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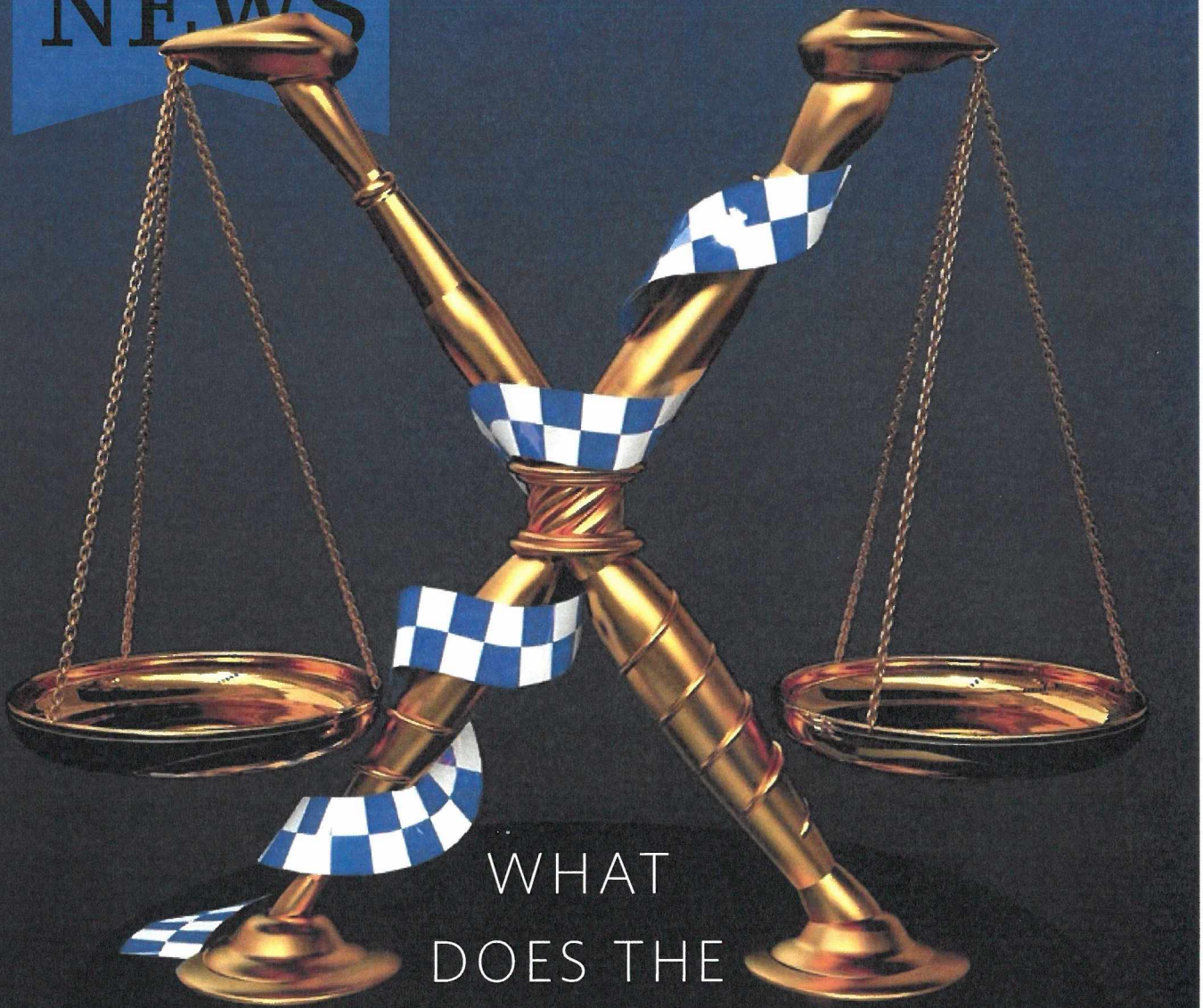
VICTORIAN BAR NEWS

2019 Victorian Bar Dinner

Dr Katie Greenaway on keeping secrets

Pro bono awards



WHAT DOES THE BARRISTER X SAGA MEAN FOR US?

