Fidelity to our Oaths as Lawyers and Judges

Ethical lessons from *Hofer v The Queen* [2021] HCA 36

The Piddington Society

Exmouth

The Honourable Justice Peter Quinlan

Chief Justice of Western Australia

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Ethical lessons from *Hofer v The Queen* [2021] HCA 36

On Thursday morning, with two travelling companions, I set out on the 1200 km road journey from Perth to Exmouth.

We set out from the country of the Whadjuk people of the Noongar nation. Initially we travelled along the coast, passing through the countries of the Yued people of the Noongar nation, the Amangu peoples and the Nhanta peoples, before turning inland through the country of the Watjarri peoples. We headed back to the coast, briefly passing through Malkana country before stopping for the night on Yinggarda country. On Friday, we completed the journey, travelling over Maya and Payungu countries before arriving in Thalanyji country.

I pay my respects to the elders past and present of all of the lands through which we passed, and to the Jindigudera peoples of land on which we meet today.

Over the course of our journey, our little company's conversation naturally turned to the beauty of constant, if imperceptibly, changing landscape and to how we might better understand the connection to the land of all of the traditional custodians through whose land we travelled. That conversation was, in part, fuelled by our awareness that Friday, 3 June, the second day of our journey, marked the 30th anniversary of the decision of the High Court in *Mabo v Queensland [No 2]*. Because it was, of course, *Mabo [No 2]* that recognised, as part of the common law of Australia, the reality that those traditional custodians had always known: that their connection to their ancestral lands and waters did not, and could not, come to an end with the reception of the common law on this continent and that the tradition of the common law was, itself, bound to recognise that connection.

The first day of our journey, 2 June, however, also brought the news of the death of Sir Gerard Brennan, former Justice and Chief Justice of the High Court of Australia, whose judgment in *Mabo [No 2]* was, and remains, the definitive expression of the common law's reckoning with its own history as it concerned aboriginal interests in land. It was Brennan J who, in *Mabo [No 2]* wrote that 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system'.[1] It was also Brennan J, himself a deeply spiritual man, who 10 years prior to the decision in *Mabo [No 2]* first recognised in the High Court that 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.'[2]

It is particularly appropriate therefore that, in making the remarks that follow, I recognise and honour Sir Gerard Brennan's incalculable contribution to the law in Australia and indeed to our national character.

There is also another reason that I should do so. The topic of my remarks today is 'fidelity to our oaths as lawyers and judges'. Fidelity to his oath was a defining mark of Sir Gerard Brennan's life and of his jurisprudence. Indeed, when I read the reports of his passing on Friday, immediately next to the reports of the 30th anniversary of the decision in *Mabo [No 2]* I read this, from Sir Gerard's son, Fr Frank Brennan SJ:[3]

> 'He constantly wrestled in his conscience with the relationship between law and justice and he took his judicial oath with all seriousness possible'.

In many ways, then, the remarks I wish to offer this morning are in many ways a tribute to the life and work of the late Sir Gerard Brennan.

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[1] ***Mabo v Queensland [No 2]*** (1992) 175 CLR 1, 43 (Brennan J).
[2] ***R v Toohey; Ex parte Meneling Station Pty Ltd*** (1982) 158 CLR 327, 358 (Brennan J).
[3] *The Australian*, 3 June 2022, page 2.

Those remarks begin like this:

In May 1952, the young American Southern-Gothic writer, Flannery O'Connor, published her debut novel *Wise Blood*.[4]

Wise Blood follows the increasingly desperate attempts of its anti-hero, Hazel Motes, to rid himself of the religious belief that has haunted him since his youth, which he likens to a wild ragged figure moving from tree to tree in the back of his mind. As the novel progresses, Hazel Motes engages in more and more grotesque and violent behaviour to prove to himself that he *does not believe!*

Wise Blood was, at the time of its release, and is still now, often misunderstood, as is Hazel Motes himself.

Ten years after it was first published, Flannery O'Connor wrote a short foreword for the Second Edition. She observed that the fact that belief was, for some, a matter of life and death had been a stumbling block for readers who would prefer to think of it as of no consequence. She wrote:

> For them Hazel Motes' integrity lies in his trying with such vigour to get rid of the ragged figure who moves from tree to tree in the back of his mind. For the author Hazel's integrity lies in his not being able to do so.

She then asked:

> Does one's integrity ever lie in what he is not able to do? I think that usually it does, for free will does not mean one will, but many wills conflicting in one man. Freedom cannot be conceived simply. It is a mystery and one which a novel, even a comic novel, can only be asked to deepen.

