader aspects of diversity, including with (sic) regards to race and other attributes.” Nothing for them yet, go to the back of the bus.

I share an unease about such affirmative action and quotas/targets with the art historian, author and feminist Camille Paglia. In an interview she gave to Emily Hill in October 2016 in *The Spectator*² the following opinions are found:

“We are rocketing back here to the Victorian period with this belief that women are not capable of making decisions on their own. This is not feminism – which is to achieve independent thought and action. There will never be equality of the sexes if we think that women are so handicapped they can’t look after themselves.”

“Girls would be far better advised to revert to the brave feminist approach of her generation – when women were encouraged to fight all their battles by themselves, and win.”

“I do not believe in quotas of any kind. Scandinavian countries are going in that direction and it’s an insult to women – the idea that you need a quota.”

I also ask these questions: “Will there be equitable briefing among women barristers, ie will the greater amount of work for women barristers be shared equally, or will the competent and experienced just get busier? Will some, well-connected, women barristers be more equal than others?”

The motto of the New South Wales Bar Association is “Servants of All Yet of None.” The Bar has aims to promote collegiality and mutual assistance. How can the Bar adequately “Serve All” when a policy it adopts does not on its face serve all its members? Such a motto and aims are difficult to

¹ New South Wales Bar Association, “Equity and Diversity at the New South Wales Bar” (Media Release, 1 September 2015).

² Emily Hill, “‘The woman is a disaster!’: Camille Paglia on Hillary Clinton. A wide-ranging interview with the iconoclastic professor”, *The Spectator*, <<http://www.spectator.co.uk/2016/10/the-woman-is-a-disaster-camille-paglia-on-hillary-clinton>>.

reconcile when a group within is given preferential treatment. What happened to the level playing field? Many at the Bar, male or female, thrive, many struggle. In what appears to be in some areas a shrinking legal market for the Bar, all of the latter group, of whatever gender or diverse background, need the Bar's help.

In February this year the Law Council announced a major new program to help lawyers understand and address unconscious bias. The so-called Gender Equitable Briefing Policy only serves to express a real bias.

The decline in membership of trade unions in Australia has been an inexorable process over some decades. A prime reason for this drop off in membership in my view was the amalgamation process whereby many smaller craft- and trade-based organisations joined up with large industry-based behemoths. The original notion of a craft guild or tribe was lost among many who simply drifted away. Ultimately, the sum of the whole was much less than the sum of the parts.

Another reason for resignation or not joining a union in the first instance may be the monopolistic nature of trade union coverage. Why belong if you don't like the union nor have anything in common with its aims. One simply can't resign and join another union as the other union must have the ability under its rules to enrol a new member. Registration of new unions is possible under the *Fair Work (Registered Organisations) Act 2009* (Cth). However, applicants need to run the gauntlet of objectors who claim that the members of the applicant could "conveniently belong" to them. A case before the Fair Work Commission, currently at a lengthy interlocutory stage, is an application to register a body called the Korean Workers' Union (KWU). The KWU seeks registration to represent employees, of whatever nationality, employed by Korean businesses operating in Australia. The officers of the KWU profess a deep business and cultural understanding of how best to represent members employed by Korean companies. The registration is being vigorously opposed by a number of registered unions. If their opposition is successful it is unlikely that persons attracted to membership of the KWU will join another union. The decline of union membership in Australia will continue apace.

Jeffrey Phillips SC
Denman Chambers, Sydney