Bar News

The journal of the NSW Bar Association

Incorporating the 50th Annual Report of the N S W Bar Association 1986 and the Annual Report of the Barristers Benevolent Association of N S W

Spring 1986

THE NEW SOUTH WALES BAR ASSOCIATION

NOTICE OF MEETING

NOTICE IS HEREBY GIVEN that the Annual General Meeting of the Association will be held in the Association's Common Room, 174-180 Phillip Street, Sydney, on MONDAY 24 NOVEMBER 1986 at 1.30 p.m.

BUSINESS

1. Minutes of the Annual General Meeting of 25th November, 1985.
2. Minutes of Extraordinary General Meeting of 6th March, 1986.
3. Reports (Annual and Auditors') Balance Sheet and Income and Expenditure Account. (Copies in the Bar News of Spring 1986).
4. Election of Members of the Council.
5. Election of New Barristers Committee.
6. Any other business which, under the Memorandum and Articles of Association, may properly be dealt with.

ELECTIONS

1. 21 members are to be elected to the Bar Council namely:

(a) Five Queen's Counsel;

(b) Three members of the Outer Bar of less than five years standing at the date of the Annual General Meeting;

(c) Four members of the Outer Bar of more than five but less than ten years standing at the date of the Annual General Meeting;

(d) Of the remaining 9 Councillors, up to a further four may be Queen's Counsel, the balance being members of the Outer Bar of any length of standing.

Attention is drawn to article 49, which is as follows: "Every candidate for election to the Council shall be proposed in writing under the hands of at least two members and every proposal shall be initialled by each candidate therein proposed or by some person authorised in that behalf by the candidate, and shall be delivered to the Secretary FIFTEEN CLEAR DAYS BEFORE THE ANNUAL GENERAL MEETING."

Nominations on the forms provided to CLERKS or available at the Registrar's Office, should be completed and delivered to the Registrar's Office on or before FRIDAY 7th NOVEMBER 1986.

2. New Barristers Committee

Ordinary members of less than 5 years' seniority on 24th November 1986 are eligible for nomination for the New Barristers Committee which consists of 4 such members (elected), together with the President or one of the Vice-Presidents of the Bar Association, and one member of the Bar Council of less than 5 years' seniority, both nominated by the Council. Nominations may only be proposed in writing under the hands of at least two members of less than 5 years' seniority and every proposal shall be initialled by each candidate therein proposed or by such person authorised in that behalf by the candidate. Nominations on the forms provided and addressed to the Hon. Secretary should be delivered to the Registrar's Office on or before Friday 7th November 1986.

D.A. WHEELAHAN
Honorary Secretary
174 Phillip Street
Sydney

16th October, 1986

P.T.O.

Barristers Benevolent Association of New South Wales

NOTICE IS HEREBY GIVEN that the Annual General Meeting of this Association will be held in the Common Room, 174-180 Phillip Street, Sydney, on Monday 24th November, 1986 at the conclusion of the Annual General Meeting of the New South Wales Bar Association (which meeting begins at 1.30 p.m.).

Business: Consideration of Annual Report and Statement of Accounts.

D.A. WHEELAHAN
Honorary Secretary
174 Phillip Street
Sydney

16th October, 1986

NOTE:

1. Ordinary Members Class B (Judges and former Judges) may attend but may not vote at any meeting of the Association (Article 6(b)).

2. Ordinary Members Class C (all other "associate" members) are not entitled to attend or vote at any meeting of the Association (Article 7(b)).

3. No member shall be entitled to vote at any meeting . . . unless all money due from him to the Association shall have been paid except such money due on a trading account which has not been outstanding for more than 30 days preceding the date of such meeting (Article 42).

4. **Proxies:** Notwithstanding Article 43, Section 30(i)(d) of the Registered Clubs Act, 1976 applies and a person shall not vote as a proxy of another person.

P.T.O.

In this issue

"What are such Courts but the embodied force of the community whose rights they are appointed to protect? They are not associations of a few individuals claiming on their personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members, composing it, is the accepted and recognised tribunal for the maintenance of the collective authority of the entire community . . . it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen but it is efficacious and irresistible and on its maintenance depends the security of the public."

Re the Evening News, Newspaper (1880) 1 NSWLR 211 at 237

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Appointments

The Association congratulates the following members on their appointments since the last report. (Styles and titles as at the date of appointment).

FEDERAL COURT OF AUSTRALIA
Judge: D.F. Jackson, Q.C.

FAMILY COURT OF AUSTRALIA
Judge: M.J.M. Lawrie

SUPREME COURT OF NEW SOUTH WALES
Judge: His Hon. Judge M.W. Campbell, Q.C.
J.P. Bryson, Q.C.
J.E.H. Brownie, Q.C.
Master C.R. Allen
Master: J.E. Monaghan

DISTRICT COURT OF NEW SOUTH WALES
Judge: J. Lloyd-Jones, Q.C.
J.R. Dunford, Q.C.
N.A. Newton
D.J. Freeman
R.N. Madgwick, Q.C.
B.E. Mahoney, Q.C.

COMPENSATION COURT OF NEW SOUTH WALES
Judge: B.E. Egan
P.R. Moran

AUSTRALIAN CONCILIATION & ARBITRATION COMMISSION
Judge: P.R. Munro

CROWN PROSECUTORS
C.K. Maxwell, H.J. Morgan,
P.L. Roberts

PUBLIC DEFENDERS
V.M. Bell

Transition

The following local Counsel have recently called upon the Attorney General in connection with the appointment of Queen's Counsel for 1986. The interstate and overseas Queen's Counsel will be invited to call upon him when they are in New South Wales.