I love the way that O'Connor uses the word 'usually' in this passage. Not only does she recognise the potential paradox that someone's integrity might lie in what she is not able to do. She goes so far as to say that this is 'usually' the case. It is the usual state of affairs that one's integrity lies in what one is not able to do.

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[4] Flannery O'Connor, *Wise Blood*, (Farrar Straus and Giroux, 1962(Second Edition)).

For, as she says, free will does not mean one will but many wills conflicting in one person. In each person. Including each lawyer and each judge.

Our 'will', in this sense, is a reference to the faculty within each of us by which we decide on or initiate action. And recognising that our 'will' may, and usually does, involve many conflicting 'wills' means that our actions, or decisions, often come from choosing one 'will' over the other.

Our 'will' is therefore essential to our *ethics* as lawyers and judges. Because recognising and choosing which will to follow is bound up with the decisions we make, and the fact that we can choose well, or badly, means that understanding our different 'wills' is an essentially *ethical* question.

As O'Connor says, our 'will' is complex and can involve a conflicting combination of what we want, what we think, what we desire, what will be easy, what will make us popular, what is right, what is wrong, et cetera.

And, significantly, as lawyers and as judges we must be attentive to the faculty of our will because we have taken oaths or affirmations to have a particular kind of 'will', at least in our professional lives.

All of you who are lawyers, for example, will have publicly said something along these lines:

> I, do swear, or affirm, that I will truly and honestly conduct myself in my practice as a lawyer and as an officer of this Honourable Court according to the best of my knowledge and ability.

Similarly, those of you who are, have been, or will become, judges will have publicly said, or will publicly say, something along these lines:

> I, do swear or affirm that I will faithfully serve the people and the State of Western Australia in the office of judge and I will do right to all manner of people, according to law, without fear or favour, affection or ill will.

Notice something significant about these kinds of statements.

They are not simply statements about our thoughts, or statements providing information or communicating our emotions. They are declarations of the will and declarations of the future. And, most importantly, of what our wills will be in the future.

As American philosopher Robert Sokolowski, said of statements like our oaths:[5]

> The state of affairs expressed in the statement – that which is promised, obligated, decided, or bestowed – is one that is being brought about or will be brought about or should be brought about through my agency. In this category belong performatives, statements in which we directly effect what we declare: 'I, Helen, take you, Donald, to be my husband'; 'I declare this session closed' …

We might add for present purposes: 'I will truly and honestly conduct myself according to the best of my knowledge and ability'.

Sokolowski continues:

> In such commitments, the state of affairs does not yet exist. Its coming into being depends on me. Because it does not yet exist and depends on me, it is one among several possibilities. Acts of cognition and emotional reactions respond to what has been and what is, but commitments look to the future, and they look to me for their actualization. My declared commitments, therefore, express how the future should be or will be or is being determined by my intervention. I am vividly at an intersection between past and future when I am engaged in such actions; I am at the switch, and it is my cognitive articulation of the world, my understanding, that lays out the possible futures that extend from that point on. Furthermore, it is not only the world that will be determined by what I declare; I myself will be different if I follow through with the course of action I now register in words. I am about to determine my own future perfect, the way I will have been if I bring into actuality the proposition that I declare.

[5] Robert Sokolowski, *Phenomenology of the Human Person* (Cambridge University Press, 2008), 24.

As I have said, then, our oaths are declarations of our wills and of the future. And, most importantly, of what our wills will be in the future. This is, in turn, a statement about the kind of being I will be in the future. As Sokolowski puts it: 'it is not only the world that will be determined by what I declare; I myself will be different if I follow through with the course of action I now register in words'.

And as much as these oaths promise what we *will* do, they promise what we will *not* do. When we recognise, as Flannery O'Connor said, that freedom does not mean one will, but many wills conflicting in each of us, an oath to act in a particular way in the future requires, in certain circumstances, that one of our conflicting wills be subordinated to another.

It is perhaps most specific in the judicial oath where we promise to act according to law, without fear or favour, affection or ill will. Notice that, not all of these things we promise to exclude are bad, *per se*. There is nothing wrong with affection, for example. Indeed, in almost every other circumstance, *affection* – a feeling of liking or caring for someone – is a good thing, something much to be commended.

We may very much like, and have great affection for, the person against whom we act as a lawyer, or in relation to whom, as a judge, we must reach some decision. And yet our affection, as with our ill-will, must be resisted. Our will to affection must give way to our oath as a lawyer or as a judge.