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Plus: Where do we come from? The diverse backgrounds of our barristers.

account; the truth proves elusive, but as the investigation progresses Grayling finds inconsistency and credibility issues among the narratives.

The central character, John Figge, emerges in the story as a powerful and dark force. His ruthlessness, confidence and general penchant for evil make him a wily target for the floundering Grayling, who seems ill-equipped to get to the bottom of things.

Much of the story follows the fate of the party as they inch their way north through the bush and dangerous river crossings to the colony. Serong dives headlong into something of an antipodean heart of darkness in describing their journey. Figge, casting a dark shadow over every page, sits alongside some of literature's best evil doers, think Judge Holden in Cormac McCarthy's *Blood Meridian* or Henry Drax in Ian McGuire's excellent *The North Water*, which also follows the fate of shipwreck survivors in a harsh and inhospitable wilderness.

Serong's maturity as a writer is evident in this, perhaps his most ambitious work. His feeling for nature and the sea has a visceral quality to it. The writing is strong and evocative without being lumpy or overblown. Importantly, the various Aboriginal tribes the wanderers encounter along the way are named and snippets of language learned are repeated in the witnesses' accounts. The effect is to reinforce that a vast and thriving indigenous population inhabited this abundant landscape before the march of white settlement. Like Kate Grenville's *The Secret River*, a writer whom Serong acknowledges, one comes away from this novel with a richer appreciation of the first contact.

> "Figge, casting a dark shadow over every page, sits alongside some of literature's best evil doers"

Whereas Serong's first novel *Quota*, a passable detective story set on the Victorian coast, had a Peter Temple flavour to it, his progression as a remarkable new Australian talent was evident in his next two offerings: *The Rules of Backyard Cricket* and the gripping refugee story, *On the Java Ridge*.

The non-linear storyline of *Preservation* does not threaten one's grip on the plot. Nor does the idiom employed by the characters, which is fittingly formal and somewhat archaic, but not at the loss of narrative drive. It's no *Trainspotting* in this regard. Above all, Serong achieves a consistency in this representation; a reflection of time spent in careful study of the period.

The upside of noisy fellow campers is that it allows one to reflect on one of Sartre's maxims: Hell is other people. (Such must be true of shipwreck survivors.) Awoken from sleep and under head-torch light, one can delve into a novel that wrestles with the dark and perennial forces that motivate human kind: greed, sexual power, dominance over others and the violent means sometimes used to attain those ends.

A smiling headshot of the clean-cut author on the jacket of this book belies a writer unafraid to enter a psychic and physical heart of darkness. Part adventure, part mystery, the result is a powerful novel that unearths a dark tale of the early years of white settlement.

Ready, Aim, Fire: Major James Francis Thomas—The Fourth Victim in the Execution of Harry 'Breaker' Morant by James Unkles

ANDREW KIRKHAM AND GARY HEVEY

On 21 February 1902, at Pietersburg, South Africa, three Australian officers were convicted by a British court martial of the murder of a number of Boer prisoners of war. The officers, members of the Bushveldt Carbineers, were Lieutenants Henry ('Breaker') Morant, Peter Handcock and George Witton.

On 26 February 1902, they were sentenced to death for their respective crimes. Lieutenant Witton's sentence was commuted to life imprisonment. He served three years in an English prison before being released and returned to Australia.

At dawn on 27 February 1902, the sentences in relation to Lieutenants Morant and Handcock were carried out. They were shot by firing squad.

James Unkles is a long-time campaigner for an official enquiry into the validity of these convictions and sentences. He has written a biography of Major James Thomas, the officers' legal representative at their courts martial, examining his role in the proceedings and the toll on him following the execution of two of his clients.

Major Thomas was in no sense an experienced advocate. At the time of his appearing at the courts martial he had practised law for 14 years as a solicitor in Tenterfield, New South Wales. He had no significant experience in criminal or military law. Specifically, he was not familiar with the 1899 British Manual of Military Law which governed his clients' courts martial.