New South Wales
C.E. Backhouse
W.W. Caldwell
J.A. Crumpton
W.M.C. Gummow
K.G. Horler
R.N. Howie
R.B.S. MacFarlan
B.C. Newport
E.O.G. Pain
G.A. Palmer
R.J. Peterson
J.W. Shaw
J.J. Spigelman
J.M. Stowe
P.D. Urquhart
A.P. Whitlam

Interstate
J.I. Fajgenbaum QC (Vic)
I.V. Gzell QC (Qld)
H.R. Hansen QC (Vic)
P.C. Heerey QC (Vic)
P. Mandie QC (Vic)
R.F. Redlich QC (Vic)
J. Strahan QC (Vic)
Beaumont QC (Vic)
P.F. Greenwood QC (Qld)
B.J. Salmon QC (ACT)

Overseas
D.ST.J. Keane (UK, HK)
N.T. Salts (UK)

Judicial Officers' Bill

Gyles, Q.C. received the following letter from the Chief Justice, The Hon. Sir Laurence Street, K.C.M.G., K.St.J.:

My dear President,

I should like to thank you and your fellow Councillors in the Bar Association for both the fact and the quality of your support in the recent dispute with the Government over the Judicial Officers Bill. This proposed legislation is of great constitutional significance. The criticism of the Government's original proposals has already produced some significant changes. I only hope that the Attorney General's, and the Government's, confidence in the justification for what it is doing proves to be well founded. They are taking an appalling risk with our judicial system on what is generally felt in professional circles to be wholly inadequate consideration and virtually no consultation.

The balanced and responsible contribution made to the public debate by you personally and other members of your Council was of considerable public significance and I would like, on behalf of our judicial institutions, to place on record our appreciation of this.

Yours sincerely,
Laurence Street,
Chief Justice

21st October 1986

Central Criminal Court

The Bar Association complained to the Attorney General in August about the facilities available at Central Criminal Court, Darlinghurst. The Attorney General has responded and agrees that the facilities do not adequately meet current needs. The government purchased the Mark Foys building in Castlereagh Street last June and the government architect is currently developing plans to provide additional jury facilities to accommodate all the Criminal Division of the Sydney District Court. The Attorney General expects tenders for the project to be called in early 1987, with a view towards work being completed by the end of 1989.

The opening of those Courts will reduce the pressures at Darlinghurst, which will then be refurbished and air conditioned with improved facilities being provided for both the profession and the public.

In the meantime, the Attorney General has asked his Department to take all necessary action to make conditions at Darlinghurst as comfortable as possible pending the refurbishment.

President's Message

R.V. GYLES QC

In a year not without activity, some issues stand out as of enduring significance.

Legislative Change to the Bar

The Attorney General's proposals for legislative change to the Bar are published in this issue of Bar News. They reflect the result of lengthy negotiations since publication of the Law Reform Commission Reports. The changes have not been sought by the Association, but are accepted in order to bring to an end the long period of uncertainty as to the future of the Bar. The Council will be working closely with the Attorney General and his Department in preparing legislation.

Judicial Officers' Bill

As this is written it appears likely that the modified Bill will become law shortly.

The Bar's opposition was made public promptly and unequivocally, and was constantly maintained. It is not necessary to repeat it here. One cannot help asking what might have been the position had the judges done the same. This is only one of a number of unanswered questions about the matter.

Law Council of Australia

In June the Association gave notice of its intention to withdraw from the Law Council of Australia at the expiration of the necessary 6 months' period of notice.

This was a consequence of certain unconstitutional resolutions of the Council. The Bars of Victoria, Queensland and the Australian Capital Territory have also given notice of intention to withdraw effectively from 30th June 1987. This will also be the effective date of the withdrawal of this Association.

The Council is very conscious of the disadvantages of dismembering the Law Council, and only acted as a last resort. There have been a number of discussions since involving Alex Chernov, Q.C., former Chairman of the Victorian Bar, and myself with representatives of other constitutent bodies and the Executive. These discussions will continue. Previous "constitutional crises" in which notices of withdrawal have been given by constituent bodies have been solved before actual withdrawal.

I shall make a full report to members well before actual withdrawal takes place.

Supreme Court Rules re Arbitration

The issue was debated widely late last year and early this year, and was well reported in Bar News. I believe that the principle for which the Bar contended was important. It is also important that it be clearly recognised by the judiciary and the executive that the profession is not to be bulldozed when important questions concerning the courts are at stake.

Accident Compensation

The practical importance of the topic is obvious to all. It is too early to predict the outcome. Much attention has been devoted to it, and a separate report is published.

I wish to thank the Registrar and his staff for their loyal efforts during the year. The workload of the Association has increased significantly over the last year. Our revised disciplinary procedures, our fees recovery procedures, and the number of urgent public issues which have arisen have caused particular strain.

I also thank the members of an active Bar Council for their work and support during the year.

Letters

Dear Editor,

Report on Visit of U.S. Lawyers

On 18th September 1986 Members of the Bar Council entertained Lawyers and Judges from Pennsylvania. On Friday 19th September 1986 the guests of the previous night became hosts for Members of the Council at the Menzies Hotel.

The Americans were their usual generous selves, and the night provided some unusual and noteworthy performances.

The quintessential American, Earl D. Hollinshead Jnr and his accomplished mezzo soprano wife, Sylvia, sang some of the more acceptable works of Tom Lehrer.