And so it is with many of our conflicting wills that might otherwise drive our actions: our will to be correct, our will to be successful, our will to live an easy life. Even, sometimes, our will to do what we think of as justice. Can we put aside those wills in favour of the will that we have sworn or affirmed that we will follow? Because having taken that oath, there will be things that we think are correct, easy, or even what we think of as just, that we cannot do.

As O'Connor put it: our integrity will lie in what we are not able to do.

This can be difficult and even painful. And it requires, I want to suggest, the cultivation of two related virtues that we perhaps don't see enough of in legal practice: introspection and humility.

By introspection, of course, I mean the deliberate examination of our thoughts feelings and motivations and, ultimately, of our conflicting wills.

By humility, I mean having a proper perspective on yourself, and keeping yourself within your own bounds. Not, I should stress, false humility: the pretence by which we lower ourselves in order to gain the approval or adulation of others.

As you will notice, it is difficult, if not impossible, to have one of these virtues without the other. We need to be able to recognise our own internal states in order to be able to put them into their proper perspective.

As I said, we perhaps don't think about these virtues much in the law. That may be because, if you scratch the surface, most of us, most of the time, naturally tend to be Sophists. The Sophists, at least as Plato described them, were the professional arguers of Ancient Greece. The Sophists taught people how to argue and how to win at debates. For the Sophists, it wasn't *truth* that was important; what was important in a debate was to *succeed*. And, to make matters worse, from Plato's point of view, they charged fees for this skill.

Using one's skill to win arguments and to be paid to do so.

Sound familiar?

For this reason Plato despised the Sophists. And when we look at Plato's dialogues, we can see that, from his perspective, two of the things that were missing in the Sophists were introspection and humility.

Consider this dialogue in Plato's *Theaetetus*:[6]

> **Socrates**
> Well, if you and I were clever and wise and had found out everything about the mind, we should henceforth spend the rest of our time testing each other out of the fulness of our wisdom, rushing together like sophists in a sophistical combat, battering each other's arguments with counter arguments. But, as it is, since we are ordinary people, we shall wish in the first place to look into the real essence of our thoughts and see whether they harmonize with one another or not at all.
>
> **Theaetetus**
> Certainly that is what I should like.
>
> **Socrates**
> And so should I. But since this is the case, and we have plenty of time, shall we not quietly, without any impatience, but truly examining ourselves, consider again the nature of these appearances within us?

Introspection, then, is looking into 'the real essence of our thoughts and seeing whether they harmonize with one another or not at all.' What do I *really* think? What am I *really* obliged to do in this particular case? Am I (and this is most important) deceiving or fooling myself?

And notice what Plato identifies as the conditions for 'truly examining ourselves': plenty of time, quiet and patience.

Naturally, we don't always have enough time, quiet or patience. But, when it really matters, if we are to be true to our oaths, we have to find them. We have to make the time and find the quiet and have the patience, to do the hard work of recognising what is driving our thoughts and our wills.

And, in this context, I especially like Plato's reference to seeing whether our thoughts *harmonize* with one another. Because often the result of quiet, patient examination of our thoughts produces a sense of discord, or lack of harmony, that

[6] *Theaetetus*, 154 - 155.

can tell us that something is wrong with our thinking and that we must dig deeper. In this way, introspection is not always, or even often, a purely intellectual exercise. Sometimes a general sense of disharmony is what tells you that your integrity will lie in doing, or not doing, something.

To put it in more prosaic terms, sometimes you recognise something wrong with your thinking by a 'gut feeling'. It is not, of course, the 'gut feeling' that you act upon. Nevertheless, the general sense of disharmony causes you to look closer into why you have that feeling and it can reveal something new about your thinking and what it is that you should do.

I can recall a case, for example, in which one of the persons involved was very likeable and sympathetic. For obvious reasons I won't identify the nature of the case. It was also factually and legally complex. It was the sort of case in which the result could, quite reasonably, have gone one way or the other and no one would have been surprised or alarmed by any particular result. As I tried to work through, in my own mind, what the answer to the various factual and legal questions should be, however, I found it difficult in a way that I had not encountered before. It wasn't the logic of the propositions I was considering that seemed to be difficult. It was, rather, a general sense of disharmony, which I could not quite put my finger on.