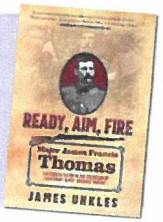
During 1901 and 1902, aged 40, Mr Thomas had himself fought in the Boer War as a captain in the New South Wales Mounted Infantry, engaging in fierce fighting in Vlaksfontein, Mabalstaadt and Elands River, as a consequence of which he was three times mentioned in despatches. He was promoted to the rank of major on his return to Australia at the end of his first tour of duty in June 1901.

Major Thomas returned to the Boer War in August 1901, and after serving a short time with an irregular unit, made a decision that turned out to be life changing. Towards the end of 1902, a fellow Australian, Major Lenehan, asked Thomas to be his legal representative in his impending court martial. Major Lenehan was a member of the Bushveldt Carbineers, having been charged with the offence of failing to report the execution of Boer prisoners of war by members of his unit, including Lieutenants Morant and Handcock.

Not wishing to refuse this request, Major Thomas proceeded to Pietersburg on 15 January 1902, where Major Lenehan's court martial was scheduled to commence on the following day. On his arrival, Major Thomas was approached by four other Australians, including Lieutenants Morant and Handcock, all of whom had been imprisoned for three months before the commencement of court martial proceedings in relation to the execution of Boer prisoners of war. All of these officers asked Major Thomas to represent them. Obtaining permission to do so, Major Thomas asked the prosecuting authorities for an adjournment of one day so as to enable him to take instructions necessary to defend the five accused. The request was refused.

Ready, Aim, Fire: Major James Francis—The Fourth Victim in the Execution of Harry 'Breaker' Morant
by James Unkles | Sid Harta Publishers, 2018 | RRP: $24.95

For more information, go to www.breakermorant.com. Copies of the book can be sourced from places such as the Law Institute Bookshop, online at Booktopia or contact James at jamesunkles@hotmail.com



One wonders why Major Thomas did not ask for more than one day given the immense difficulties facing him in representing so many accused. Instructions needed to be obtained regarding issues such as potential conflicts of interests, the need for separate trials, obedience to orders (which had not been promulgated) from a superior officer who had died, provocation and the defence of honest and reasonable belief in a state of facts which, if true, might have afforded a defence. Making his task more difficult was the fact that the 1899 Manual of Military Law, which governed the proceedings, specifically prohibited the execution of enemies who had surrendered.

It was clear that Lieutenants Morant, Handcock and Witton had breached provisions of the Manual of Military Law. However, that same manual required that those charged with military offences be afforded a proper opportunity to prepare their defence, including free communication with any witness, friend or legal advisers with whom they wished to consult. The manual warned that a failure to comply with these requirements, as set out in rules 13, 14 and 33, may invalidate the subject proceedings. Rule 89 provided that counsel appearing for an accused person had, in this respect, exactly the same rights as the accused. Those rules containing such rights were, on their face, mandatory with the result that non-compliance would be fatal to the validity of the proceedings of a court martial.

There was apparently no reason given for the refusal of the request for time to properly prepare the case for each and all of the accused.

Mr Unkles' book questions the actions of the judge advocate, the members of the court martial and the prosecutor in denying or opposing Major Thomas's modest request for a short adjournment to prepare a defence for each of his clients. Clearly, by today's standards (see *Wilde v R* (1988) 164 CLR 365; *Dietrich v R* (1992) 177 CLR 292; *R v Fuller* (1997) 69 SASR 251, 95 A Crim R 554 at 559), and as Mr Unkles argues, even by the standards of the time, the failure to allow adequate time and resources to prepare a defence was fatal to any fair trial of any of the accused men.

From 16 January to 19 February 1902, Major Thomas represented his five clients before courts martial with three of those clients facing capital charges.

At the conclusion of the courts martial proceedings, Major Thomas had secured acquittals of his clients in respect of a number of serious charges but failed to secure acquittals for Lieutenants Morant, Handcock and Witton in the case concerning the deaths of the eight Boer prisoners. It was not in issue that the eight Boer prisoners had been executed. The unsuccessful defence advanced was that the accused officers believed that they were acting in accordance with the orders of superior officers.

