Bar News

The journal of the NSW Bar Association

Autumn 1986

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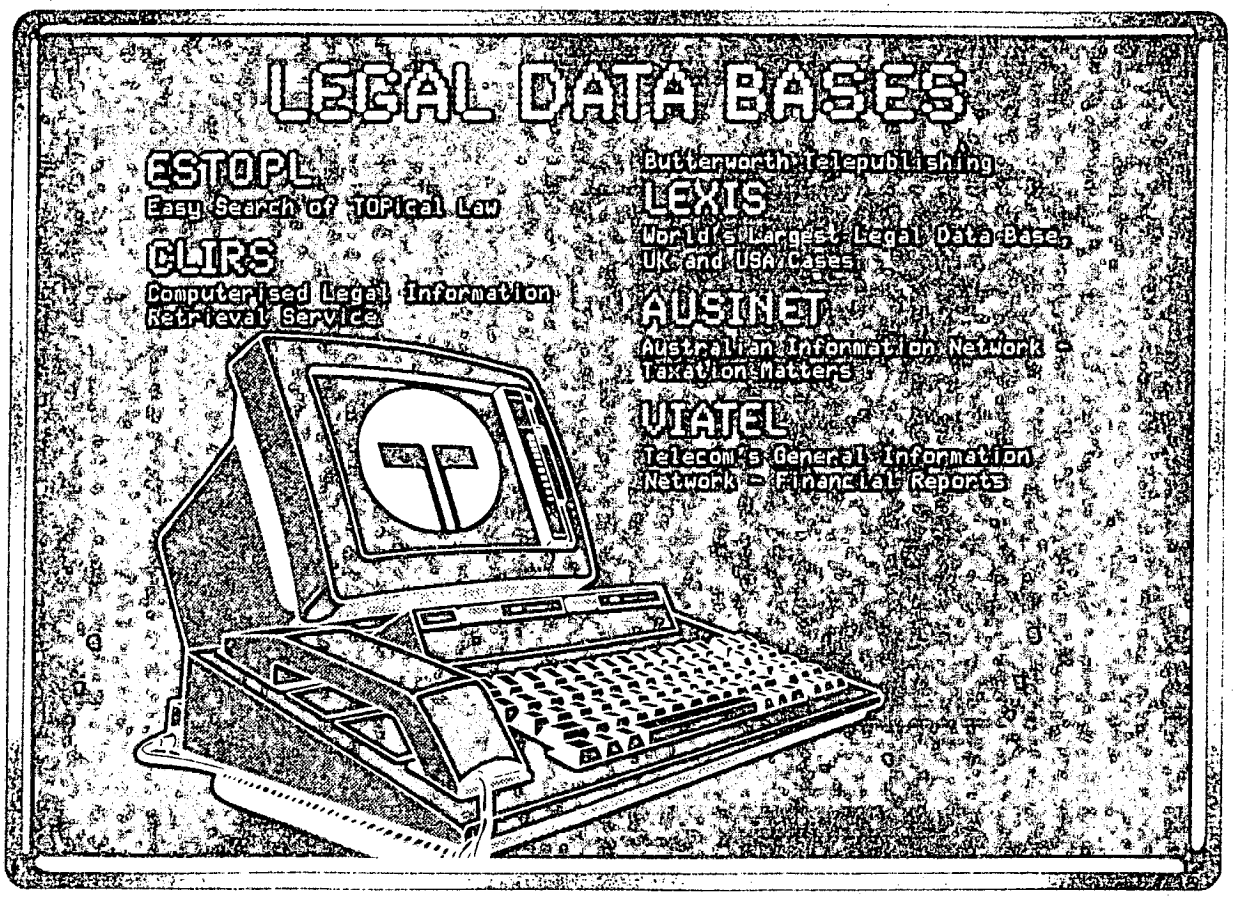

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Editorial contributions are welcomed, and should be addressed to the Editor, R.S. McColl, 7th floor, Wentworth Chambers, 180 Phillip Street, Sydney, NSW 2000. Deadline for the next issue is June 30.

Supreme Court Rules

In the summer issue of *Bar News* a short article appeared dealing with the Bar's opposition to amendments to the Supreme Court Rules inserting Part 72 (Arbitration) and amending Part 39 (Court Experts). That article has been criticised in that its author asserted the new rules to be innovative but did not refer to certain legislative antecedents. In February the Association sought disallowance of the rules by Parliament and provided the Attorney General with detailed written submissions in support of its position. Copies were provided to the Chief Justice and to the shadow Attorney General. The Bar was circulated advising members of the step which had been taken and inviting them to read a copy of the Bar's submissions by arrangement with the Registrar. It was then indicated that there would be a full report on the matter in this issue of *Bar News*.

In the course of a speech to the Commercial Law Association, Mr Justice Rogers was critical of the Bar's submissions. The Chief Justice has also been critical of the Bar's position in correspondence with the Attorney General and the President.

On 9 April 1986 the shadow Attorney General moved the Legislative Assemble to disallow the rules. The motion was debated on 10 April 1986 and lost as the Government opposed it.

It is not possible to set out all of this material. Readers will find a summary of the Bar's submissions and a summary of the points made by Mr Justice Rogers in his speech in this issue. As this is of necessity selective, a file of all relevant material and correspondence including a copy of Hansard will be placed in the Bar Library for inspection by all interested members.

Common Law Bottleneck

If you were wondering why your common law case didn't get a start in the Supreme Court last month, consider the following statistics.

In February 1986 out of 279 cases fixed for hearing 36 (12.9 per cent) were not reached. This compares favourably with the figures for January-February 1985 (the term started a little earlier) when out of 266 cases listed only 37 (14 per cent) were not reached.

March is a different picture. In March 1985, 209 cases were listed and 32 (15.3 per cent) were not reached. In March 1986 283 cases were listed and 70 (about 24.75 per cent) failed to get on. It is believed that the April figures will demonstrate an equally poor, if not worse, situation.

Of the cases listed for hearing in February 1986, 26 were adjourned, 133 were settled (either before the date of hearing, at the doorstep of Court or after the matter commenced) and 84 were heard. In March 28 were adjourned, 123 settled and 62 were heard.

Jury cases headed the list of not-reached matters (20 and 41 for February and March respectively) followed by motor vehicle cases (9 and 11 respectively) and other non-jury cases (7 and 18 respectively).

The Chief Judge at Common Law, Mr Justice Slattery, is understood to be considering the figures with concern and attempting to devise a solution to increase the turnover. He is hampered, however, by the fact that two of his judges are, unfortunately, unavailable through illness. With the imminent retirement of Mr Justice Lusher the necessity for his immediate replacement is apparent to prevent the situation worsening.

Members of the Bar with suggestions as to how the situation might be improved should communicate with the Courts Liason and Listing Committee (Gormly QC, Dent and Biscoe).

Reading Lecture Notes for Sale

As a result of the reading programme, the Bar Association has acquired a collection of some 80 sets of reading notes covering almost every area of practice at the Bar.

These notes have been written by senior and junior members, Judges and Court Officers, all of whom have particular expertise in the areas covered by the papers.

The notes cover such aspects as practice and procedure and the running of cases in the various courts, drafting pleadings, chamber work generally, evidence, proof of documents, leading evidence, cross-examination, and major areas of practice as well as a host of specialist fields (e.g. defamation, adoption, freedom of information, trade practice, protective division, stamp duty and many more).

Complete sets of notes are now available to members of less than five years seniority at a cost of $190 and to all other members and associate members at a cost of $250. Individual papers may be purchased at a cost of $10 (prices are subject to review from time to time).

Members are urged to take advantage of this offer. Enquiries should be directed to the Education Officer.

Professor Younger to Lecture

The Legal Education Committee of the Bar Association is arranging for Professor Irving Younger, the eminent United States jurist and lecturer, to deliver a lecture on 10 June 1986 on the use and treatment of expert witnesses.

Professor Younger's techniques are both unusual and interesting and his skill as an educator has earned him world acclaim.