After a while, and after much thought, I realised that the various conclusions I had been working through in my own mind were conclusions that led to a result in which the likeable and sympathetic person involved in the case was successful. So, as an exercise, I began to think through the conclusions that would lead to the opposite result; the result in which the likeable and sympathetic person would be unsuccessful. Reflecting on those conclusions, the general sense of disharmony was gone. What it was replaced with, of course, was the recognition that the correct result, the conclusion that I was obliged to reach, was the result in which

the likable and sympathetic person, as it were, 'lost'. As much as part of me (one of my 'wills' as it were) wished that this person should succeed, what I was required to do (the 'will' I was required to follow) produced a result in which that person did not succeed. The earlier sense of disharmony arose from the failure to immediately recognise that those wills, what I wished for and what I was obliged to do, were in conflict.

As a colleague said to me, as I talked through this experience, 'Well, you took the oath'. That was, in a sense, a synonym for 'your integrity lies in what you are not able to do'.

I tell this story not to illustrate that sometimes our oaths as lawyers and judges require us to do things that, if we had a free hand and were masters of the universe, we would prefer not to do. That is, in a sense, obvious. It is, rather, to illustrate, the importance of time, quiet and patience in being able to recognise the sometimes conflicting wills that operate within us. Because sometimes we don't see the thing that we should do, are obliged to do, even when it is staring us in the face.

It is also worth observing, in this context, that this is something that you can get better at. You can work at being introspective and you can get better at examining your own thoughts, feelings and motivations. And the better at it you get, the better you will be at keeping your oath as a lawyer or a judge.

Of course, there are some people, like Hazel Motes, who are not able to 'truly examine themselves' or who, frankly, do not want to. We have all known lawyers and (heaven forbid) judges, who are so utterly convinced of their correctness, and the correctness of their views, that they are unable to see that there might be a different perspective to that of their own. These individuals are, from an ethical point of view, the most dangerous because they naturally assume that there is only one answer to every question and that, miraculously, that answer always happens

to be the one that first occurs to them.

That is why so many decisions in relation to the discipline of legal practitioners place significant stress on the notion of 'insight', the ability to notice and understand some thing or other. The 'insight' that we refer to in this context is always 'self-insight', the ability to understand oneself and one's actions. And, importantly, the ability to make a critical judgement of oneself and one's actions.

Which brings me to the other, related, virtue I referred to earlier: humility. That is, the ability to have a proper perspective on yourself. To be able to keep yourself within your own bounds. As I said earlier, not the false kind, although I must say there is in the extract from *Theaetetus* reproduced above a measure of false humility in Plato's sarcastic reference to the Sophists: 'if you and I were clever and wise and had found out everything about the mind.'

Beneath the sarcasm, however, the true self-examination that Plato calls for recognises that none of us are 'all-clever and all-wise' and none of us have 'found out everything about the mind'. When Plato has Socrates say to Theaetetus 'we are ordinary people' he is not being sarcastic. We are all 'ordinary people' and so must look into the real essence of our thoughts.

Humility involves the recognition that we are not, in the end, the final arbiter of the correctness of our own thoughts and actions. The correctness of our thoughts and actions must be assessed in light of the traditions of which we form a part. Traditions which we contribute to in our own way, no doubt, and which on occasion we must, collectively, correct. But, for all of that, traditions that are greater than us and, as a part of which, we cannot claim to have a monopoly on what is right or true. Oaths as lawyers and judges are, therefore, a commitment to a particular tradition, or set of traditions; imperfect no doubt, and always in need of reform and renew, but traditions to which we have publicly and solemnly committed ourselves.

Indeed it is our commitment, by our oaths, to our legal traditions that give us not only the right but the responsibility to keep those traditions alive, to ensure that they change when they should change and that they continue to properly serve the people and the community for which they exist.

Returning briefly, at this point, to Sir Gerard Brennan as an exemplar of fidelity to his judicial oath and humility in the face of tradition. I would commend to all of you a close reading of Brennan J's decision in *Mabo [No 2]*. One of the features of Brennan J's reasons in that case, and which gives those reasons such resonance, is how his Honour carefully drew upon common law's own traditions and internal resources in charting the boundary between 'adopt[ing] rules that accord with contemporary notions of justice and human rights' and [fracturing] the skeleton of principle which gives the body of our law its shape and internal consistency'.[7]

What Alasdair McIntyre said of living traditions generally, then, applies to our legal tradition in particular:[8]

> A living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations. Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part, and this is true both of those goods which are internal to practices and of the goods of a single life.

To recognise that you are part of, and only one part of a historically extended tradition, ultimately, requires humility.

Can I conclude these remarks by reflecting for a moment on a recent decision of the High Court?

