

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**BOOK LAUNCH**  
**'HAMMERSCHLAG'S COMMERCIAL COURT HANDBOOK' BY DAVID**  
**HAMMERSCHLAG**  
**THURSDAY 28 NOVEMBER 2019**

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.
2. These days, we hear a lot about how international trade and transnational legal disputes have affected and will continue to affect a lawyer's commercial practice, whether as a barrister or a solicitor. It is difficult to attend a conference, or even a CPD session, without hearing about the newest models of international arbitration,<sup>1</sup> the impact which future changes in technology will have on the profession,<sup>2</sup> and the ongoing debate about whether Australia needs its own international commercial court.<sup>3</sup> One sometimes wonders whether the frequency with which these matters can be debated is not the first worrying sign of

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<sup>1</sup> T F Bathurst, 'Evolution and Adaptation: The Future of International Arbitration' (Closing Keynote Address, 24<sup>th</sup> International Council for Commercial Arbitration Congress, 18 April 2018)  
<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst\\_20180418.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180418.pdf)>.

<sup>2</sup> T F Bathurst, 'The Role of the Commercial Bar in the mid-21<sup>st</sup> Century' [2019] (Winter) *Bar News* 28.

<sup>3</sup> T F Bathurst, 'Benefits of Courts such as the Singapore International Commercial Court (SICC)' (Speech, Sydney Arbitration Week, 21 November 2016)  
<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst\\_20161121.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20161121.pdf)>

latent amnesia amongst the profession, or perhaps, at least among the more senior members charged with delivering such sessions.

3. Now, I have to come clean and say that I am one of the guilty parties here, having discussed these topics once or twice in the past. In fact, I think I even once managed to discuss all three in a single speech. But, these issues can seem far removed from the problems which arise in your everyday practice. These debates will tell you very little about what you need to do when you get on your feet on Friday morning in Court 7D to explain why you and your client have missed yet another deadline. Approaches to handling this situation can and do differ. Some will say that the best strategy is to run. Others may cruelly encourage you to obfuscate. But most will tell you that the only thing that you can do at this point is stop – it's "hammer time".
4. In doing so, Justice Hammerschlag is following a longstanding tradition in the List. I recall one of his distinguished predecessors being so concerned with the delay in a matter in which I was involved that he decided to sit a three-person bench to reject my excuse and make quite clear that the delay was unacceptable. I was saved from the immediate entry of summary judgment only by reason of the fact that the bench observed that my instructing solicitor was about to have a heart attack.
5. For these reasons, it is perhaps surprising that, at least since the introduction of the modern commercial lists in the Supreme Court, there has been no widely-available guide which explains the principles upon which those lists operate. *Ritchie's Uniform Civil Procedure* is, of course, the gold standard for procedural law in this State, but nobody wants to carry, or, even more importantly for the image-conscious barrister, be seen to be carrying, all three volumes into court for a simple directions hearing or motion. Even with the miracles of modern portable technology, it can be difficult to find the relevant materials collected in the same online location at short notice. Thus, for some time, there has been a need for publication brings these materials together in one, readily-accessible location.

6. *Hammerschlag's Commercial Court Handbook* aims to satisfy this need. It aims to be “a practical guide for the assistance of those who practise in the commercial jurisdiction of the Supreme Court of New South Wales”,<sup>4</sup> which includes the Commercial, Technology and Construction, and Commercial Arbitration Lists. To that end, it collates many of the legal, procedural, and most importantly, practical, rules which govern the exercise of that jurisdiction. But it is more than a simple directory of legislation, practice notes, and judgments. Its true value comes from the fact that it has been authored by Justice David Hammerschlag, the List Judge for each of those lists, who explains how these rules and principles are actually applied by the Court in its commercial jurisdiction.
7. The handbook is divided into five parts, each of which examines a different aspect of the procedure of the Court. The first part reviews the principles which underlie the case management powers of the Court, mainly by reference to the *Civil Procedure Act 2005* (NSW), but also legislation on particular topics, such as the *Court Suppression and Non-publication Orders Act 2010* (NSW).<sup>5</sup> No practitioner today can go without understanding these principles and their application to the determination of disputes, and this part provides a convenient and useful summary focused on commercial law.
8. The second, and longest, part explains how these principles inform the practice of the Court in the Commercial and Technology and Construction Lists, and provides a valuable overview of how the Court will manage a matter commenced in those Lists, with much commentary from the author explaining important points which do not otherwise appear from an examination of the text of the Uniform Civil Procedure Rules 2005 (NSW).<sup>6</sup>

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<sup>4</sup> David Hammerschlag, *Hammerschlag's Commercial Court Handbook* (LexisNexis, 2019) xi.

<sup>5</sup> Hammerschlag (n 4) ch 1.

