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# Jeffrey Phillips SC: His (and others') strong points of view

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How do you categorise Jeffrey Phillips SC?

Senior Counsel at the Sydney Bar with many years experience in the practice of industrial relations and employment law. Writer, voracious reader, athlete, club man (“like Bertie Wooster, I am very clubable”). All these. But also gardener, classical music aficionado, rugby league and rugby union fan, art collector.

Anyone who has had the pleasure to dine with Jeff, as the author has, knows that he is also generous, gregarious, a bon-vivant, and a *hugely* amusing raconteur.

True too, he is a person of strong views, who does not shy from expressing these with forthrightness. Jeff concedes: “It could be argued that I have written on a few contentious topics and been at times a little risqué!” Well, it is his trade after all, to argue his case passionately.

But it is in the nature of an adversarial legal system that there are always two sides (at least) to any argument. And while prosecuting the interests of the party he or she represents with the full measure of professional skill, it is also the advocate’s responsibility to conduct himself or herself fairly and honourably. Jeff Phillips SC embodies these principles.

Understanding of the need for fairness and balance is to be seen in Jeff’s stewardship, together with co-General Editor, Neil Napper, of this journal. In a sphere of human affairs characterised by disputation – at times fierce disputation – Jeff and Neil are conscious to ensure that both sides of the divide get a chance to state their case in the pages of *Workplace Review*.

For former union official Jeff, it would seem that this approach, as well as being reflective of his professionalism as a barrister, also stems from his having lived a life with its share of highs and lows. He instinctively understands the dialectic in all things.

Doesn’t help with categorising him though ...

## A VALUABLE EDUCATION

Jeff was brought up in Concord and Strathfield in Sydney. He attended school first at St Mary’s in Concord and then afterwards at St Patrick’s in Strathfield. Unlike many in the legal profession, he does not come from a family of lawyers. Indeed, he is descended from the other side of the tracks; this fifth generation Australian’s great, great grandfather, Samuel Phillips, was a convict.

“I am the first lawyer in the family,” he said. And with clear pride, he added that his younger brother, Gerard, is an employment law partner at international law firm, K&L Gates.

Jeff acknowledged his parents’ deep commitment to their children receiving a good education, as being one of the main factors leading to his professional success.

“My parents recognized the value of education,” he said. “Both were at school during the Depression. My paternal grandfather was a country policeman and my maternal grandfather’s business failed during the Depression. Neither of my parents went beyond the intermediate certificate at school. My father served in the 9th Division, AIF, in the Second World War.”

He said that it was “with great financial sacrifice” that his parents put five children through Catholic private schools. “All five children graduated from university,” he added.

Another powerful formative influence for Jeff was his time at St Patrick’s College.

“It was conducted by the Christian Brothers. At school I did not hear of, nor see, any evidence of the sexual impropriety which subsequently engulfed the Order. The Brothers who taught me were



selfless, dedicated men who inculcated into us a sense of social responsibility and urged us to aspire within our abilities to do as best as we could – academically and athletically.”

The times were also conducive to social advancement. “The 1950s and 1960s were a time of social mobility for lower middle class Catholics. See St Pat’s old boy Thomas Keneally’s: *Homebush Boy – A Memoir*,” said Jeff.

As in any life, Jeff experienced peaks and troughs. “One year I spent over six months in hospital with serious orthopaedic problems. Upon my return to high school I was given, at no cost to my parents, extra classes by the Brothers to make sure I passed the year. I was given enormous encouragement and extra coaching to overcome my physical disabilities. By my final year, I won the Open cross-country, 800, 1500, and 3000 metres races”.

“I came second in the 400 metres to Craig Emerson who became a federal Parliamentarian and a Minister in the Rudd and Gillard Labor Governments,” he added.

Asked about his interests outside of work, he demonstrated that they are very wide.

“I like reading, writing, playing golf, listening to classical music, watching rugby league and rugby union. I follow the Wests Tigers, the Waratahs, and Sydney University. I enjoy gardening. I collect contemporary art.”