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[7] ***R v Toohey; Ex parte Meneling Station Pty Ltd*** (1982) 158 CLR 327, 358 (Brennan J).
[8] McIntyre, *After Virtue*, (University of Notre Dame, 3rd Edition, 2007), 222.

Hofer v The Queen[9] was delivered on 10 November 2021. While the decision will be of interest to criminal lawyers generally, I propose to focus on two matters that I thought vividly illustrates some of the points I have been trying to make in this paper: the importance of fidelity to our oaths, as essential to the administration of justice, and the importance of reflection and humility in the attainment of that fidelity.

The appellant in *Hofer* was convicted of eight sexual offences against two young women aged 23 years and 17 years, respectively. The allegations by the complainants concerned events which took place on consecutive days and each had certain common features. The two complainants (C1 and C2) had each responded to an online advertisement placed by the appellant offering to rent a bedroom in a 'one bedroom house', preferably to a female aged between 21 and 35. Arrangements were made for each complainant to meet with the appellant. By the time the appellant took each of them to view the room, C1 and C2 were intoxicated, having drunk alcohol to excess at the insistence of the appellant. There was no dispute that sexual intercourse of some kind took place. The issue at trial was whether the appellant believed that each complainant consented to having sex with him or whether he was reckless in that regard. The appellant gave evidence that he believed that each complainant consented. Accordingly, the credibility of the appellant was important.[10]

When the appellant gave evidence, both in evidence-in-chief and in cross-examination he gave evidence in a number of respects that was inconsistent with or contradicted the evidence of complainants, none of which had been put to either of them in cross-examination.[11] I need not set out the evidence itself; it suffices to observe that it concerned matters about which the complainants could

[9] ***Hofer v The Queen*** [2021] HCA 36 (***Hofer***).
[10] ***Hofer*** [2] (Kiefel CJ, Keane & Gleeson JJ).
[11] ***Hofer*** [3] (Kiefel CJ, Keane & Gleeson JJ).

and should have been able to respond.

Most of you will immediately recognise from this that the case involved a failure by defence counsel to comply with the rule in *Browne v Dunn*.[12] That rule requires that where it is intended that the evidence of a witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony, should be put to the witness by the cross-examiner for his or her comment or explanation.[13]

The rule in *Browne v Dunn* is described not only as a rule of professional practice but as essential to fairness. While 'fairness' in this context can be understood as a reference to fairness to the parties in the conduct of adversarial proceedings, it is notable that very often the rationale behind the rule is expressed in terms of fairness ***to the witness***. In *Browne v Dunn* itself Lord Herschell described the rules as 'essential to fair play and *fair dealing with witnesses*'.[14] Lord Halsbury, similarly said:[15]

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

As you will notice, Lord Halsbury described the rule in terms that focused on the 'absolute injustice' of not giving the witness the opportunity of explanation or an opportunity to defend their character.

It is not difficult to see the significance of these observations for a case such as *Hofer* where the injustice visited upon a witness by depriving them of the

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[12] ***Browne v Dunne*** (1893) 6 R 67 (***Browne v Dunn***).
[13] ***Hofer*** [26] (Kiefel CJ, Keane & Gleeson JJ).
[14] ***Browne v Dunn***, 70 – 71.
[15] ***Browne v Dunn***, 76 – 77.

opportunity to defend their character was an injustice visited upon the complainant in a sexual assault trial.

It was not, however, the failure to comply with the rule in *Browne v Dunn* that led to the miscarriage of justice in that case. It was, rather, the use to which the prosecution put that failure in cross-examination.

Kiefel CJ, Keane and Gleeson JJ commenced discussion of this issue with this important observation:[16]

> The difficulty respecting the rule in criminal proceedings arises not so much from adherence to it as from the proper course to be followed when it is not observed.

In *Hofer* the prosecutor had cross-examined the appellant as to defence counsel's failure to cross-examine the complainants as to the various matters, including to the effect that the reason for the omission was that the appellant had not instructed defence counsel as to those matters, and so must now be making the evidence up.

That cross-examination, all members of the Court concluded, gave rise to a miscarriage of justice. In that regard, their Honours concluded, the questioning undertaken by the prosecution departed from the standards of a trial to which an accused is entitled and the standards of fairness which must attend it. As Kiefel CJ, Keane and Gleeson JJ said:[17]

> The questioning was such as to imply that the appellant was obliged to provide an explanation as to why matters had not been put to C1 or C2. This suggested he possessed information which he had not given counsel by way of instructions. The unfairness in this regard was compounded when the appellant was not permitted by the trial judge to provide an answer and by defence counsel not informing the court that he had those instructions. The attack upon the appellant's credit by assertions of recent invention was based upon an assumption which was not warranted. All of these matters were highly prejudicial to the appellant.