Further details concerning his visit will be circulated through Floor notice boards. The charge for attending his lecture, which will be of approximately two hours duration, will be $10.

SPEAKING OUT BY THE BAR

The contribution to this issue of *Bar News* by the Honourable Athol Moffitt CMG, QC, the former President of the Court of Appeal, asks us to pause and consider whether the Bar has sufficiently performed its public function and maintained its independence by speaking out on issues. As it happens this is a very topical question.

Before dealing with that I should remind members that the Association has expressed views publicly on a great many recent issues of significance. I do not attempt to catalogue them. They include the Law Reform Commission's Proposals upon the Structure of the Legal Profession; the proposed National Crimes Commission and then the National Crime Authority, including the appointment of a Judge as its head; the Special Commissions of Inquiry Act; legislation retrospectively affecting Court decisions concerning land development; the New South Wales Drug Commission, and the appointment of a new District Court Judge as its head; publicity concerning the trial of Mr Justice Murphy; Judges as Royal Commissioners; changes to the Workers Compensation Court; publicity as to the arrest of those charged with the murder of Anita Cobby; amendments to the Supreme Court Rules and Accident Compensation. Private representations have been made to Government and the Courts on a myriad of other topics. Indeed, more is usually to be achieved by private representation and negotiation that by public confrontation. Then again, it is not every issue which warrants a stance.

It is also realistic to recognise that it is in the interests of the Bar to have good relations with Governments of the day and the Judiciary. The recognition of this, of necessity, acts as a brake upon confrontation, public or private. The trick is to decide when diplomacy becomes appeasement and when the watchdog has become a spaniel lying on its back waiting to be tickled.

Never has the dilemma been more acute that it has over the Murphy saga.

Since the verdict in the first trial there has been a series of extraordinary events. I mention some.

The members of the first jury were subjected to sustained public criticism for their verdict. The Director of Public Prosecutions has received persistent trenchant public criticism for his decision to prosecute. Mr Justice Murphy publicly criticised the first trial judge. The Premier was charged with contempt of Court. The Premier has attacked the Chief Magistrate in and out of Parliament. Certain Supreme Court judges, including the Chief Justice, wrote to the Permier in defence of the Chief Magistrate. Mr Justice Murphy publicly described his trial as a political show trial. The Chief Justice of the High Court has issued a press statement, and the judges of that Court are individually considering their position. The leader of the Australian Democrats has publicly said that no new South Wales judges were to be considered for the proposed Parliamentary Commission of Inquiry because some of them were "sus". This unprecedented Inquiry has been set up.

In normal times each of these events would have attracted much attention. Together, they reflect a crisis of major proportions concerning the administration of justice, and the conduct of those concerned with it, in which the Bar has a fundamental concern. A combination of pending trials, inquiries and actions has made comment difficult. The constantly changing scene, and the difficulty of ascertaining underlying facts adds to the difficulty. It would also be unduly naive not to recognise that the party political implications involved, and the high offices held by many whose conduct is under scrutiny, have called for more than usual caution and restraint. So far we have spoken only when plainly necessary.

When the proper time comes, however, the Bar will not shirk its duty to speak.

R.V. GYLES QC

THE ARBITRATION DEBATE

In February 1986 the Bar Association forwarded to the Attorney General, the Honourable T.F. Sheahan MP, a submission in support of the Bar Council's proposal that Part 72 of the Supreme Court Rules be disallowed by the State Parliament. On 18 March 1986 His Honour, Mr Justice Rogers delivered a paper to the Commercial Law Association in which he commented upon the Bar's attitude to Part 72. The gist of the Bar's submissions and His Honour's comments are set out hereunder.

The Bar's Case: Validity.

Section 124(2) of the Supreme Court Act as amended in 1984 provides that:

The Rules may make provision for or with respect to: (a)the cases in which the whole of any proceedings or any question at issue ... may be referred by the Court to an Arbitrator..."

Rule 2(1) of Part 72 of the Supreme Court Rules promulgated late in 1985 provides that the power to refer to arbitration may be exercised "in any proceedings in the Court". The only limitation on this power is that it cannot be exercised in relation to cases to be tried by a jury (Rule2 (2)).

Rule 2(1) in providing, subject to Rule 2(2), that the power may be exercised in the cases selected by the Court in its discretion and acting possibly of its own motion, does not "make provision for...(a)the cases" in which the power may be exercised in accordance with Sec.124(2).

The point is covered by the decision of Jacobs J. in *Baker v. Gough* (1962) 80 WN 1263 at 1270. In that case Jacobs J. had to consider the validity of an ordinance passed by the Synod of the Diocese of Sydney pursuant to the 21st Constitution in the Schedule to the Church of England Constitutions Amendment Act, 1902. The 21st Constitution so far as relevant provided:

"The Synod of each diocese shall have power to determine by ordinance **in what cases** the licence of a clergyman licensed within the diocese may be suspended or revoked"

At p.1270 Jacobs J. said:

"...my view is that it is not an expression by Synod of a case in which the licence of a clergyman within the diocese may be suspended or revoked to say that it may be revoked at the will or pleasure of the Bishop. No case is thereby expressed but the power is in effect delegated to the Bishop of the Diocese or the Archbishop as the case may be to determine the case in lieu of the Synod itself. I do not think that this can be done."

An ordinance of Synod represented a form of delegated legislation under the authority of an Act of the State Parliament in all respects analogous to rules of Court made by a committee of judges under the Supreme Court Act. It is clear that the reasoning of Jacobs J. is directly applicable to Rule 2(1) of Part 72.

Accordingly, Rule 2(1) of Part 72 is ultra vires the Rules Committee. The invalidity of Rule 2(1) results in the whole of Part 72 being invalid. The provisions are inseverable because if no power to refer exists under the rules there will be nothing for the other rules to operate on.

Problems in Principle:

The Association firmly holds the view that it is fundamental to our system of government and of justice that a citizen should be entitled to have his dispute resolved by the courts of the land, openly, in accordance with the law, and with the protections which are traditionally built into the court system including the right to legal representation. The Association is unimpressed by arguments that the power to refer matters to arbitration or to court experts has existed for many years (Arbitration Act, 1902 s.15). Its disuse is eloquent evidence of its inutility. With our courts and judges under scrutiny, and even attack, as perhaps never before, the view of the Association is that nothing should be done to undermine public confidence in the judiciary or to detract from its traditional role. With this in mind, it is inappropriate to give power to judges to decline to hear cases brought to the court by citizens.

The following points of principle are also involved in Part 72 as presently drafted:

1. The power of the courts to appoint a particular arbitrator or referee and fix his fees. This gives the court a power of patronage which is quite undesirable.
2. The power to appoint a judge, master, registrar or other officer of the court as an arbitrator or referee. Nothing could be more calculated to undermine public confidence in the role of the judiciary and the courts. It is one thing to have an official referee or referees appointed publicly to undertake such tasks generally. It is quite another to have ad hoc appointments of individual judges or court officers.

3. The power of the court to act "upon its own motion" in rules 2, 10 and 13.
4. The abandonment of the rules of evidence and procedure provided by rule 8(2) of the rules.
5. The extraordinary power contained in rule 8(5).
6. The absence of criteria and the unrestrained nature of the discretions conferred upon the court.

The fact is that, save in certain limited circumstances, arbitration has not been popular in this State, or indeed, in this country. It is very expensive — not only because of the necessity to pay for all facilities including the arbitrators, but because in practice arbitrations tend to be drawn out and cumbersome. They are also a fertile ground for feelings of injustice in the result. Procedures are often lax, the knowledge and ability of arbitrators is uneven, and even if reasons for a decision are given, it is extraordinarily difficult to test those reasons in court. If access to the courts in the course of an arbitration is denied, there is great scope for injustice and the appearance of injustice — on the other hand if access to the court is available there will almost inevitably be applications to the court of one sort or another which are costly and time consuming. All this shows the real practical difficulties in a hybrid situation.