A particular source of satisfaction has been his memberships in an array of organisations – “a great joy”, he says. These include: the Union, University and Schools Club; the Masonic Club; the Australasian Pioneer Club; Royal Sydney Golf Club; Hurstville Golf Club; and the Bondi Icebergs. The range of these organisations further attests to the breadth of Jeff’s interests.

Perhaps underlining his commitment to living a full and diverse life, Jeff reflected: “Frank Curran, my pupil master when I came to the Bar, once said of himself: *‘I have spent my money on wine, women and song ... the rest I wasted!’*”

### **SINATRA SAID IT BEST**

Asked about the highlights of his career and life, Frank Sinatra came to mind.

“If one regards one’s career as one’s life, I have had highs and lows,” said Jeff. “To quote from Sinatra’s song *That’s Life*, I have been ‘... riding high in April, Shot down in May’.”

“On the plus side, studying Arts/Law at Sydney Uni, competing for that university’s Athletics and Rugby teams, attending St John’s College and later being elected as a Fellow to its Council, attending about ten Inter-Varsity competitions (once in Adelaide as my brother Gerard), being NSW State Champion in the 50 km Road Walk, being awarded a Blue in Athletics in 1976, helping to defeat the push for Australia to become a republic in 1999, coming to the Bar in 1982, and being made Senior Counsel in 2003, the birth of my daughter Camilla in 1991, and her graduation as an architect in 2017 from my *alma mater*, and lastly, but importantly, being appointed Australia’s Defence Force Advocate in 2015.”

Among the lows he has experienced, Jeff cited: “The fall of Saigon in April 1975, a marriage break-up, nearly going broke in the recession ‘We had to have’ in the early 1990s, arthritic knees that stop me running, a bitter sweet moment when appointed Senior Counsel that it was not as Queen’s Counsel, Cardinal George Pell’s cynical dismissal of the St John’s College Council in 2012 to overcome a ‘crisis’, he, as the College Visitor, should have helped to resolve – not to create.”

Bowed, but not broken, Jeff turns to Sinatra again to explain how he deals with the lows.

“With lows, one has to always remember Frank’s other words from that great song: ‘... each time I find myself flat on my face, I pick myself up and get back in the race’,” he said.

### **THE IRONWORKERS’ OFFICIAL**

Given that he has practised extensively in industrial law and related areas, Jeff was asked about the influences and experiences that had developed his interest in industrial and workplace relations law.

“I was involved in student politics at Sydney University, which in turn led me into becoming a trade union official, first briefly with the Shop, Distributive and Allied Employees Association (SDA), and then for a few exciting years with the Federated Ironworkers’ Association (FIA).”

Jeff's time with the FIA was "thoroughly enjoyable", both in terms of the people with whom he worked and the heavy industries the union covered. "A vignette of my time in student politics and the union movement can be found in Greg Sheridan's memoirs, *When We Were Young and Foolish*," he said.

"The FIA had some very effective, self-educated union officials who were from the shop floor, who did not see the union movement as a stepping stone into Parliament but as an end in itself. Laurie Short, the long-term Federal Secretary, was an intellectual and a hero. His wife, Nancy Borlase, was a great painter and the *Sydney Morning Herald* art critic."

Jeff noted that Laurie Short remained a close friend of Sir John Kerr, and he said Short credited Kerr with helping him (Short) and the Groupers "take the FIA out of the hands of Ernie Thornton and the Communist Party" in the 1950s, when Kerr acted as Short's Queen's Counsel. Jeff added that: "The defeat of the Communists in the union movement by Short and others had a profound long-term effect on the ALP and, in turn, on Australia."

### **"MY OPINION IS NOT MATERIAL. MY JUDGMENT IS."**

In his career, Jeff has appeared for, and provided advice to, both employers and unions. Given the strong divisions involved, he was asked whether it was a challenge to adjust to representing the different sides of the industrial argument, and how he managed that.

For Jeff, it is a matter of going back to first principles as a barrister.

"Appearing for both sides is a cornerstone of practice as a barrister, the so-called 'cab-rank rule'," he explained. He said that "solicitors can pick and choose their clients and, in effect, choose sides."