During the courts martial, evidence was led that an officer (who was deceased by the time of trial) had given orders to the accused men that they should execute surrendered enemy combatants. The deceased officer's superior officer denied that any such order had been passed down the chain of command and no written version of such an order was produced at the proceedings.

There are many imponderables relating to these courts martial. There is no transcript, although a contemporaneous newspaper report of the proceedings remains. There is an indication that Lord Kitchener contemplated giving a General Instruction (which would have been treated as a lawful order by those to whom it was published) that Boer prisoners caught wearing British uniforms by way of disguise were to be shot. However, this was not the case in the courts martial. No record of such an order was ever produced, although oral evidence of like understandings was given during the trials. It is not apparent that such an order, if it existed, would have provided a total defence to the charges of murder, although it may have been relevant in relation to penalty.

During the trials, the Pietersburg Fort (the venue of the proceedings) came under attack by Boer soldiers. Each of the accused men was recalled to duty armed, and assisted in fighting off the attackers. Mr Unkles points out that the accused's participation in the defence of the fort and its occupants gave rise to a defence of 'condonation'. At military law a person placed in that position, as these accused were, could argue that any outstanding charges had been condoned by their being recalled to arms and placed in harm's way. That argument alone would normally have been sufficient to act as a bar to the courts martial continuing, or, if not accepted by the court, as a significant factor in mitigation of any penalty to be imposed.

All of the rulings given by the presiding judge advocate on matters of law are contained in Mr Unkles' book and seem unexceptional. However, the judge advocate had the role of ensuring that the accused received a fair trial and the question remains as to why no adjournment was granted to allow Major Thomas to prepare his various defences. Mr Unkles also argues that the issue of condonation, which does not appear to have been raised by Major Thomas or the judge advocate, may have been able to have been used as a bar to the prosecution or at least in mitigation of the respective sentences.

> "This is a book which will appeal to those with an interest in military history and an empathy with those seeking to right perceived past wrongs."

Mr Unkles explores the various political influences that might have contributed to the executions of Lieutenants Morant and Handcock being carried out within 18 hours of the penalty being notified to them and the apparent hurdles put in the way of Major Thomas being able to contact Lord Kitchener, the Australian Government or the King in his attempt to have the convictions and sentences reviewed. He describes the efforts of Isaac Isaacs KC (as he then was) on behalf of Lieutenant Witton, the release of Witton from prison and his return to Australia in 1904.

Mr Unkles' book seeks to rebut earlier criticisms of Major Thomas's representation of his clients. He points to the acquittals secured in respect of other significant charges and the recommendation for mercy for the three convicted officers. These recommendations were based on a number of grounds including provocation, previous good service and lack of any significant military experience.

Having regard to Major Thomas's lack of relevant forensic experience, the incredibly difficult circumstances in which he was placed from the moment his application for an adjournment was refused and the fact that he had no assistance whatsoever in the defence of his clients, it is suggested that retrospective criticism is misplaced. In Mr Unkles' book, Major Thomas is presented as a man prepared to accept the responsibility of appearing for persons who would otherwise not have received representation in significant court martial proceedings, who did the best he could in the context of a strong prosecution case and who, even after the proceedings had concluded, did all that he could to try and have the decisions and the sentences reviewed.

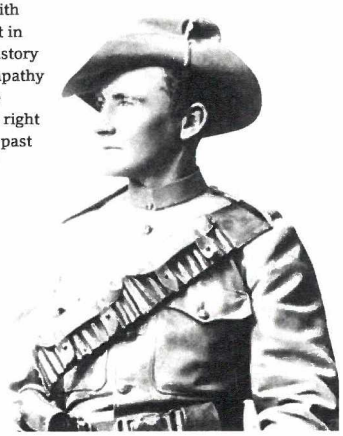
Mr Unkles' research has unearthed interesting paraphernalia that would otherwise have been lost, not least of which is a poignant photograph of Major Thomas standing over the graves of the newly interred Lieutenants Morant and Handcock.