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[16] ***Hofer*** [29] (Kiefel CJ, Keane & Gleeson JJ).
[17] ***Hofer*** [42] (Kiefel CJ, Keane & Gleeson JJ).

Notwithstanding that there had been a departure from a trial according to law to the prejudice of the accused, a majority of the Court in *Hofer*[18] went on to conclude that the proviso applied: that is, that there had been no substantial miscarriage of justice. The appeal was therefore dismissed.

In reaching that conclusion the majority applied the proviso by reference to the approach identified in *Weiss v The Queen*.[19] Kiefel CJ, Keane and Gleeson JJ described that approach in the following terms:[20]

> [T]he appellate court's assessment of the appellant's guilt "is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. As was explained by the plurality in *Kalbasi v Western Australia*, in such a case "the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had".

The majority of the Court concluded that the appellant's evidence that he believed the complainants to have been consenting was so glaringly improbable as to be incapable of belief. For example, Kiefel CJ, Keane and Gleeson JJ, referring to the reasons of Fagan J in the Court of Criminal Appeal said:[21]

> In his reasons, Fagan J, having earlier noted that the appellant was "a 130 kg virtual stranger" to each complainant, went on to say:
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> > "His evidence that he thought they agreed was objectively improbable given the age difference, the brief period over which each complainant had made his acquaintance and the limited, non-romantic business purpose for which they had met with him. The incontestable evidence that the [appellant] had plied each of these young women with alcohol evinced his intent, from the outset, to reduce their capacity for resistance; it showed his reckless disregard for whether they consented or not."

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[18] Kiefel CJ, Keane, Gageler and Gleeson JJ; Gordon J dissenting.
[19] ***Weiss v The Queen*** (2005) 224 CLR 300 (***Weiss***).
[20] ***Hofer*** [59] (Kiefel CJ, Keane & Gleeson JJ).
[21] ***Hofer*** [64] – [66] (Kiefel CJ, Keane & Gleeson JJ).

> To these undisputed aspects of the evidence noted by Fagan J may be added the truly extraordinary circumstance that the appellant's assaults on the complainants occurred on consecutive nights upon young women who had responded to the appellant's offer of accommodation. The extraordinary circumstance that the incidents in question occurred on consecutive nights is significant, not because of coincidence or tendency, but because of what it reveals of the appellant's modus operandi and the intention which informed his plans. On two nights in a row, with different young women, the appellant pursued a course of conduct that was plainly focused upon having sex with them. The evident purpose of the appellant's plan was to reduce each complainant's agency by isolating her in his house, where, affected by alcohol, she would be at his mercy by reason of his height and weight. Plying each complainant with alcohol before bringing her back to his house was also part of that plan, which had nothing to do with the search for a possible housemate.
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> It is an affront to common sense to suggest that the appellant, in fabricating the pretext of offering to share his house, was acting otherwise than with the intention to lure young women back to his house and, having plied them with alcohol before doing so, to have sex with them irrespective of their wishes. There is no room here for reasonable doubt that in the case of each complainant the sexual assaults which the appellant perpetrated were planned in advance and were to be executed without regard to the wishes of the complainants.

Gageler J, whose separate reasons I will return to, agreed with this conclusion and broadly with the reasons expressed by their Honours.[22] Both the plurality and Gageler J described the circumstances of the case as 'extraordinary'.[23] Absent those extraordinary circumstances, one may infer, it would have been necessary to conclude (as Gordon J did in her Honour's dissenting reasons)[24] that, as the case turned on issues of contested credibility, there should be a retrial.

Astute listeners will notice that this summary oversimplifies, to a degree, the Court's discussion in *Hofer*, of both the role of the rule in *Browne v Dunn* in criminal proceedings and the application of the proviso in criminal appeals.

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[22] ***Hofer*** [80] (Gageler J).
[23] ***Hofer*** [71] (Kiefel CJ, Keane & Gleeson JJ); [88] (Gageler J).
[24] ***Hofer*** [133], [140] –[141] (Gordon J).

Much could be said, for example, as to whether, and to what extent, the rule in *Browne v Dunn* required that each of the matters the subject of the appellant's evidence in *Hofer* be put to the complainants in cross-examination. The summary is sufficient, however, for my present purpose, which is concerned more with the ethical lessons that can be drawn from the decision.