Hitherto, the courts in Australia have been most reluctant to order arbitration, even on the application of one of the parties, where it is not the subject of consent. *Honeywell Pty Limited v Austral Motors Holdings* (1980) Qd.R 355; *Taylor & Sons Pty Limited v Brival Pty Limited* (1982) V.R. 76; *Silk v Eberhardt* (1959) QWN.

Indeed, even consent arbitrations have led to their share of problems. The sole exception to this is a recent decision of a judge of a New South Wales Supreme Court, a judge who was a member of the Rule Committee which passed these rules, in which he discussed the rule herein in question (*Qantas Airways Limited v Dillingham Corporation December* 5 1985 Rogers J.). In the view of the Bar Association the philosophy expressed in this judgement is out of step with the views of other courts in Australia and other judges, and it is not in accord with contemporary commercial and political reality.

The Effect of an Order upon Appeal Rights:

The Judge having appointed himself as arbitrator (of his own motion) can then report to himself as Judge and of his own motion adopt his own report, although neither party is satisfied with it (Rule 13).

The powers of the Court of Appeal to interfere on appeal from an order adopting the arbitrator's report may be very limited. Since the rules of procedure and evidence may have been dispensed with, there may be no transcript of evidence. If a Judge as referee has "informed himself" in relation to a matter otherwise than in accordance with the evidence called before him by the parties, there may be no material before the Court of Appeal which would enable that Court to review the Judge's decision on that matter.

In this way the rights of the unsuccessful party to appeal from the decision on the merits, while preserved in form, may be effectively destroyed in substance.

The same position would pertain where a Judge adopts (or varies) a report from another referee or arbitrator.

The Suggested Precedents:

(a) S.15 Arbitration Act, 1902.
(i) The section only applied to limited and defined classes of case.
(ii) It required application by one party.
(iii) The reasons for judgement of the High Court in *Buckley v Bennell* 140 CLR 1 contain some discussion of the utility of a power in the Court to refer cases to arbitration under the control of the Court. At p.21 Stephen J. said:

"...when the compulsive power...is exercised the legal rights and obligations of a party to litigation then being determined by extracurial arbitral process, the resultant award will attract to itself all that relative immunity from judicial review which surrounds a conventional award. This immunity is well enough in a case of a conventional award, being explained by the consensual character of conventional arbitrations. But in the compulsory reference the consensual element is wholly absent. The party, whether plaintiff or defendant, will never have consented to any such determination of his rights or obligations but will nevertheless find himself denied judicial review of an award which he may regard as palpably wrong in fact or in law."

To some extent in this passage Stephen J. was dealing with the consequences of an interpretation given by the Full Court of the State to the predecessor of Section 15 of the Arbitration Act 1902 and the undesirable consequences which flowed from this interpretation. Nevertheless the passage contains a clear and powerful statement of the reasons why parties should not be forced, without their consent, to arbitration when this would have the effect of depriving them of their right to have their cases heard in accordance with law.

In this same case Jacobs J. said at p.37:

"Parties to an action do not often want to forgo the rights of a litigant to have questions determined according to law correctly applied, including questions of evidence. More importantly, the Court will hardly be prepared to compel parties to forgo its effective control and supervision to proceedings commenced before it in favour of a determination subject to the very limited powers of review which the Court has in the case of an arbitration by consensual submission."

It will be seen from these passages, and they are consistent with the whole of the majority judgements, that they provide no support for the provisions of Part 72 in their present form. In fact the judicial philosophy expressed in the quoted passages is directly opposed to some of the fundamental provisions of Part 72.

It is of concern that a judge as arbitrator could, of his own motion, direct the reference to be heard by himself, in whole or in part outside New South Wales, thus adding further to the expense and inconvenience of the parties.

Summary of his Honour, Mr Justice Rogers' paper — "Business Disputes made easier."

His Honour pointed out that Section 15 of the now repealed Arbitration Act, 1902, gave power to the Court to order the whole cause or any issue to be sent to

arbitration if all the parties consented or:

"If the cause or matter required prolonged examination of documents or any scientific or local investigation which, in the opinion of the Court, could not conveniently be dealt with by the Court or, if the dispute was wholly or in part matters of account, without the consent of the parties."

The Commercial Arbitration Act, 1984, which, his Honour said, was designed to return to the original concept of arbitration as a swift, informal and cheap determination, did not repeat Section 15 of the 1902 Act. However, at the same time that it was passed, Section 124 of the Supreme Court Act was amended to give the Rule Committee power to make rules prescribing the cases or questions which may be sent to arbitration. Pursuant to that power, the Rule Committee made Part 72 of the Supreme Court Rules which had now been attacked by some members of the Bar Council. His Honour criticised the suggestion that the power conferred on the Court to appoint of its own motion a court expert was "some great leap into the unknown by adventurous spirits" as failing to take into account recommendations to that effect by the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence (1982) and rule 706 in the US Federal Rules of Evidence, 1975.

He rejected the proposition that Part 72 was ultra vires as being based on the text of different legislation and totally overlooking the history of Section 124(2).

Dealing with the article in *Bar News* which suggested that an order should never be made where neither party desires it, his Honour referred to the decision in *Tylors (Aust.) Limited v. Macgroarty* (1928) St.R.Qd. 170 in which the trial Judge ordered that the dispute be sent to arbitration because he thought the course would save expense to the parties and lead to a more satisfactory determination of all matters in dispute.

The trial judge reviewed the historical evolution of the power to act without the consent of the parties. In 1921 power was conferred on the Supreme Court to make rules empowering a judge either generally or in a particular case to refer any cause or matter to arbitration. The rule made in exercise of this power gave the judge power to refer any case of his own motion. The Full Court affirmed his judgment (ibid, at p.371). His Honour pointed out that more recent single judge decisions which were referred to in the summer issue of *Bar News* failed to refer to *Tylors Case*.

His Honour also pointed out that in *Buckley v. Benell Design and Construction Pty Limited* (1978) 140 CLR 1, Jacobs J. (with whom Murphy and Aickin JJ. agreed) said (p.37):

"The power to refer should have been one which the Court would frequently exercise."

He attributed the rare use of Section 15 of the 1902 Act to an interpretation given to the Section some 40 years earlier which was reversed by the High Court in *Buckley v. Benell.*

His honour also pointed out that the power to appoint a judge as an arbitrator existed in the United Kingdom where it was sharply favoured by the legal profession.

When all was said and done, his honour said history showed that there were cases which should be sent to arbitration for the benefit of all concerned and that, provided care was taken, the provision would serve the interests of justice.

THE BAR v THE LORD CHANCELLOR

In February 1986 the English Bar took legal action against the Lord Chancellor, Lord Hailsham, in the High Court for judicial review of the Lord Chancellor's decision to increase the fees payable to barristers under the Legal Aid in Criminal Proceedings (Costs) Regulations by no more than 5 per cent effective from April 1, 1986. The Bar sought a declaration that the Lord Chancellor's decision was unlawful and that, before making such regulations, the Lord Chancellor had been and remained obliged to consult and negotiate with representatives of the Bar.

The case commenced on March 20 before Lord Lane, Lord Chief Justice, Mr Justice Boreham and Mr Justice Taylor.

The background to the case is to be found in the Legal Aid and Advice Act, 1974 which required the Lord Chancellor in fixing scales of legal aid fees to pay a fair remuneration according to work done. Since 1974 fees had only risen annually by a small percentage, apparently adopted by reference to the rate of inflation. The 1985 increase was imposed on the Bar under protest and, at the time, the Lord Chancellor said he would welcome an in-depth examination of the remuneration and expenses of the Bar. The Bar commissioned Coopers & Lybrand to do the study. It was understood by the Bar that the study would be considered by the Lord Chancellor and discussed with the Bar and form a basis for negotiation between the Bar and the Lord Chancellor concerning the future revisions of the legal aid scales, including that to take effect in 1986.