<sup>6</sup> Ibid ch 2; cf David Hammerschlag, 'Dealing with Cost and Delay' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2016) 65.

9. No doubt many of the regular offenders – I mean, practitioners – in those Lists could use a reminder of the procedures which ought to be followed, but I think that the main benefit will be for those who are new to the Lists or do not appear there regularly. The commentary covers everything from the protocol for communicating with the Associate of the List Judge,<sup>7</sup> to the practice of the Lists in relation to discovery,<sup>8</sup> to the likely timeline for the delivery of reserved judgments.<sup>9</sup> There is much else besides which previously could not be learned other than through practice, and to that extent, it deserves to be widely studied.
10. The third and fourth parts deal with two of the more specialised components of the commercial jurisdiction of the Court, namely, class actions<sup>10</sup> and commercial arbitration.<sup>11</sup> While still forming part of what might be called the “commercial court”, these areas have different procedures which need to be followed in order to accommodate the unique challenges they present. First and foremost are the particular statutory provisions and practice notes which are directed to these areas, which are covered at a useful level of detail.
11. Importantly, the handbook also covers the recent legal developments which have occurred in the case law in relation to common fund orders,<sup>12</sup> class actions with overlapping classes, and class actions with the same subject matter commenced in different courts.<sup>13</sup> As these types of litigation continue to become increasingly common in the Commercial List, I think it will be difficult for most practitioners to avoid having at least some working knowledge of the complex procedural issues these

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<sup>7</sup> Hammerschlag (n 4) 33 [2.14].

<sup>8</sup> Ibid 44 [2.25].

<sup>9</sup> Ibid 63 [2.34].

<sup>10</sup> Ibid ch 3.

<sup>11</sup> Ibid ch 4.

<sup>12</sup> Ibid 77 [3.10.3].

<sup>13</sup> Ibid 72 [3.3].

sorts of proceedings throw up. The summary provided in the handbook is a good starting point.

12. The final part is the collection of appendices, which contain the major practice notes relevant to practice in the commercial jurisdiction of the Court.<sup>14</sup> No competent lawyer is likely to forget the relevance of statute or case law to the resolution of legal proceedings. However, in my experience, many will ignore, forget, or just not be aware of a relevant provision of a practice note until right before a court appearance. No longer will this be any excuse, if it ever was one. They are now available in a convenient and portable format for easy reference.
13. It is true that practice notes are not binding rules of law, and may be departed from with the leave of the court.<sup>15</sup> Indeed, one of the reasons the List has been so successful is that practice notes have always been seen to exist to serve litigation, and if there is a more efficient method of proceeding, it will be adopted, whether the parties like it or not. Nevertheless, the rules they prescribe are essential to the smooth day-to-day functioning of the court, and practitioners who regularly fail to comply with these requirements can end up incurring unnecessary costs and delays, both to their own clients and to others in the List. I would hope, and I'm sure this was part of the author's intention, that their easy availability in this volume might minimise how frequently this occurs.
14. This handbook contains all the material needed to achieve its aim to "promote efficient conduct of proceedings" in the commercial jurisdiction of the Court.<sup>16</sup> It is comprehensive, clear and concise, and thus tailored to the needs of a busy practitioner. Now, I do not think it is a coincidence that those same three words – comprehensive, clear and concise – could also be used to describe the book's author. Throughout

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<sup>14</sup> For the online collection of practice notes, see  
<[http://www.practicenotes.justice.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/Web%20Version%20Notes?OpenView&Start=1&Count=50&Collapse=1#1](http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/Web%20Version%20Notes?OpenView&Start=1&Count=50&Collapse=1#1)>

<sup>15</sup> *Civil Procedure Act 2005* (NSW) s 15.

<sup>16</sup> Hammerschlag (n 4) xi.

the book, his wisdom, knowledge, and experience as the List Judge for all three commercial lists are readily apparent. It is largely thanks to his hard work that these lists have the reputation for speed, efficiency and fairness which they do today. Perhaps the most important tip I would give to practitioners newly arrived in the List is to work on the assumption that Justice Hammerschlag knows everything about the case that can be discerned from the papers, and that trying to pull the wool over his eyes is a futile manoeuvre.

15. Justice Hammerschlag has done an excellent job of putting together this resource for practitioners, and for that, he deserves our thanks and congratulations. However, perhaps the final test of a work like this is whether it succeeds in becoming widely used and results in an improvement in how prepared practitioners are for their appearances in the lists. Long experience has taught me that it is a fool's game to try to get barristers to reach agreement on anything, no matter how trivial. But, in this case, I would hope that we can all agree that this handbook ought to be indispensable for any lawyer practising in the commercial jurisdiction of the Court.
16. Thank you.