The first lesson concerns the critical importance of fidelity to our oaths in the attainment of justice.

Because, as the decision recognises, real difficulties can arise in criminal proceedings in properly responding to a failure to comply with the rule of fairness reflected in the rule in *Browne v Dunn*. The accusatorial nature of our system of criminal justice is such that, when that rule is not observed (which may, for the witness concerned, be a source of injustice), there are significant limits on the extent to which that failure can be adequately remedied. As the decision in *Hofer* recognises, cross-examination of an accused person runs significant risks of prejudice to the accused and for inappropriate intrusion into client legal privilege.

What then is to be done when the rule of fairness is breached?

Kiefel CJ, Keane and Gleeson JJ posed one potential solution:[25]

> An obvious course which may be taken is to recall the witness so that the omission can be corrected. This may be preferable and may be undertaken without injustice, depending on the course the trial has taken.

Their Honours cited, on this point, the Court's previous decision in *MWJ v The Queen* in which the Court referred to the 'salutary practice', in many jurisdictions, of excusing witnesses temporarily only, and on the understanding that they must make themselves available to be recalled if necessary at any time before a verdict is given.[26]

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[25] ***Hofer*** [31] (Kiefel CJ, Keane & Gleeson JJ).
[26] ***MWJ v The Queen*** [2005] HCA 74; (2005) 80 ALJR 329 at 339 [40].

While the course identified by the Court in *Hofer* may, in some cases be possible, the recall of a prosecution witness after the close of the prosecution case is, at least in this State, exceedingly rare and, for obvious reasons, even rarer still in the case of a complainant in a sexual assault case. In Western Australia, unlike the other jurisdictions referred to in *MWJ v The Queen*, witnesses (including complainants) are routinely excused from any further attendance. Indeed, in the case of sexual offences, it is a routine practice to pre-record the evidence of complainants prior to trial. Once that process is completed it is very rare indeed for a complainant to be required to attend for further cross-examination.

Moreover, in those circumstances, while the recall of the witness may well correct the state of the evidence for the trier of fact and so remedy any injustice in the trial itself, from the witness' own perspective a sense of injustice may remain. The very fact of being recalled for repeated questioning, while necessary for the administration of justice in the particular case, may well leave the witness himself or herself with a legitimate sense of grievance and, in some cases, additional trauma.

It may therefore be that, in many cases, either for practical reasons or reasons of principle, it would not be possible to remedy a failure to observe the rule in *Browne v Dunn*. And, whether the outcome of a particular trial is a conviction or an acquittal, from the witness' perspective, that which Lord Halsbury described as 'absolutely unjust', may be a wrong without a remedy.

Which brings us back to the importance of fidelity to our oaths. For in such a case, the only effective means of avoiding that injustice, the indispensable feature of our system of justice upon which that system relies for avoiding injustice, is counsel's fidelity to their oath. In such a case, it is counsel's fidelity to their oath, to fair play and fair dealing, that is the only effective mechanism for ensuring that the process of the trial is fair to all of those involved in it.

It is you, the lawyer, and your fidelity to your oath, upon which the administration of justice in the particular case therefore depends. Of course, as the cases recognise, this can give rise to forensic dilemmas. How best to serve the interests of one's client, while maintaining fidelity to one's oath. I don't suggest that this is easy. In fact, it can, at times, be extremely difficult.

But that is the point. That is where the need for introspection comes in. Because, as I tried to illustrate earlier, we can very easily fool ourselves into thinking that the 'will' that we *want* to follow is the 'will' that we *should* follow. So we need to develop the skill, and where it counts, find the time, quiet and patience, to be able to recognise the sometimes conflicting wills that operate within each of us.

There is another lesson from *Hofer* that I want to end with. It is not so much an admonition, as the first lesson, but an illustration of the complexity that is involved in fidelity to our oaths.

As I noted earlier the majority of the Court in that case, applying *Weiss v The Queen*, concluded that, notwithstanding the departure from a trial according to law to the prejudice of the accused, there had been no substantial miscarriage of justice. In particular, the justices in the majority were satisfied, beyond reasonable doubt, as to the appellant's guilt. I have already referred to the reasons of Kiefel CJ, Keane and Gleeson JJ in that regard.