The Times (21 March 1986) described the work done by Coopers & Lybrand and the report produced as follows:

> "Twenty four sets of chambers in London and in other cities were surveyed. They were doing largely but not entirely criminal work. They made regular returns to Coopers & Lybrand over 12 consecutive working weeks of barristers of five to nine years' seniority and of 10 to 15 years, who made individual returns.
>
> To avoid the possibility that an individual study might be of an under-employed barrister, Coopers & Lybrand created a model barrister who was engaged solely on that type of work, who was assumed to be handling a mix of cases but was someone who was working as hard and often and as efficiently as any barrister who could properly be expected to work throughout the year.
>
> The result to which they came was that on the scale of 1984-1985 the median of five-to-nine year barristers in London would have an annual income of about 12,500 Pounds before tax, and for those of 10 to 15 years' call the figure would be 15,000 pounds before tax. In the provinces the estimated income would be slightly less."

Paragraphs 16 and 17 of the summary of their report read:

Our conclusion that the present criminal legal aid fee scales are inadequate and fail to meet the principle of 'fair and reasonable reward for work reasonably done' is supported by evidence of declining quality of entry to the criminal bar, a trend which once established will become increasingly difficult to arrest.

There is also evidence that able young barristers are leaving the criminal Bar through dissatisfaction with the financial rewards.

We have based our recommendations, not on a comparative study of the incomes of barristers with people in other walks of life, but on the principle that there should be consistency in the net rewards of barristers — whether they are salaried civil servants or self-employed — who rely wholly on government-funded work.

We have applied this principle with regard to the salaries and conditions enjoyed by barristers in similar age groups in the government legal service. This demonstrates that the incomes of self-employed barristers who specialise in publicly funded criminal defence work would need to be increased by between 30 per cent and 40 per cent at current rates if they were to be put on a similar earnings basis to government legal servants."

The report was submitted to the Lord Chancellor in September 1985. On February 7, 1986 the Lord Chancellor wrote to Mr Alexander QC, the Chairman of the Bar of England and Wales and told him that he had "yet to be convinced that the main recommendations of the consultants' report — principally that an increase between 30 and 40 per cent in criminal legal aid fees is required to give fair and reasonable remuneration — can be justified." In that light he proposed to apply the same formula as had been used in previous years which would allow for a 5 per cent increase overall in legal aid fees.

Mr Alexander QC responded by pointing out that there had been no effective discussion of the report submitted by the Bar to the Government and there was no independent body to which the Bar could turn for further negotiation. The present level of legal aid fees was causing hardship and the proposed increase was "based on an unjustifiable formula which does not apear to relate to fair remuneration." The Lord Chancellor's letter had led the Bar to conclude that no further consideration of the Coopers & Lybrand report would take place.

The proceedings in the High Court were then commenced by Mr Alexander QC, as representative of the Bar Council.

The grounds on which the Bar sought relief were:

1. That the Lord Chancellor failed to consult or negotiate with representatives of the Bar before reaching his decision in breach of express assurances that such negotiations and consultations would take place and contrary to the legitimate expectation of such negotiations and consultations, and thereby acted unfairly.

2. That, in making his decision, the Lord Chancellor failed properly to fulfil his statutory obligations to "have regard to the principle of allowing fair remuneration according to the work actually and reasonably done" in relation to the level of fees applicable from April 1, 1986.

Both the Lord Chancellor and Mr Alexander QC filed affidavits which substantially reiterated the history of the conflict.

It appears to have been common ground between the parties that as at November 1985 the Bar and the Lord Chancellor and his officials respectively contemplated a timetable which would enable negotiations for a review of the criminal legal aid rates to be completed and proposals to be put forward by the end of January 1986.

Upon this basis Mr Phillips QC, Counsel for the Lord Chancellor submitted that although there was a legitimate expectation on the part of the Bar that the report would be fully considered, fully discussed and negotiations would take place with the Bar on the basis of the report and that the Lord Chancellor would have regard to the outcome of the negotiations in considering the proper increase in the criminal legal aid fees, nevertheless the doctrine of legitimate expectations did not require that process to be completed in time to affect the outcome of the regulations, due to take effect from April 1986.

He also submitted that the Lord Chancellor's letter of February 7, did not indicate that the Lord Chancellor had rejected the Coopers & Lybrand report but that he had decided to award the Bar 5 per cent to reflect inflation without prejudice to the claim advanced by the Bar.

This submission elicited a robust response from Lord Lane who said that it would have been so simple to spell that out in clear terms in the letter instead of which there were extraordinary cliches which seemed designed to be ambigious. He said the words "I am not persuaded", "nor would I accept", "remain to be convinced" meant "I reject." Mr Phillips QC agreed. Mr Justice Taylor said that the one thing that was totally absent was any suggestion of any further consideration of the report. Mr Justice Boreham said that the letter did not say or make clear that it was just a holding operation.

Lord Lane commented that it seemed to him to be a great pity that the matter was the subject of litigation at all.

He queried why the Lord Chancellor should not enter into a binding timetable, to which Mr Phillips QC responded that the only question was the uncertainty as to precisely what he would need to consider and his reluctance to bind himself.

Lord Lane then commented:

"We have now got down to the very narrowest of narrow points. I wonder why we have been spending a day and a half over these matters which cause great unpleasantness, whatever happens."

Mr Phillips QC said that the Lord Chancellor would undertake to exercise all reasonable endeavours to pursue negotiations.

On March 26 the Lord Chancellor undertook to agree to a timetable which would lead to him making a final decision on the Bar's claim by July 16. The timetable incorporated proposals for detailed consultation between the Lord Chancellor's Department, Coopers & Lybrand and the Bar to complete discussions on the report and for the Lord Chancellor to inform the Bar of any changes which he was minded to make to regulations setting the criminal legal aid fees scale and for the Bar to be allowed to make appropriate representations in respect to those proposals.

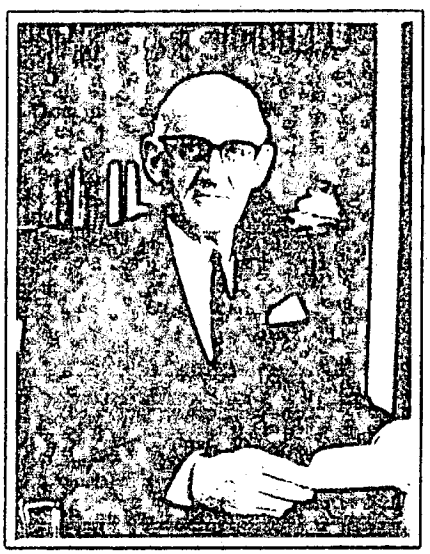
The Court awarded the Bar its costs which only related to the solicitors' costs as Counsel for the Bar provided their services free of charge.

THE ADMINISTRATION OF JUSTICE THE WATCHDOG ROLE OF THE BAR

by The Honourable Athol Moffitt, CMG, QC, President of the Court of Appeal 1974-1984.

My Book, *A Quarter To Midnight*, makes some reference to the Bar and its independence. The fierce independence and the detachment of the majority of the NSW Bar to which it refers relates to individuals in the discharge of their duty to clients.

An important, but different matter not dealt with, is the independence of the organised Bar. Its function as an organised institutional body is different from that of its members as individuals. The role which Bars in Australia and elsewhere have accepted over the years is a public one, namely, in the public interest to exert their influence, e.g. by expressing opinions or offering criticisms, where necessary publicly, on matters of public importance concerning the administration of justice.



It is a role of the watchdog type in which the status, professional knowledge and independence of the Bar is directed to using its influence, including raising its corporate voice, when action is taken, practices are adopted or incidents occur, concerning the constitution, powers and operations of courts, tribunals, offices and institutions, which interfere with, put at risk or ignore the independence or quality of the administration of justice.

The Bar is better able than the Judiciary to offer public criticisms, for example where there is an intrusion into judicial independence or a breaking down of practices designed to preserve it. For this reason the Bar aids the Judiciary by filling the gap when the Judiciary has difficulty in doing so.