Ordinarily, such a vulgar display would not attact a response from the New South Wales Bar, however, the Americans did not count on the presence of Handley, Q.C., Gormly, Q.C. and Wong.

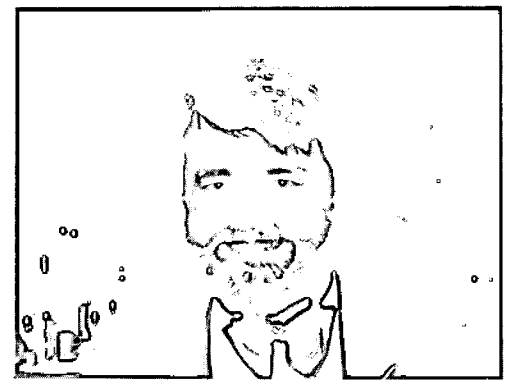
Handley, suffering from laryngitis, led Gormly and Wong in the seemingly endless verses of "Botany Bay." The Americans were enthralled — the writer appalled.

When order was restored and the end of the festivities drew nigh, the guests erroneously believed they were safe from further seranades. Unfortunately, Gormly remembered a truly awful ballad from his university days in the 20's and favoured the gathering with all 8 verses of "Keyhole in the Door."

The evening was reduced to a shambles; the Americans were bemused and American/Australian relations set back a quarter of a century.

The Bar Council will be entertaining some lawyers from Maryland in December and hopes for a distinct improvement in the conduct of its senior members.

Yours faithfully,
Dennis Wheelahan
Hon. Sec.



D.A. Wheelahan

Dear Editor,

I read with interest the article of J.J. de Meyrick in the Autumn edition of the Bar News.

As a practising barrister in Victoria (and also one of those who has "filed through" the ceremony in your Banco Court) may I suggest a solution to the unsatisfactory situation posed in the article?

In Victoria, as you may be aware, before one can practise law, one has to complete 12 months of post-graduate articles or 9 months of post-graduate College of Law which thereafter entitles admission to the Supreme Court as a "Barrister and Solicitor of the Supreme Court of Victoria."

This title effectively means that all solicitors are granted the same rights of audience as barristers, which arises from an 1891 statute to attempt amalgamation of the two professions.

Once admitted, one signs the "Roll of Barristers and Solicitors" kept by the Prothonotary (the "Prothonotary's Roll").

However, in order to call yourself a barrister as we know it, you must sign the Roll of Counsel (the "Bar Roll") a separate Roll kept by the Victorian Bar Council as distinct from the Prothonotary.

Signing the Bar Roll does not affect one's presence on the Prothonotary's Roll and takes place at the Victorian Bar's council chamber without involving any judges or public servants.

Such a step is governed by the internal Rules of the Victorian Bar which stipulate, inter alia, that a signatory must already be admitted to the Prothonotary's Roll, completed the Bar Readers Practice Course (which interestingly prohibits the acceptance of any briefs in the first 3 months), practise exclusively as a barrister in accordance with Bar Rules and from chambers as approved by the Victorian Bar Council.

The prevailing feature of the Bar Roll is that it becomes a roll of practising barristers all under the jurisdiction of the Bar Council (although the Victorian Bar keeps a separate member list of judges, official appointments and other prescribed dignified status).

Hence, the Victorian "Damien Bloggs" who, after completing the above steps, tires of life at the Bar and wants to become a corporate food law officer, would discover that he can no longer keep chambers (or, at least, chambers approved by the Bar!) and has no alternative but to have his name removed from the Bar Roll.

Damien then goes off to Smithfield (or Springvale) in the consolation that he remains on the Prothonotary's Roll and may still at cocktail parties pass himself off as a lawyer.

The only difficulty with the Victorian model lies in the title "Barrister and Solicitor" which causes interminable confusion in the minds of the public (especially at cocktail parties).

The solution, it appears, is that all law graduates upon completion of the prescribed training be entitled to admission as solicitors of the Supreme Court of N.S.W. (leaving the Law Society to regulate those who wish to practise by the issue of practising certificates).

The Roll of Barristers would be transferred to the custody and control of the N.S.W. Bar Association without prejudice to the Supreme Court's disciplinary powers over the Roll of Barristers.

Needless to say, once a practitioner signs the Roll of Barristers, his presence on the Prothonotary's Roll is quiescent as he is bound under the Bar Rules not to practise as a solicitor.

Yours faithully,
P.A. Collins,

Owen Dixon Chambers,
205 William Street,
Melbourne.

The Appointment of Judges and their Return to the Bar

Address to the Second Biennial Conference of the Australian Bar Association by the Hon. Dame Roma Mitchell.

In 1970 the legal profession in England expressed something akin to horror at the resignation of Sir Henry Fisher from the High Court Bench to take an appointment in the City. The Solicitors' Journal reported it as causing "a shock"[1]. In a paragraph which appeared among Current Topics the Journal referred to the resignation and said:—

> "This seems to be without precedent, although in some ways parallel with Viscount Kilmuir's work after leaving the Woolsack. We cannot welcome the innovation. Head hunting, recruiting able men from other people's organizations, has become an established feature of industrial and commercial life, and there is little reason to object to it. However, if the Bench becomes part of the territory for the head hunters' safari, British justice will suffer in two ways. The best brains will be creamed off, reducing the quality of the Bench. Worse probably, after it became known that judges were likely to be in negotiation with big business concerns over their future employment, their reputation for absolute impartiality and integrity, which is as valuable as the impartiality and integrity themselves would suffer. It should not be too much for the country to ask that, in return for the invaluable constitutional guarantee of security in their appointments, High Court Judges should themselves refrain from resigning to take other jobs unless the circumstances are exceptional. The current salary of £11,500 is too low for High Court Judges, but it is unlikely that their salary will ever match what they might command elsewhere, and they must consider this when accepting their elevation."