Barristers do not have that luxury. They are bound by the rules of their calling to accept the briefs that come their way, that, among other considerations, they have the capacity, skill, and experience to take on. One purpose, at least, of the cab-rank rule is to guarantee that persons who are to appear in court have a fair chance at being represented by skilled advocates.

Jeff indicated what this requirement implies for barristers practising in the highly contentious industrial relations/workplace relations space.

"Industrial relations of its nature is partly political. If it is in my area of speciality I am prepared to appear for anyone."

This understanding of fairness in representation informs his approach, even if he has personal views/positions on workplace relations issues which may conflict with the positions of parties he represents.

"My opinion is not material in a case, but it may guide one's approach consciously for the betterment of the client. My judgment, however, is that it is more important to advise and to appear for a party requiring representation."

### **WORKING FOR THOMSON REUTERS**

The understanding that contesting parties are entitled to an equal chance to have their voice heard has clearly fed into Jeff's approach to *Workplace Review*. Over the years, he and co-General Editor, Neil Napper, have accepted, encouraged, and suggested contributions for the journal from individuals with very different political and industrial viewpoints. This has also been seen in the choice of interview subjects for *Workplace Review*; notable inclusions have been Ged Kearney, President of the ACTU, and Senator Michaelia Cash, Minister for Employment, as well as a wide range of academics, judicial officers, commentators, politicians, and practitioners in the industrial relations area.

This striving for balance in the presentation of material, accords with Thomson Reuters' trust principles which commit it to "independence, integrity and freedom from bias in the gathering and dissemination of information and news." It is a pillar of the company's aim to provide trustworthy information solutions.

Jeff spoke about the work he has undertaken for Thomson Reuters over many years in a variety of capacities and on a number of products.

He started by giving an insight into where his appreciation of the importance of good legal publishing stems from – namely, a love of the written word.

“As a student and as a junior member of the Bar I was a fan of Lord Denning, the Master of the Rolls. Not only was he a trailblazer in the law, he wrote well, both for the practitioner and the public. I remember in one of his books he gave a wonderful piece of advice which had an impact on me. He said that to be a good advocate you need to read widely, well beyond the dusty law. Read good books and well written articles; history, literature, biography – anything which gave a better understanding of life and our great English language.”

“For decades I have read *The New Yorker* and *The Spectator*,” said Jeff. “As a lawyer, language is a tool of trade. Denning also advised that to be a superlative advocate you need to be a good writer. If you write well you will speak well.”

He spoke about his work at Thomson Reuters, and the satisfaction it has brought him.

“Having the opportunity to work for Thomson Reuters over the last fifteen years or so has been a great joy and learning experience. I have been a casual writer; a board member of the looseleaf and online service *National Workplace Relations*, with Andrew Herbert and Frank Parry SC; a co-writer of the text book *The Law of Unfair Contracts*,<sup>1</sup> with the prolific Michael Tooma; and co-General Editor of *Workplace Review*, with Neil Napper.”

Recently Jeff has taken on another role with Thomson Reuters, “an advisor for Thomson Reuters’ forthcoming *Personal Workplace Disputes Tracker*.”

Jeff was fulsome in his praise of Thomson Reuters. “It is at the forefront of legal publishing,” he said. “Its treasure is its staff. All the ones I have had the pleasure to work with have been diligent, encouraging, friendly, intelligent, and understanding. Never a word of complaint. I have never been censored by Thomson Reuters.”

“I find WestlawAU to be a great research tool, even for an internet klutz like me!”, he added.

## **AUSTRALIA’S DEFENCE FORCE ADVOCATE**

In 2015, Jeff was appointed to the part-time position of Defence Force Advocate. It is an appointment of which he is intensely proud.

“The highlight of my career was being selected, after an exhaustive interview process, to be Defence Force Advocate, a statutory position under the *Defence Act*.”