On his return to Australia, Mr Thomas resumed his country legal practice and the running of the local Tenterfield newspaper. Having previously been a respected and active member of his local community, his life went into a decline, leading eventually to his name being removed from the roll of practitioners in New South Wales and him serving a short period in Long Bay Jail.

Mr Thomas's decline was attributed by his close contemporary 'Banjo' Patterson to his suffering grief as a consequence of the outcome of the courts martial.

On Armistice Day, 11 November 1942, James Francis Thomas, former solicitor, newspaper proprietor, army officer and sometime advocate in capital cases, died alone and impoverished.

This is a book which will appeal to those with an interest in military history and an empathy with those seeking to right perceived past wrongs.



Breaker Morant

Response to Christchurch—Towards a federal religious vilification law in the age of technology

Review of an article by the Hon Peter Vickery QC*

JENNIKA ANTHONY-SHAW

I had the privilege of being Justice Vickery's associate for two years. In addition to his considerable expertise as a commercial lawyer, and despite the demands of being the Technology, Engineering and Construction List judge, his Honour maintained an impressive contribution to social justice causes as a skilled human rights jurist and also by way of his art and poetry.

Now recently retired from the Supreme Court, Peter Vickery continues to apply his intellectual and creative resources to issues of human rights and multicultural inclusion in Australian society.

The article reviewed here will be published in the upcoming issue of the *Media and Arts Law Review*. In it, Peter Vickery presents a compelling argument for a new anti-religious vilification regime, calling for an expansion of Australia's current obligations in respect of domestic incorporation of the International Covenant on Civil and Political Rights (ICCPR), and drawing upon the deterrent force of the criminal law in order to address the serious problems facilitated by technology in this sphere.

The premise of the article was provoked by the recent horrific violence at the Al-Noor Mosque and Linwood Islamic Centre in Christchurch, which was live-streamed on social media, as well as the subsequent online publication and wide re-distribution by media sites of the contents of Senator Fraser Anning's 'press release', which sought to causally connect the massacre with Muslim immigration.

The legislative response to the events in Christchurch by the Australian federal government has been the hasty production of the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019*. As Mr Vickery observes in his article, there is little doubt that social media platforms and online discussion websites which permit publication of abhorrent violent material "should be made accountable to the laws of the democracy that enable them to function." The proposed Bill attempts to grapple with this issue. However, although well intentioned, the Bill has been criticised for significant drafting deficiencies.[1]

Drafting shortcomings aside, Peter Vickery points to a key substantive deficiency—the Bill fails to deal with the very evil illustrated by the events in Christchurch, namely the incitement and promulgation, by online publication, of religious hatred. While acknowledging the importance of free speech, Mr Vickery says, "Published words do matter. Some commentary is as divisive as it is dangerous, particularly when it emanates from an authority figure. Legitimising extreme thought legitimises extreme action."

The proposition advanced in the article is the introduction of a federal offence of serious religious vilification. It aims to deter an author of offending material at an early point, "before the horse has bolted", such as the release of live-streamed footage to social media.

Peter Vickery points to a range of factors which highlight the need for such legislation at a federal level, including:

- ICCPR obligations which, subject to the current reservations adopted, would otherwise oblige Australia to pass federal law dealing with religious vilification;
- the limitation in current technologies to effectively screen and block serious religious vilification material and other hate speech before it can be successfully uploaded to social media;
- shortcomings of the *Commonwealth Criminal Code 1995* and the *Racial Discrimination Act 1975* (Cth) in dealing with the specific problem of religious vilification;
- the wide divergency of approach in state and territory legislation on the subject, leading to a weak level of overall protection by international standards; and
- the published reports of the Australian Human Rights Commission, which have consistently advocated for the creation of a new federal offence of serious religious vilification.

1. *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019*, Second Reading Speech, House of Representatives, Hon Mark Dreyfus, Shadow Attorney-General, (Hansard 4 April 2019, 14).

**This article will appear in the* Media and Arts Law Review 2019