I believe all this is recognised, at least in theory, by the bars of Australia. For reasons I will mention, it is not always easy to match theory effectively with practice. The Bar, its representatives and its members, I suggest, need from time to time to pause in the pursuit of their individual professional duties to consider how effectively and independently this public role of the Bar is being pursued.

If the Bar is to fulfil this role with credibility and hence effectively, it is essential that it be done with independence, in particular with independence from any political party in government or opposition. This places a heavy onus on those who act and speak for the Bar, because it is not always easy to act independently in a way acceptable to the body of the Bar.

Individuals of the Bar, in particular in NSW, are close to politics. Over the last few decades leading Australian and State politicans, Labor and Liberal, have come in inordinate numbers from the NSW Bar. Friendships, party membership, membership of organisations such as the Labor Lawyers Society, patronage of individual members of the Bar by the exercise or the prospect of the exercise of Executive power, increasingly politically orientated, are powerful factors pressing against independence or demonstrations of it. It is difficult to reconcile an independent legal profession with membership of a professional lawyer association which has an allegiance, philosophic or otherwise, to a particular political party, Labor, Liberal or Communist.

A major section of my book dealt with the intrusion of political interests in various ways into "independent" institutions, but particularly into the many institutions and offices concerned with the administration of justice.

While the book is critical of all parties, it deals particularly with intrusions in recent years and hence during the terms of office of present governments into the

independent administration of justice and, in doing so, analyses examples, a number of which have occurred in recent times in NSW.

If the Bar finds what I have written on these matters to be substantially sound, its reaction should be more than just of approving readers. I suggest it should lead the Bar to ponder whether it has been as active, independent and effective as its public role demanded and what should be its reaction to any similar future intrusions into the independence of any of the many offices concerned with the administration of justice or the setting up of ineffective tribunals or commissions.

If the Bar thinks I am wrong, it is open to it to say so, but if it or any of its members does so, surely this must be by thoughtful analysis and discussion of matters on their merits.

What I have said leads me to refer to the review of my book (*Bar News*, Summer 1986) by Mr Finnane, QC.

In referring to or dealing with various matters appearing in the book, there was little discussion of subjects of substance on the merits and in particular the general thrust of the work. Several important subjects which were referred to at some length were disposed of by political type responses.

The reviewer is the one referred to in the book (p.176-7) as the inspector with 'ALP affiliations' appointed to conduct the inquiry into Mr Sinclair's involvement in a private family company. The explanation may be that his active party membership or interest has coloured the review of a book which has as a central theme the intrusion of party political interests, in particular recently in NSW into all manner of institutions and activities.

Thus, where responses to matters in the book apparently critical of present governments have a political rather than an analytic character, there will be some lack of confidence in the review. This is a central theme of the book, namely lack of public confidence in objectivity or independence when political factors appear to intrude.

One example of the reviewer's apparent political responses to an important part of the book was that relating to the NCA. In a substantial chapter there is a detailed analysis, largely based on the constituting Act, of the structure of the Authority, pointing out, with the support of detailed reasoning aided by the author's experience in this field, the deficient and cumbersome powers of the Authority and its absolute imposed secrecy and the absolute political control of it.

What was said was and is an appropriate subject for thoughtful review by lawyers and in particular the Bar in their concern for both public and individual interests in the pursuit of proper and effective justice. Of course, for the book to so criticise the NCA structure was to criticise the ALP which set it up and determined its structure and shut down the effective but embarrassing Costigan operations. This was more so as the book asserted that this was virtually the sole resonse of the ALP in Canberra to rising organised crime and corruption.

As the book points out, the effect of what has been now done is to hide from all including the Opposition, individual members of Parliament, including rank and file members of the ALP, and the public what is being done by a politically controlled and structurally weak body. The book asserts, and I repeat, this is a matter for grave public concern. I interpose that since writing the book, the pattern has spread and the State Crimes Commission has been structured on the same pattern and so has almost all of the same deficiencies.

The review of this part of the book so dealing with the NCA is of some length, but deals not at all with it on its merits. The reviewer says he found this chapter to be the "least satisfactory in the whole book," but does not say why. He only adds that it was repetitious and that the Authority is without precedent in Australia, so caution was understandable and that it will need time to operate effectively. Of course, it has been so structured that it is unlikely that outsiders can ever know how well or badly it is operating.

The approach of Mr Finnane QC in rubbishing this politically inconvenient demonstration of the unsatisfactory structure of the NCA without dealing with its merits is in accordance with the party political line of Mr Young, the Special Minister of State in the House of Representatives, and of Mr Evans in the Senate, already the subject of much press coverage. When asked about it in Parliament, each, by differing "side-swipes," likewise avoided dealing at all with the merits of what had been written of the structure of the NCA.

The Bar reviewer also had his own "side-swipe." He speculated (contrary to the fact, outside the scope of the book and not referred to in it) that I would favour police "verbals" and would be against any reform to prevent them.

Then the comment of the reviewer, in aid of disposing of criticisms of political appointments to politically sensitive but "independent" offices, was the usual political response to criticisms of governments for making such appointments. The critic of a government becomes the one criticised. His criticism, including criticisms that such appointments are made because of expectations that an appointee will not be independent, is twisted, so the critic is criticised for allegedly attacking the integrity of the appointee.

The example which the reviewer took from the book and used for this purpose was the criticism of the Government for its appointment of Mr Temby to the office of Australian Director of Public Prosecutions.

The criticism made in the book was entirely of the Government for making an appointment of a then recently active member of the appointing political party to an office, specially created so it would be seen to be independent and so give public confidence in the independent administration of the prosecution function, in particular in the cases where party political interests are involved. It was made clear that the criticism was only of the Government because it was expressly stated in the book that it was not aserted that in fact Mr Temby was not independent.

Mr Finnane used the same party line as used by Mr Evans to ignore the criticism of the appointing government to twist what was said to, as Mr Finnane put it, an "attack on Mr Temby," to which he was "entitled to take strong exception" (or as Mr Evans put it "extraordinary and disgraceful"). It is noticeable that sudden silence has descended on this line of criticism when a new event involving Mr Temby and Mr Wran intervened. What has occurred is consistent with my analysis

that the expectation in question existed but that it was not fulfilled.

In the end the reviewer did say that all practising barristers should read the book. They should do so to form their own opinion. Those who do will see from the preface that a purpose of the book "is to throw the subjects (dealt with) into the public arena, so they are open to mature thought and vigorous debate and criticism and hopefully action."

I return to where I commenced. If, as my book asserts, there is a serious decline in the independence and quality of the administration of justice in the ways pointed out, it must be a matter of serious concern for the Bar in its role of watchdog on this field. It is fair to say that the NSW Bar does recognise the public role earlier outlined and that in the past it has often spoken out on matters concerning the proper administration of justice.

The real question that the Bar must ask, and do so at intervals, is how effective and independent has it been able to be and in fact been in discharging this public role. The question is a serious one — and more so if it is accepted that I am substantially right in what I have said about intrusions into independence in the administration of justice and what I have said about some commissions on inquiry and various institutions such as the NCA set up by governments.

Having ceased to be an active member of the Bar over a quarter of a century ago, I do not profess in this article directly or indirectly to answer these questions. I do suggest that these are serious questions which serious members of the Bar should ask themselves.

Bar News *sought Finnane QC's comments on Mr Moffitt's article. His response is set out hereunder:*

I was somewhat surprised by the personal tone of this article. I certainly concede that my views are affected in part by my social and political beliefs. They are also affected by my religious beliefs, my family background, my friends, my interests, my work as a barrister, my experience of life and books I have read, including that of the author.

One part of my background which enabled me to review the validity of what he said was my experience as a barrister in the conduct of various types of Inquiries.

Although my review endorsed many of the points made in the book *A Quarter To Midnight*, I was not prepared to agree with his criticisms of the NCA, because such criticism, in my view was premature.