The New Journal[2] took a much less stringent view of the situation. It said:—

> "Judges are men (a statement which causes me some dismay) and men change their careers for many reasons. Prominent among those reasons is the realization that the career they are in is not really for them — the belief that they would be happier and more effective elsewhere. If a High Court Judge feels that he is unsuited to the judicial way of life, surely it is better for the administration of justice, as well as for the individual concerned that he go. The fact that Mr. Justice Fisher has been on the Bench for only two years, and that he came to it (as all judges must) from the very different discipline of practice at the Bar, suggests an explanation that may adequately explain the motive for his decision. Perhaps he would have liked best to return to the Bar, if he could. But is it really his going or is it the particular destination that he has chosen that accounts for the indignation with which he is rebuked? If for example he had abandoned the Bench to become a Professor of Law (at a salary worth at the most only half of what he is getting now) would he have been told that his duty was to remain where he is? Such a contention is in our view ridiculous. A judge is entitled, like anyone else, to make his life where he honestly believes he can best be himself. The judicial oath is not an irrevocable vow. Nor is the City, even at £15,000 a year a choice that necessarily justifies attitudes of outrage that might be appropriate in the Headmistress of a Finishing School who hears that one of the most promising pupils has gone off to be a bunny girl."

The repercussions of Sir Henry's retirement were still felt in England when the Lords were debating the new Courts Bill in November 1970. Clause 16 of that Bill was in pari materia with section 6 of the County Courts Act 1959, the effect of which was that, for as long as he held the office of a judge a County Court judge could not practise as a barrister nor could he be directly or indirectly concerned in the practice of a solicitor. Clause 16 caught the eye of Lord Dilhorne and aroused his righteous indignation. His Lordship said:—

> "What I think is unprecedented and I myself think inexcusable is that someone who has accepted the appointment by Her Majesty as a judge should thereafter relinquish the appointment and take one in business. It should be clear, surely, to everyone at the Bar that if one accepts a judicial appointment, there are obligations attached to it; that one cannot return to the Bar and practise as a barrister and that, having embarked on a judicial career one is under a moral obligation to do the job and not to give it up in favour of one that appears more attractive."[3]

Lord Denning contributed to the debate upon this topic in the House of Lords. He said:—

> "Perhaps it is to be remembered that in this country alone, as far as I know, by a convention, a judge on his retirement does not return to the Bar or engage in legal work at all. In the United States, Canada and in many other countries it can be done and it is done. I venture to think that it is unsatisfactory because during his tenure a judge might have his eye too much on what he was going to do when he ceased to be a judge."[4]

Lord Dilhorne later returned to the attack and proposed an amendment to section 16 to limit the work that could be undertaken by a retired judge. His Lordship said that he did not want to prevent retired judges from acting as arbitrators or referees (work traditionally undertaken by retired judges here as well as in England) but he thought that they should not be otherwise employed. The Lord Chancellor, Lord Hailsham, opposed the amendment saying:—

> "We leave what he may do when he leaves office to the appropriate professional body. I think that it has been accepted since the 17th century that this return to the Bar is not proper for High Court judges and I should have thought the same to be true of County Court judges. Indeed I thought there was a ruling of the Bar Council, and probably of the Law Society, to the same effect."

In the result Lord Dilhorne withdrew his amendment.[5]

The question of High Court judges returning to the Bar had been raised in England in 1952 when two members of the High Court indicated that they found themselves unable to support their families upon their judicial incomes and that they wished to resign from the Court and return to the Bar. Dr. Shimon Shetreet in his work "Judges on Trial" says that their request to return to the Bar was refused.[6] Sir Winston Churchill, as Prime Minister, referred to the request in the House of Commons debate upon a Bill to increase judicial salaries which had not been increased for a century. The Prime Minister said:—

> "I heard two years ago that several judges had asked to return to the Bar, as is their right."[7]

Whether they had a right to do so or not they did not return to the Bar and presumably made do on their inadequate judicial salaries. Mr. Justice Legoe of the South Australian Supreme Court, who was a pupil at the Inner Temple at the time the alarming request was made, tells me that his Master was asked by a not very successful silk what he thought of the move and Chris's Master replied "Very good idea. It should be a precedent for a few silks to take stuff again."

Section 6 of the County Courts Act, to which I have referred, seems to state the obvious but it must be remembered that England used and still uses to some extent the Recorder as a part time judicial officer and so the roles of barrister and judge may be played by one person, though not at the same time but certainly throughout the same year.

However in some parts of the United States of America, even in comparatively recent times, full time judicial officers have claimed the right to practise law in their spare time. In *Bassi v. Langloss*[8] in 1961 the Supreme Court of Illinois, while it held that it was against public policy for an attorney to practise law during his tenure as a County Court judge, postponed the operative date of this new ruling until the time when judges elected at the next election would assume office. The reason given for the postponement was that the legislature would have an opportunity to recognise that henceforth County and Probate judges would be prohibited from practising law and that, if lawyers were to be attracted to the office, their salaries must be increased. The annotation which accompanies the report of *Bassi's* case contains some entertaining digests of cases in which the courts considered the involvement of such judges in matters arising in the courts to which they had been appointed. In one such case in 1949 the action of a judge in disqualifying himself from acting in the probate proceedings of a will and later appearing as counsel for one of the litigants in an action brought to interpret the will was held to be "highly improper".[9] In another matter the judge was held to have violated the provisions of a criminal statute making it illegal for a judge to practise law because he filled in blanks for executors, administrators and others interested in the settlement of estates of deceased persons. He advised interested persons as to the proper steps to be taken in administration of the estates.[10] In Australia we do seem to be spared the necessity of debating whether persons occupying judicial office can, while they occupy that office, undertake legal work.