I want to end, rather, with Gageler J's concurring reasons. His Honour wrote separately in order to address, *inter alia*, what his Honour described as reservations he had repeatedly expressed in the past about aspects of the reasoning in *Weiss v The Queen*. As I noted above, according to the approach identified in *Weiss*, an appeal court's ultimate focus, in applying the proviso, was not on the effect of an error on the jury at trial or some hypothetic jury, but on the appellate court's satisfaction as to guilt. Gageler J described this as a pivot 'from an "effect-on-the-jury" conception of the appellate function to a "determination-

of-guilt" conception of the appellate function.'[27]

This reorientation of the appellate function, as his Honour described it, was for his Honour 'difficult to square with the traditional common law understanding of the jury as the constitutional tribunal for the determination of criminal guilt'. As his Honour explained his view:[28]

> I have preferred to understand the essential role of an appellate court in an appeal against a conviction on indictment as being to ensure the integrity of the verdict of guilt that has been rendered by the jury. … I have baulked at the notion that the function of the appellate court encompasses determination of guilt for itself. The proper function of the appellate court, I have thought, is to determine "not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials".

Gageler J, nevertheless, observed that he had avoided meeting his preferred view head on in the past. His Honour said:[29]

> What has made that avoidance possible is that the ordinary assumption, that a belief an appellate court itself forms beyond doubt on the evidence properly admitted at trial is also a belief that the trial jury properly instructed would have formed on the same evidence, has been available in those cases in which I have been required to consider the proviso.

As his Honour noted, however, that assumption was strained in *Hofer*, particularly in light of the fact that the jury in that case had acquitted the appellant of two charges. His Honour said:[30]

> The trial jury's acquittal of the appellant on two out of ten counts indicates that the attitude of the jury to the appellant's account might not have been one of wholesale disbelief. That circumstance provides reason to reflect long before being confident that the appellate record is alone a sufficient basis upon which to be satisfied of proof beyond reasonable doubt of the appellant's guilt on the other eight counts. Might something

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[27] ***Hofer*** [84] (Gageler J).
[28] ***Hofer*** [85] (Gageler J).
[29] ***Hofer*** [87] (Gageler J).
[30] ***Hofer*** [92] (Gageler J).

> about the manner in which the appellant gave his account, or something about the atmosphere of the trial not conveyed in the written record, have made the incredible seem credible? … The possibility that the question might admit of an affirmative answer could never be excluded beyond all shadow of doubt. But I can and do exclude it in my own mind beyond the shadow of a *reasonable* doubt.

The logic of *Weiss*, his Honour therefore observed, was that his Honour was bound to give effect to his own conclusion, notwithstanding the possibility that the trial jury might have made a different assessment.

And, absent an application to reopen *Weiss*, Gageler J concluded that he was duty bound to follow it. As his Honour said:[31]

> The bottom line is that I am impelled to follow *Weiss*, not "because it is the right decision, because it is logical, because it is just, because it accords with the weight of authority, because it has been generally accepted and acted on, because it secures a beneficial result to the community", but "because it is a previous decision and for no other reason".

In reaching this conclusion, it is worth emphasising, Gageler J drew upon Brennan J's formulation of judicial duty. His Honour said:[32]

> Brennan J captured both the duty of an individual Justice to obey a previous decision that stands unyieldingly as an authority of this Court and the rationale for that duty when he explained that, "[a]s the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration". His Honour went on to explain that "observance of such a constraint, coupled with the Court's ability to re-examine its own decisions, provides the appropriate balance between a legal system on which the dead hand of the past rests too heavily and one in which the law is in continual ferment".

Gageler J's reckoning with his own reservations about aspects of *Weiss*, and the resolution of those reservations in *Hofer*, I want to suggest, provide us with vivid illustration of the kind of reflection and attention involved in what I have been

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[31] ***Hofer*** [97] (Gageler J).
[32] ***Hofer*** [96] (Gageler J).

trying to draw out in these remarks.

His Honour's reasons in *Hofer* demonstrate, with estimable clarity, the need for us to identify, and to understand, our own 'preferences', the need for long and patient reflection on what we would *prefer* and what we are *obliged* to do, and the need for the humility to recognise the point at which fidelity to our oath requires obedience to the tradition of which we form a part (and, as might be the case in other circumstances, when it will not).

It also illustrates the complexity of that process of reasoning and reflection. For, reduced to its essence, Gageler J's reasoning in *Hofer* amounts to something along the lines of this: 'While I would prefer not to prefer my own view of the guilt of the appellant to that of others, I am, by reason of my oath, bound to do so'.

We should pause to feel the weight of this responsibility. It is one that rests on all of us.

Thank you for your attention.