Other views I was unable to accept were:

- the particular vulnerability of the ALP to corruption
- Special Commissions of Inquiry were bad in principle
- the appointment of Mr Ian Temby, an appointment of a type which "is only made because the appointing government expects that on important occasions the party member office holder will not be independent and will not let the party down." I regarded his comments on Mr Temby as being "a most intemperate ill-considered attack."

I stand by the views I previously expressed as to the good and bad points of this book. No doubt those who read the book will be better able than I to judge the fairness of my review.

AUSTRALIAN COMMERCIAL DISPUTES CENTRE

Sir Lawrence Street, KCMG.

On 17 January 1986, the Premier, Mr Wran, announced that the Australian Commercial Disputes Centre would begin operations in Sydney on March 3. He said the Centre would provide an innovative approach to the settlement of costly and lengthy commercial legal disputes thereby relieving the courts of work and overcoming delays. The establishment of the Centre would enhance Sydney's position as the leading financial centre in Australia and encourage international corporations to conduct their business in New South Wales and give local companies further business confidence in the State.

The new Centre was to be funded initially by the Government but was to become self-funding. The Centre was to provide a dispute resolution service which would allow speedier, cheaper and less formal resolution of disputes, both domestic and international, by conciliation, mediation or arbitration. It was also to offer dispute management advice and facilities including hearing rooms, document preparation and secretarial services for the parties to a commercial dispute. Educational and training courses were to be organised and sponsored for mediators and arbitrators.

While the Centre was to be independent of both the Government and the Courts, the Supreme Court would be available to assist the parties to a commercial dispute should they so desire.

On 28 January 1986, the Chief Justice, Sir Lawrence Street, KCMG, opened a residential course on dispute resolution sponsored by the Australian Commercial Disputes Centre and held at Wesley College over 28-31 January 1986.

In his speech, the Chief Justice recounted the history of the establishment of the Centre. It was, he said, the culmination of the work of a Committee in which judges, members of the legal profession and members of the commercial community participated. In December 1985, the Committee recommended to the Government, the establishing of the Centre, and that recommendation was accepted. On 2 January 1986, the Centre was incorporated as a company limited by guarantee. The Centre had been brought into being essentially and primarily with the aim of providing a comprehensive dispute resolution service in the commercial area. His Honour continued:

> "The critical feature that marks out alternative dispute resolving mechanisms from regular court system is that the former draw their authority from the agreement of the parties. That agreement may be found in a clause in a contract itself, or it may arise after a dispute has crystallised when the parties determine to seek some alternative means of resolving their contest. This concept of consensus pervades the whole field of alternative mechanisms and it is coming increasingly to be recognised as having significant advantages when compared with the confrontationalist antagonistic philosophy that tends to pervade ordinary court cases.
>
> To the forefront among the services provided by the Centre would be mediation or conciliation conducted by a person having competence as a mediator and relevant experience which would command the confidence of the parties to the dispute. If the mediation resolves the dispute by arriving at a solution accepted and agreed to by both parties that, no doubt, would be the most desirable outcome possible. Perhaps one of the most significant advantages is that the dispute would have been resolved within a consensus approach thereby preserving unimpaired the goodwill which is so essential to an ongoing commercial relationship between the parties. The conflict approach that inevitably underlies formal Court proceedings can, not infrequently, at least sour, if not destroy, mutual trust and confidence between the parties to their ultimate detriment and to the detriment of the free flow of trade and commerce.
>
> Apart from the consensus attractions of a successful mediation, there are the dual benefits for the parties of expedition and avoidance of the extensive demands, both financial and of executive time, that are inevitably part of a major commercial litigation in the Courts.
>
> Consideration is being given to conferring on the Supreme Court jurisdiction to make orders in aid of mediations and arbitrations being managed by the Centre. Such orders might include orders for sale of deteriorating goods with complete protection to all concerned where questions of ownership may, at the outset, be far from clear; or they might be orders for the production of documents by strangers such as bankers. A variety of other orders in aid could be available to serve the particular requirements of the mediation or arbitration in hand. In this context it would be contemplated that the Court's role would be specifically directed towards assisting a current mediation or arbitration towards a successful conclusion."

His Honour also rejected as "wholly unfounded" comments that the Sydney Centre could be seen as a competitive exercise by New South Wales in response to the opening in Melbourne of the Australian Centre for International Commercial Arbitration. He pointed out that the genesis of the Sydney Centre was to be found in the first few months of 1984 when a recommendation was made to the Government that steps be implemented to modernise the facilities available in New South Wales for resolving commercial disputes. That recommendation had led to legislation for the establishment of the Commercial Division within the Supreme Court and, also, to appointing the Committee whose advice led to the establishment of the Centre. The Sydney Centre, he said, was intended to provide a different and far wider service than that to which the Melbourne Centre was primarily directed, namely international commercial arbitration. The Sydney Centre, on the other hand, embraced the holistic concept of providing an overall management service with primary emphasis on mediation and aiding the resolution of domestic commercial disputes.

His Honour appended to his speech, a clause for insertion in contracts providing for invoking the Court's services in conciliation disputes and providing a series of alternative arbitration clauses according to which international arbitration rules the parties might wish the Centre to apply. *Bar News* sets out hereunder the appendix to his Honour's speech.

AUSTRALIAN COMMERCIAL DISPUTES CENTRE — STANDARD DISPUTE CLAUSE

(A) Conciliation. It is the intention of the parties, without creating any legal obligation, that any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be the subject of conciliation administered by the Australian Commercial Disputes Centre in Sydney, Australia.

(B) Arbitration. Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in Sydney, Australia in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force at the date of this contract. Such arbitration shall be administered by the Australian Commercial Disputes Centre, Sydney, which shall be the appointing authority.

To assist parties in making an appropriate choice the Committee considers the following alternatives to Clause (B) should be provided:

For the **Institute of Arbitrators Australia** Rules to apply:-

> "Any dispute or difference whatsoever arising in connection with this contract shall be submitted to arbitration at the Australian Commercial Disputes Centre in Sydney, Australia in accordance with and subject to the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations."

For the **London Court of International Arbitration** Rules to apply:-

> "Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration at the Australian Commercial Disputes Centre in Sydney, Australia under the International Rules of the London Court of International Arbitration."

For the **International Chamber of Commerce** Rules to apply:-

> "Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration at the Australian Commercial Disputes Centre in Sydney, Australia under the rules of arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules."

For the **American Arbitration Association** Rules to apply:-

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration at the Australian Commercial Disputes Centre in Sydney, Australia in accordance with the Commercial Arbitration Rules and supplementary procedures for international commercial arbitration of the American Arbitration Association and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

Artificial Stuff

by John de Meyrick

It was one of those crowded cocktail parties where one is confronted by so many strange faces that you begin to wonder if you've come to the right function.

"Did I hear you say you are a barrister?" A matronly lady standing nearby took my arm and asked.

"Yes, that's right," I responded a little apprehensively.

"What a coincidence," she beamed with motherly pride (as though barristers were some rarity of the human race). "My son's one of those."

"Really, poor chap," I was about to say when she added... "You probably know him — Damien Bloggs."

I pondered for a moment in order to convey a sense of due respect for this unknown colleague. "I don't think I've come across him. What field of law does he practise in?"

"Oh, I think he's in food law, or something like that. He handles all the contracts for Quikquid Supermarkets," she informs me with authority.

"Well," I assure her, "He's lucky to have such an important commercial client. Where are his chambers?"

"Chambers?" she says, with a blank expression.

"Yes, what's the name of the offices where he has his practice," I translate.

"Oh, he works out at Smithfield somewhere. He's got a big office with a company car and all that," she assures me. "He's one of the top knobs in the company, next to the senior legal man."

"Oh, I see. He's a legal officer with Quikquid, is he?"

"Oh, no!" she quickly corrects me. "He's a barrister just like you. I was there when he got his wig and gown, you know. In the Supreme Court."