In the passage from the House of Lords debates which I cited earlier Lord Denning suggested that England was the only country in which a judge on his retirement could not return to the Bar or engage in legal work. But in South Australia at least the prospect of him so doing was not treated with equanimity as far back as 1959. Sir George Ligertwood was the first South Australian Supreme Court Judge to be caught by a compulsory retiring age. When he left the Bench there were judges substantially older than he still occupying positions on the Bench. He was an active man with a keen intellect. He indicated that he intended to do some opinion work. The only professional body in South Australia at that time was the Law Society of South Australia of whose Council I was a member, the unofficial separate Bar not then having been established. The proposal of Sir George caused dismay within the Council. Consultations were held and resolutions were passed. However the matter faded away when Sir George was appointed a Royal Commissioner to inquire into taxation matters. This occupied him and defused the situation.

There was one other occasion when the Law Society of South Australia considered the matter. That was in the mid

1960's when a retiring Magistrate who had presided over the Adelaide Magistrate's Court announced his intention of setting up in practice to a limited extent. On that occasion an opinion was obtained from Dr. Bray Q.C. (as he then was) as to an appropriate rule of practice to prevent any former judicial officer from practising the law after retirement from the Bench but I believe that nothing further was done. In recent years several South Australian Magistrates have retired from the Magistracy long before reaching retirement age and have either returned to private practice or have taken appointments as legal officers. No objection to this course has been taken by the Bench or the profession generally. There has been no further case of a retired judge of the Supreme Court or any other South Australian Court returning to legal practice.

I do not know whether there were any problems in Victoria when Sir Reginald Sholl, who had taken early retirement from the Bench to take up a diplomatic position, subsequently returned to Melbourne and became a consultant to a firm of solicitors. My recollection is that he first intended to return to the Bar but later abandoned this in favour of acting as a consultant.

I am grateful to the Chairman of this Conference who checked for me and ascertained that I was correct in my understanding and that the Lord Chancellor now requires High Court judges, before their appointment, to give an undertaking that they will not return to the Bar upon retirement. I did not know that, apart from that undertaking, they forfeit their commissions as Queen's Counsel and their admission to the Bar. This is not the position anywhere else in Australia as far as I know. I understand that in Australia the commission as Queen's Counsel is dormant upon the appointment to a superior court but that the title Queen's Counsel reverts after retirement from the Bench. The name of the judge remains on the roll of barristers or the roll of legal practitioners as the case may be, notwithstanding elevation to the Bench.

There is a rule of ethics of the England Bar Council that Crown Court judges may not return to the Bar after retirement.[11] I have been informed by David Bennett that there is some concern in England that the rule may be unlawful under the monopolies legislation but that so far it has not been tested.

I do not believe that the Lord Chancellor required an undertaking not to return to the Bar to be given by about-to-be appointed High Court Judges at the time of the 1970 debate in the House of Lords to which I have referred. In the course of that debate Lord Hailsham said that he told intended judges that he regarded "their immovability by Parliament as one reason for treating the career as a permanent one and that they should approach the Bench with the enthusiasm of a bridegroom approaching marriage, or of a priest approaching priesthood."[12] Can it be that in the interim the impermanence of many marriages and the defection of some priests from the priesthood have convinced the Lord Chancellor that a more effective sanction is called for?

The rules of the New South Wales Bar Association provide:—

> "A barrister who is a former judicial officer (including a former Magistrate but excluding any acting juducial officer) shall not practise as a barrister in any court or before any officer exercising judicial or quasi judicial functions if he has been a member of or presided in such court or exercised such function."[13]

That rule has been observed by the two former superior court judges who have returned to the Bar in recent times. If a judge, upon retirement from the Bench, takes up practice as a solicitor he or she is not disabled from appearing in any court in which solicitors have a right of audience.

The main question for discussion on this topic is probably whether there should be a prohibition against the return to the Bar of former judges and, if so, whether the prohibition should be absolute or should be limited in any way. I have always felt that the acceptance of a judicial appointment should have, as a corollary, the final farewell to the Bar. But the task of writing this paper has necessitated an examination of the reasons behind such a conviction. I would still regard with distate the prospect of wholesale resignations from the Bench followed by the return of judges to the Bar but appreciate that my distaste, as Dr. Shetreet says in the work to which I have already refereed, "rests not so much upon reason and argument as upon a long established tradition" which tradition he says "has never been questioned."