Essentially, the role of the Defence Force Advocate is to be an intermediary in the determination of military remuneration before the Defence Force Remuneration Tribunal. In this issue of *Workplace Review*, Jeff provides more details of the role of the Advocate and the Tribunal in his article “‘The King’s Shilling’: Military industrial relations in Australia”, which also includes a historical review of the development of military pay fixation over the centuries.

On his role as Defence Force Advocate, he says: “I had big shoes to fill. My predecessor, Richard Kenzie QC,<sup>2</sup> was in the role for about eighteen years. As long as I can remember, he has been the leader of the industrial bar throughout Australia. I was humbled to be his replacement.”

### **“I BELIEVE IN HONEST, STRONG UNIONISM.”**

Jeff was asked to talk about the issues he sees as important in contemporary Australian industrial relations.

“Firstly, the costs regime under the *Fair Work Act* in relation to general protections and enforcement of awards and enterprise agreements. It is hindering workers claiming their lawful entitlements.”

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<sup>1</sup> J Phillips and M Tooma, *The Law of Unfair Contracts in NSW: An Examination of Section 106 of the Industrial Relations Act 1996 (NSW)* (Lawbook Co., 2003).

<sup>2</sup> Richard Kenzie QC was an interview subject in *Workplace Review*: see S Andrew, “Richard Kenzie: Without fear or favour – industrial relations the Kenzie way” (2015) 6 WR 63.

He explained that the traditional approach was that in a successful claim for underpayment of wages, allowances, or annual leave, legal costs would follow the event. “Now, under s 570 of the *Fair Work Act*, in courts before which such claims are litigated, costs are only awarded on a narrow basis, that is, if the proceedings were instituted vexatiously, or without reasonable cause, or a party committed an unreasonable act or omission.”

“That was generally the position in arbitral matters before the Commission, including unfair dismissal claims, but in judicial proceedings the ordinary costs rule used to apply,” he said. “Now, under s 570, small claims may not be marginally viable, they may be of little practical utility, because even if successful, the costs could soak up or wipe out the order for underpayment.”

“The Fair Work Ombudsman is not big enough to take on all cases, and reserves its resources for matters of wider application and importance. The union movement does not seem to want to, or is not able to, do enough in this area.”

This last comment touches on what for Jeff is the second most important issue in Australian industrial relations today: the decline in union membership. It is a subject that he has written extensively about in the pages of *Workplace Review*.

“The decline of the union movement in membership and influence is a matter of grave concern. I am a firm believer in honest, strong unionism,” he said. “There may be many reasons for the decline of unionism in this country, particularly in the private sector.”

“I trace one of the major reasons for the drop off in membership to the almost compulsory amalgamation process of the 1980s and 1990s. Many small, craft or industry-based, unions were subsumed in larger blocks. The feeling of belonging to your union – which understood your aspirations and needs – was lost. Tribal loyalties were ditched. Perhaps breaking up the big unions into smaller more responsive bodies may arrest the decline.”

Another suggestion Jeff had for the revitalisation of the union movement was for unions to embrace a form of job-insurance.

He said: “One thing I think which may help is for the unions to provide a job-insurance like agreement as a basis of membership. This agreement being that, should you be dismissed, adversely affected in your employment, or be underpaid, the union will support and/or indemnify any reasonable legal action for redress.”

“The insurance industry may be able to underwrite such a concept,” he added.

The final issue identified by Jeff as being particularly important in the present industrial relations climate, is the question of the authority of the Fair Work Commission which arose in connection with the Commission’s recent penalty rates decision.

“Recent undermining of the authority and decisions of the Fair Work Commission is to be deprecated,” he said. “The Commission is the statutory arbitrator of industrial matters within its jurisdiction. It hears evidence and acts judicially in its determinations. The Commission and its predecessor bodies have served this role for over a century. One may not like all its decisions but they have been reached according to law.”

For Jeff Phillips SC, there is much at stake should discontent with decisions of the Commission manifest in a legislative response which may result in a reduction in the Commission’s decision-making authority or capacity.

“To urge legislative relief should a decision not be liked is to undermine the status and integrity of the Commission and similar statutory bodies,” he said.

*Craig Ryan is the Workplace Review editor at Thomson Reuters.*