"But he doesn't practise as a barrister though," I politely suggest, hoping to establish some measure of distinction.

"Oh, yes," she insists. "He has to look over all their buying orders. Some of them cost thousands of dollars."

"But he doesn't conduct cases in court, does he?"

"Oh, yes. He can do that if he wants to," she affirms with growing indignation at my reluctance to recognise her talented offspring.

Eventually I extricate myself from this doting, non-practising barrister's mother, but not before she impresses upon me the importance of her brilliant son's immense legal responsibilities and assures me that if ever I want to know anything about food law (or something like that) she felt sure her Damien would only be too pleased to spare me a few minutes of his valuable time, without charge, should I care to telephone him and mention that I'd been talking to her.

As I thank her and head towards the door she restrains me by the arm and adds, "By the way, what's your name in case you ring Damien? I'll let him know."

"Tell him, Lord Denning," I reply in confidence, and depart with the best air of regal carriage I can muster.

As I return to my humble chambers next day (devoid of company car and expense acount) I realise that for every barrister in private practice there are very many more non-practising barristers dispersed throughout the workforce and the community who benefit considerably from being able to call themselves "barristers," even though in all but a few cases where practitioners may have retired or left the Bar to take up administrative appointments, they have never conducted a case in court, nor perhaps have ever been to a court except on the day of their admission.

What then is a barrister?

The Macquarie Dictionary says, simply, a barrister is "a lawyer admitted to plead at the bar in any court." (That is not strictly correct, of course. Admission is only

in respect of the system of courts for which it applies, and "lawyer" is not really a term recognised by legislation in Australia even though it is a useful, and well understood term of general reference for all forms of legal qualification and practice.)

The Macquarie Dictionary gives a second (and in respect of some colleagues I know, a more appropriate) definition of barrister as: "A tropical climber of Eastern Australia, with strong recurved prickles."

The more dependable *Shorter Oxford English Dictionary* defines barrister as: "A student of law who has been called to the bar, and practises as advocate in the superior courts of law."

Here, the *OED* envisages that a barrister is one who *actually* practises as an advocate. That, surely is the public understanding and image of a barrister: an advocate who appears in court — not a legal officer who sits behind a desk in a corporate setting surrounded by telephones and secretaries.

Clearly, however, anyone (in NSW) who completes an approved course of law and who meets certain other formal requirements of the rules, may be admitted by the Supreme Court as a solicitor or barrister. Whether they ever actually practise in these branches of the profession is another matter.

In the case of solicitors, the (NSW) Legal Practitioners Act provides for a system of registration (practising certificates) without which persons qualified in law cannot practise as solicitors, or even hold themselves out to be solicitors. On the other hand, persons admitted as barristers may properly hold themselves out to be barristers even if (as in the majority of cases) they do not practise as such.

Thus, many graduates who have no intention, nor immediate plans of going into private legal practice, and especially those who may already be in commerce or industry, or in the public service, will choose to be admitted as barristers rather than as solicitors. (This also avoids the need to complete the six months post-graduate course for solicitors at the College of Law.)

Legal officers are employed by many public and private organisations (e.g. banks, local councils, companies, building societies, insurance offices, government departments and commissions). Where these officers are solicitors with current practising certificates, then there is no legal barrier to them acting for their employers as such, provided they remain personally responsible for their professional work.

The concept of the staff solicitor has long been established in Australia, but (except for Crown advocates) the employee-barrister is not part of our system (in NSW) principally because, as a matter of practice, barristers are received in our courts, only as briefed by a solicitor.

A colleague, David Wetmore, who has recently joined the NSW Bar from the Toronto Bar, informs me that the concept of the in-house legal officer is so well entrenched in Canada and the USA that these house counsel (as they are called) now represents a very substantial proportion of the legal profession. Big companies provide attractive employment packages to draw the best of them away from other organisations, and even from private practice.

Also, because there is no professional distinction between the work of attorneys (solicitors) and the role of counsellors (barristers), salaried house counsel are received in courts without the need to be briefed by intermediary legal representatives. These house counsel represent a significant proportion of advocacy work.

The employee-advocate arrangement of course, puts the practitioner's professional independence at risk. It also weakens the degree of trust which courts may have in the advocates who appear before them.

In the USA, where contingency-fee advocacy abounds, these factors may not be of much concern. But would they be acceptable here, in Australia?

For may years, certain statutory tribunals (principally administrative and industrial arbitration tribunals) have allowed paid agents (e.g. employer association officers and union officials, as well as privately-practising industrial relations consultants) to appear before them. Mostly these persons are lay advocates, but with wider educational opportunities many such advocates are now legally qualified.

Curiously enough, in most of these statutory tribunals the legislation provides that a solicitor or barrister may be denied the right of audience upon the objection of a lay opponent. This is so in respect of both federal and state industrial arbitration tribunals (although the Full Bench of the WA Industrial Commission has held in *AMIEU (WA Branch) v. Anchorage Butchers Pty Limited*, 1980 AILR rep. 40, that, despite objection, a practising English barrister could appear in a matter before it because he was not admitted to practise anywhere in Australia and therefore was not a "legal practitioner" excluded by its Act).

In recent times there have been a number of non-practising barristers described in the media as "barristers" in connection with matters not relevant to legal practice. The latest is a recent newspaper report of a NSW police inspector who has been charged with two counts of misconduct and who was referred to as a "barrister and former member of the Armed Hold-Up Squads."

Clearly, unless the profession is able to institute appropriate controls, this kind of confusion and misunderstanding will continue to reflect upon the reputation of the privately-practising barrister.

Unfortunately, admission to practise does not mean that one must practise. Nor is it subject to a declared intention to practise.

At one time an admission ceremony was a very special occasion for the legal profession and the community generally. Few people were ever admitted without intending to become a private practitioner. Nowadays, with the hordes of graduates emanating from a growing number of law schools which cater in large measure for persons preparing themselves for administrative and commercial careers, admission days (usually with several sittings and hundreds of admittees, relatives and friends packed into the Banco Court) have become little more than a tiresome form of graduation ceremony serving to fortify the notion that it is in recognition of qualification rather than admission to the practice of law.

Surely it is time to stop conferring this status on people who have no intention, desire or likelihood of ever opening their mouths in a court, except to take the oath of admission.

It is time to distinguish between the graduate who is actually to practise as a barrister and those who merely want the status of "barrister" added as a gloss to their employment prospects, and in order perhaps to enhance their standing amongst their business associates, relatives and friends.

Certainly, one may be (say) a plumber, electrician, accountant, engineer, or architect, and be so described whether in private practice or in employment. But if one does not practise as an advocate how can one be properly described as a barrister? It is not a qualification. It is an occupation.

If the Damien Bloggs of this world want to practise food law at Smithfield, good luck to them. But let them do so as "lawyers" or "legal officers", or whatever fancy title best describes their function within the corporate enterprise that employs them.

A "barrister" is someone "who has been called to the bar" and who actually "practises as an advocate in the superior courts" (*OED*). That term of reference should be related and confined as such by statutory provision if necessary in keeping with the public's understanding of what a barrister is and does. Not with what someone may be qualified to be.

Without proper regulation, this distinction will become increasingly blurred, and it would be a great pity indeed, if the Bar were to ultimately find it necessary (as privately-practising accountants have found) to engage in extensive media advertising in order to distinguish in the public's mind the difference between "certified" practising barristers and your friendly, neighbourhood, non-practising kind.

Motions & mentions

Amnesty International Lawyers Group

There is a Lawyers Group of the New South Wales Branch of the Australian Section of Amnesty International.

AI, for those who may be unaware, is "a worldwide movement which works impartially for the release of prisoners of conscience, men and women detained anywhere for their beliefs, colour, ethnic origin, religion or language, provided they have neither used nor advocated violence." It opposes torture and capital punishment and advocates fair and prompt trials for all political prisoners. It is an independent organisation financed by subscriptions and has consultative status with the UN and other accreditations.