Although it may not have been questioned in England it has now been questioned successfully in Australia. Highly qualified and well respected judges have resigned from a superior Court and have returned to the Bar. Certainly there are some impediments to their freedom to appear but those impediments are slight today when there are a multiplicity of courts in Australia. Are the restraints imposed by the New South Wales Bar Association adequate? To those who believe that elevation to the Bench should negative any possibility of return to the Bar they are not. If, however, the prohibition is not to be absolute are the restraints necessary and are they sufficient? A superior court is not likely to be affected in its judgment by the fact that one of the counsel appearing before it was formerly a member of the court. It is possible that, in demonstrating that the former status of the counsel does not affect his judgment, the judge may lean in the opposite direction. But is there a danger that the litigant not represented by the former judge would believe that he is prejudiced? If there is such a danger will it not exist whether the counsel was a

member of the same Bench or of a Bench of equal standing? Would such a belief be reasonable and should it weigh the scales against permitting a retired judge to return to the Bar? Is there not a greater danger in the former judge appearing before an inferior court? The danger may be twofold if one assumes that judges are venal. If the former judge in his judicial capacity has allowed appeals from the presiding judge his client may suffer a disservice but, if the position is reversed, the opposition may be disadvantaged or may believe itself to be disadvantaged. The reputation of the retired judge, now counsel, may unduly impress an inferior court, but I would be inclined to think that, by and large, the mere fact that a person has held judicial appointment is not likely to enhance his reputation above that of the well regarded counsel who has not at any time forsaken the Bar.

What of the judge who, after retirement, limits himself to giving opinions as counsel. Are those opinions likely to carry a weight disproportionate to their real value? Mr. Justice Jacobs of the Supreme Court of South Australia has informed me that during a short period in which Sir George Ligertwood did some opinion work Sam Jacobs, then a junior, obtained an opinion from him in a matter which was about to go to court. I assume from his story that he must have shown the opinion to his opposition because he says that the matter was promptly settled. However, as the leader on the other side was the late Sir Harry Alderman, a counsel not easily intimidated, both Sam and I doubt whether the fact that the opinion in Sam's favour which was given by a recently retired and revered judge was responsible for the settlement.

The fact that non-contributory pensions are paid to judges upon retirement after a stated number of years service seems to me to provide a good reason for discouraging judges from returning to the Bar. It would not add to the prestige of the profession if it became common for a judge to serve for ten years (which is the statutory time after which some judges receive pensions) then retire and resume a lucrative practice at the Bar. I have heard it suggested as an argument against permitting British High Court judges to return to the Bar that they could receive their automatic Knighthood upon appointment and, of course, retain it after retirement. That inducement to the taking of an appointment does not exist in Australia nor do I think that it is one that is likely to trouble us in the future. In Maryland U.S.A. a judge who retires and accepts a pension is enjoined by statute against practising the law "for compensation." In 1977 one Richard V. Waldron's term of office as a judge was not renewed, a judicial nominating commission having failed to recommend him because of his unsuitable "temperament and disposition with attorneys." He retired on a pension of $21,000 a year and went into private practise as a lawyer. He claimed that the statute prohibiting him from doing so was unconstitutional as violating his constitutional right to practise law. According to a newspaper article printed in October 1979 the question then remained unresolved.[14] The article suggested that a number of Maryland retired judges who had hitherto obeyed the injunction were eager to have the question of constitutionality tested. I do not think therefore that we can lightly disregard the possibility that retirement on a pension as soon as it is available and a return to the Bar may become an attraction to judges.

It is said that nowadays judges are appointed too young to the Bench and that to some of them the road ahead appears too long, too straight and too uninteresting. It is said that they are likely to become disillusioned and that we must expect a number of them to wish to return to the Bar. There are probably two main reasons for the appointment of judges to the Bench at earlier ages than was the custom hitherto. The first is that the compulsory retiring age means that some positions on the Bench become available earlier than would have otherwise been the case. The second is that there has in recent years been a proliferation of courts and quasi-judicial bodies and appointments to them. One cannot quarrel with the proposition in the article from the New Law Journal which I cited earlier that, if a judge feels that he is unsuited to the judicial way of life, it is better for the administration of justice as well as for him that he should leave the Bench. However I have not a great deal of sympathy for the person who leaves the Bench because he does not find it sufficiently stimulating nor am I impressed with the fact that judges appointed at an early age have to serve for many years if they serve until the statutory age of retirement. They know that when they take the appointment. A former Chief Justice of the Supreme Court of South Australia, Sir Mellis Napier, was aged 42 when he was appointed to that Bench. He later became its Chief Justice and served in all 42 years before he chose to retire. Presumably he was not one of those who was bored by life on the Bench, although I do believe that he became impatient of arguments which he felt he had heard hundreds of times. This is a problem which a long serving judge and those who appear before him have to face.

So far I have addressed myself to the question of the return by judges to the Bar. I turn now to the earlier question in the topic set for this session, namely the appointment of judges. In his foreword to Dr. Shetreet's Judges on Trial Lord Justice Scarman (as he then was) said:—

> "In the English practice of juducial appointment there is no systematized plan."

His Lordship concluded:—

> "It is better thus. Judicial appointments are not suitable work for a committee, where compromise is a virtue and mediocrity would be a likely consequence. They must not fall into the hands of the politician (or a group of politicians) — unless (bless the illogicality of it!) he happens to be the Lord Chancellor."

In 1972 the Justice Subcommittee on the Judiciary recommended that the Lord Chancellor should be assisted in his selection of judges by a small advisory committee on which should be representatives of The Law Society, the Bar, academic lawyers, the judiciary and perhaps the general public. The recommendation has not been adopted in England. From time to time in Australia one hears the argument that there should be an official body to recommend appointments to the judiciary. I shared Lord Scarman's doubts about the appropriateness of such a method. I, too, fear that there would be compromise and that it would not be the best method of selection. Nor do I think that the judges themselves should have the final say in the selection of a new member of a particular Bench. This might result in self-perpetuation and eventual stultification of the particular Bench. Nevertheless consultation both

with the Bench and with the Bar is surely desirable. In his paper "Judging the Judges" presented at the 20th Australian Legal Convention in 1979 Murray Gleeson Q.C. referred to the part played by the Attorney-General, whether State or Federal, in judicial appointments. He said:—

> "There does not seem to be any settled practice as to consultation and inquiry. Presumably a good deal of informal consultation goes on. It will rarely be the case that the responsible Attorney-General will have any detailed personal knowledge of the possible appointees. It is a defect in our system of appointing judges that there are no clearer and more widely-known procedures of consultation and inquiry in relation to judicial appointments. Notwithstanding that such procedures were left in the area of practice and convention, they would reinforce public confidence in the judiciary."[15]

So far as I know those remarks have fallen upon stony ground. It appears that the processes of consultation and the sources consulted vary from Attorney-General to Attorney-General. Certainly before an appointment to the High Court of Australia is made State cabinets are invited to suggest names of appropriate appointees but I do not believe that, in the case of other appointments, any process of consultation is disclosed. Questions for this conference are:—

(1) should there be a different method of selection of judges from that which exists at present and, if so, what method would be appropriate?
(2) in any event should there be consultation and, if so, with whom and should the method of consultation be made public?

There is also the question of the appropriate qualifications for the Bench. In those States of Australia in which the profession is divided it has in the past been thought appropriate to appoint to the Supreme Court only from the Bar and ordinarily from the Senior Bar. Where the profession has been fused the practice has been similar, in that it has been usual to appoint silks to the Supreme Court Bench. In this respect Australia has followed the English practice. However, as there have been exceptions in England, there have been exceptions in Australia. One of my contemporaries on the South Australian Supreme Court came to the Bench after a career first as a junior practitioner then a magistrate and subsequently Deputy Master and then Master of the court. The present Chief Justice of Tasmania took that office straight from the Magistrates' Bench. In neither case can it be said that the choice was wrong. One of the present incumbents of the Bench in South Australia had also been a Master before he became a judge and later Chief Judge of the Industrial Court. From this position he moved to the Supreme Court. A recently appointed puisne judge had not joined the unofficial Bar in South Australia before his appointment to the Bench and doubtless would have described himself as a solicitor, although in the years immediately preceding his appointment to the Bench he must have been required to give many opinions on important commercial matters.

In recent years there has been considerable discussion concerning the appointment of academic lawyers to the Bench. In Judges on Trial, to which I have already made reference, the learned author says:—

> "It is generally admitted that the academic lawyer is not qualified for appointment as a trial judge."[16]

This statement assumes that the academic lawyer has always been an academic and has had no other experience. Sir Richard Blackburn, who was Bonython Professor of Law at the University of Adelaide before he gave up that position to enter private practice, gives the lie to a blanket statement that academic lawyers are not appropriate to be trail judges. There is one former academic in the Family Court of Australia, in which the selection of judges has been from a wider spectrum of the profession than that thought appropriate for other superior courts, and South Australia has one former Professor of Law in the Local and District Criminal Court. Both these judges are required, on a daily basis, to deal with issues of fact. I have not heard that their academic experience has been too narrow to enable them to do so.

Sometimes it is suggested that it would be appropriate to appoint an outstanding academic to the appellate courts but to have academics bypass the trial courts. It seems to me however that, if a lawyer is not fit to preside over a trial, he or she is not fit to sit as an appellate judge. In every court (and this includes the High Court of Australia) there is a necessity for the judge to have some knowledge of how a trial is conducted and of problems which beset trial court including judge, counsel, litigants and witnesses.

Finally I address the difficult question of promotion of judges. Theoretically in Australia, as in England, there is no promotion for a judge. This is in contrast to the system which applies in France and most other European and many Asian countries in which a judicial career means that one starts in the lowest rank of judicial officer and aims to progress to the top rank. This latter system has been regarded both in England and Australia as likely to militate against true judicial independence which is more likely to be achieved where, in the words of Lord Scarman, "a judge does not come to the Bench looking for further promotion; judicial office is itself the apex of legal career."[17] But in practice there may be promotion after appointment to the Bench both in England or in Australia. Almost without exception judges of the Court of Appeal in England have come from the High Court and almost all Law Lords have been appointed from the Court of Appeal. The High Court of Australia consists of judges, all of whom were either members of other courts or law officers prior to appoint-

ment to the High Court. And would Australia benefit if it were otherwise? It is easier and less impertinent to draw upon the past rather than to comment upon the present in this connection. So I merely ask would it have been appropriate for Sir Owen Dixon to remain a judge of the Supreme Court of Victoria rather than to become eventually Chief Justice of the High Court of Australia?

If we assume that there will be progression by some judges to a higher court than that to which they are originally appointed and if we accept, as I do, that it is appropriate that this would be the case there remains the question whether there can be any safeguards to prevent the progression being by way of political favour and to ensure that it is upon merit alone and the further question how can the general public be made to understand that this is the position. In dealing with the second question first I refer to *Barton v. Walker*[18] in which one of the questions before the Court of Appeal was whether it might reasonably be suspected by fair-minded persons that the judge from whose order the appeal had been brought might not resolve the questions before him with a fair and unprejudiced mind. The allegation of bias arose from the fact that the judge in question had recently been appointed as Chief Judge of the Criminal Division of the Court and one of the litigants was the Attorney-Geneal. Samuels J.A. in whose reasons the other members of the court agreed said:—[19]

> "I do not consider that, in the circumstances presented by this material,' fair-minded persons might reasonable entertain the suspicion of prejudice which provides the standard to be applied. The Attorney-General's role in the matter, to the extent that it may be inferred, was imposed upon him by the nature of his office. The learned judge was bound as an officer of the judicial arm of government, to entertain (but not, of course, necessarily to accept) the offer of appointment, involving, as it did, the administration of justice in this State. Both of them were, therefore, acting in pursuance of public duties which they had to perform, notwithstanding that the Attorney-General was a party to proceedings before the judge.
>
> .....
>
> The appellants' point is that the suspicion generated (as they contend) by (the judge's) appointment would have been created, fundamentally, by the apprehension that the judge might favour the respondent out of gratitude for the benefit which the appointment represented. This argument has no rational foundation once it is apparent that the appointment was not the product of the respondent's own favour."