The Lawyers Group concerns itself generally in the activities of AI and particularly in appeals on behalf of lawyers detained in other countries who qualify for the assistance of AI.

The Group is divided into small sub-groups. The most common task required of individual members (of sub-groups, by rotation) is the writing of letters in urgent appeals for humane treatment of detained or mistreated lawyers, asking they be treated according to the rule of law and the Charter of the UN.

The work is not onerous. There are well-established lines of communication along which readily digestible information is passed, and is occasionally rewarding.

The time of members is not wasted in unproductive meetings.

Anybody interested in joining (there are now about 30 members) should contact the Secretary, Chris Roper, on 439-2099 (The College of Law), DX 838.

Australian Centre for Intl Commercial Arbitration

The Australian Centre for International Commercial Arbitration was established in May 1985 by the Institute of Arbitrators Australia, the Law Council of Australia, the Bar Association of Australia and the Victorian State Government.

Lord Roskill has accepted an invitation from the Centre's Board of Directors to become a member of its Panel of International Arbitrators.

On-Line

The New South Wales Society for Computers and the Law aims to explore the interface between developments in technology and the law. The Society has more than 300 members, making it the largest computer-law society in Australia. Its members include solicitors, barristers, computer consultants and managers.

It holds meetings on the first Wednesday of every month with a variety of local and international speakers from the legal and technical worlds. They are held at the Law Society Conference Rooms, 2nd Floor, 170 Phillip Street, Sydney and alternate between lunchtime and evening to cater for all members. Attendance in open to non-members and is usually free.

The Society also publishes a newsletter and the proceedings of its meetings.

Membership enquiries should be directed to: David Lewis, (02) 233 1955 or DX 1278 Sydney.

Coming events

19-20 May: Third Annual Seminar on International Banking and Financial Law — Rome. **Contact** IBA, 2 Harewood Place, London W1R 9HB, Tel (01) 629 1206.

10 June: Professor Irving Younger lectures for the Bar Association. See *Bar Notes*.

13-14 June: International Financing of Commercial Real Estate. Legal and Business issues. **Contact** IBA, see above.

19 June: Symposium on International Law and Practice. **Contact** Capital Conferences Pty Ltd, PO Box E345, Queen Victoria Terrace, Canberra, 2600.

20 June: Law Institute of Victoria Annual Dinner. Guest speaker; Professor Irving Younger. **Contact** Mrs Pat Hogan, GPO Box 263C, Melbourne, 3001. Tel (03) 602 3922.

2-9 July: ABA Second Biennial Conference, Alice Springs and Ayers Rock. **Contact** D. Bennett QC, 5/180 Phillip Street, Sydney. Tel (02) 232 8658.

17-21 August: International Symposium on Health Law and Ethics, Sydney. **Contact** Anne Riches, AMA, Box 20, Glebe, NSW 2037. Tel (02) 660 6466 or, to register, Landmark Tours, 18 Cross St, Double Bay, NSW 2028. Tel (02) 328 7864.

1-3 September: Current Developments in International Securities, Commodities and Financial Futures Markets, Singapore. **Contact** Faculty of Law, National University of Singapore, Kent Ridge, Singapore 0511.

Changing Rolls

The following persons had their names removed from the Roll of Barristers to the Roll of Solicitors on 14 February 1986:

Shane David SIMPSON
Garth Justin SYMONDS
Wayne Lindsay MARLER
John Emmanuel ROSE (formerly John Triantafilis)
Gary Phillip ALLEN
Michael Joseph DONOHOE
Carol Frances GOLLDING
Roger Anthony KIMBELL

The following persons had their names removed from the Roll of Barristers to the Roll of Solicitors on 11 April 1986:

Louis Stuart LIEBERMAN
John Gerald McMAHON
Nanette ROGERS

Driving under the influence of intoxicating liquor

It is interesting to trace the development (pre PCA and RBT) of the formula used by the constabulary re DUI.

In about 1950 the formula ran as follows:

- he was unsteady on his feet;
- his eyes were bloodshot;
- his face was flushed;
- his speech was slurred;
- his breath smelt strongly of intoxicating liquor.

(XX: "Is that the formula you were taught at the Academy?" Witness: "That's right".).

In about 1953 there were additions:

- his eyes were glassy;
- his pupils were dilated;

(XX: "What do you mean by dilated?" Witness: "I am not quite sure".).

In about 1955 were further niceties:

- there was dry spittle at the corners of his mouth;
- he leant heavily against the vehicle on alighting.

In about 1957 were added:

- his clothing was in disarray (meaning he had forgotten or was unable to do up his fly. What would Womens' Lib. make of this item in the formula?!);
- he stumbled as he got out of the vehicle.

What a pity it is that the mechanical sciences of breath-testing and breath-analysing of PCA should have substantially pushed into limbo the delightful and varied arts and crafts of DUI.

Book Review

Fertilising the Mainland

Three Tasmanian lawyers Messrs Lillas, Szramka & Cross throw some light on the evidence statutes of all States in their book Tasmanian Annotated Evidence Act 1910.

Bar News received for review, a book, published by the authors, annotating the Evidence Act 1910 of Tasmania. The Tasmanian Act is, perhaps, most directly comparable with the Western Australian Evidence Act, but the process of legislative cross-pollination between the evidence statutes of all States has produced much common ground.

The authors have addressed themselves to a particular goal in annotating the Tasmanian Act — namely to produce a handbook of real practical use to those who need quick, reliable access to up-to-date judicial statements on the Evidence Act.

In this aim, I think, they have largely succeeded. They do not pretend to have written an evidence text. I doubt if they would claim as their "target audience" advocates at the coal face of day-to-day litigation who might be expected to keep themselves up to date with developments in the law. This is not to say that the book is not of some use to those people, but rather to suggest that its real utility is to the less specialised practitioner faced with a question of admissability of evidence, who has neither the time nor the library resources to examine the matter.

For the NSW practitioner, there are some limitations of the book's usefulness. There is in the front a very handy table of comparable sections of the Evidence Acts and Ordinances of the States and the ACT. If one knows the relevant section of the NSW Act, it is the work of a moment to find the corresponding section of the Tasmanian Act and go to the annotations thereon. However, some areas covered by the NSW Act do not appear in the Tasmanian Act, and vice versa. For example, the Tasmanian Act has no equivalent of section 14B of the NSW Act, a section the subject of frequent judicial notice in this State.

In a book intended to be severely practical, there might here and there have been a little more effort to identify the latest discussion by the High Court of Australia on a given topic. For instance, in the annotations to section 98 of the Tasmanian Act (approximately the equivalent of section 53 of the NSW Act dealing principally with hostile witnesses), there is no reference to *McLellan v. Bowyer* 106 CLR 95. There is nothing like citing a strong statement by the High Court to end arguments on evidence.

On the other hand, the annotations to the "business records" provisions now common to the Tasmanian and the NSW Acts are an excellent collection of up-to-date judicial interpretations of the sections. One of the features of the annotations generally is that the authors, while refraining from almost all commentary of their own, have set out the most telling passages from many of the authorities cited, particularly in such new areas as that of "business records." This has the tremendous advantage for the advocate that even if he or she lacks access to reports, a useful submission may be made based upon the extracts from the leading cases. I think the authors have shown nice judgement in striking a balance between merely referring the reader to authorities with a very brief statement of their effect, and setting out extracts from judgments. They have tended to use the latter approach in areas which they have identified as being commonly met with in Court, or where the matter is new to the law of evidence.

There are inevitably some typographical quibbles and the occasional citation error (such as the intended reference to *Albrighton v. Royal Prince Alfred Hospital* where the case name spelling, the citation and the page number in the volume is wrong in the Table of Cases and at p.100). It has to be said that in a book designed for the person in a hurry, special care must be taken to ensure citations are correct.

Nevertheless, the work is a useful one and is likely to come to find a place on the shelf of many practitioners beyond the shores of Tasmania.

C.G.G.