There is no ready answer to the first of my questions. It is not surprising if governments favour appointment to high office of persons whose philosophy appears to accord with their own, although one may wonder, without undue cynicism, whether an identical philosophy is espoused by all members of any government. That practice will be likely to be adopted in appointments to the highest judicial offices. Provided that the appointments are of persons whose capacity to fill the office equals that of others who might have been selected there can be, as it seems to me, no valid criticism of the selections. For the rest I think that we must rely upon the tradition of impartiality of judges mentioned by Samuels J.A., a tradition which should be nurtured in possible future appointees to the Bench from their law school days onwards.

1. The Solicitors' Journal Vol. 114 No. 32 7th August 1980. p. 593.
2. August 13th 1970 pp. 746-747.
3. 312 H.L. Deb. 1288 (19th November 1970).
4. ibid 1303.
5. 313 H.L. Deb. 733-734 (3rd December 1970).
6. p. 374.
7. 525 H.C. Deb. 1063 (23rd March 1954)
8. 89 A.L.R. 2d 881.
9. *Tucker v Myers Estate* (1949) 151 Neb. 359.
10. *Wheat v. Hilkey* (1938) 148 Kan. 60.
11. see W.W. Boulton note 30 at 34; A.S. 1963 at 28.
12. 312 H.L. Deb. 1314 (19th November 1970).
13. rule 7.
14. 1979 The Washington Post (12th October 1979)
15. 53 A.L.J. at 339.
16. p. 58.
17. Scarman, The English Judge 30 Mod. Rev. 1 at 3 (1967)
18. (1959) 2 N.S.W.L.R. 740.
19. at pp. 757-758

Moments Like These . . .

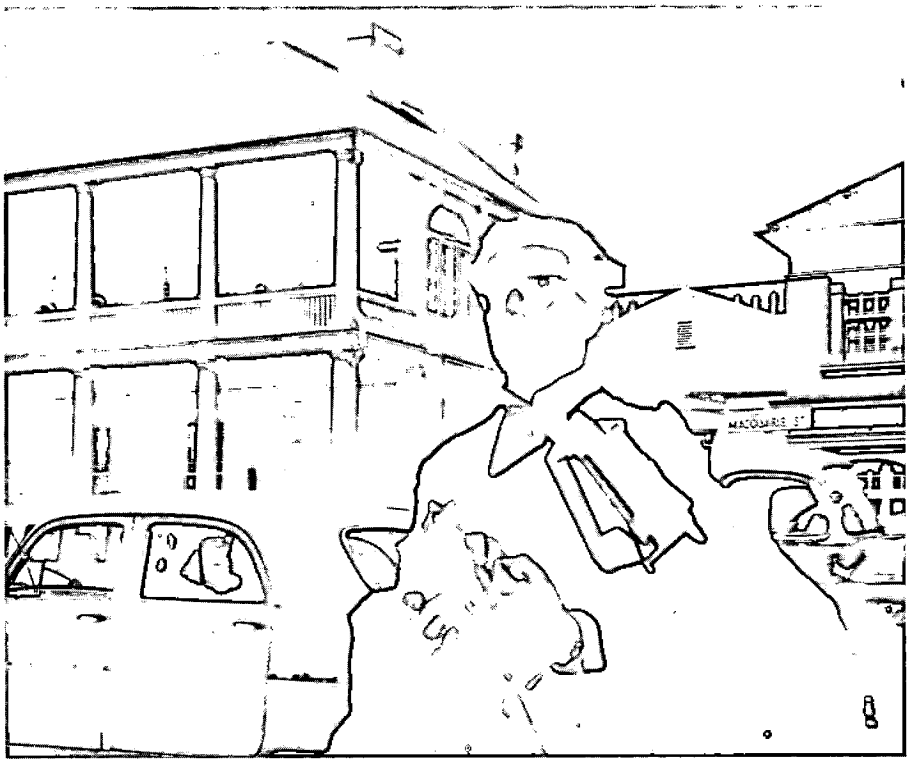
A well-known criminal named Seeley was being tried at Newcastle Quarter Sessions before Judge Cross and a jury of twelve on a charge of break, enter and steal. Two detectives from Sydney, Detectives X and Y, gave evidence that in an interview between them and Seeley, Seeley had made a verbal confession. Seeley made an unsworn statement from the dock. In the course of his statement Seeley said:

> "What Detectives X and Y said in their evidence was not true. It is the fact that they were interviewing me in the Newcastle Police Station and on that occasion what occurred was as follows. Some footsteps were heard outside the window of the room in which they were interviewing me and the local sergeant of police, Sergeant A, walked past the window. Detective X said to Detective Y, "Who is that?" Detective Y said: "That is the village idiot."
>
> Sergeant A then opened the door and said to Detectives X and Y: "What are you doing?"
>
> Detective X said: "We are in here putting a verbal on Seeley."
>
> Sergeant A said: "You had better watch out. Cross does not like verbals."
>
> Detective X said: "We don't care about Cross. We're only interested in the twelve idiots on the jury."

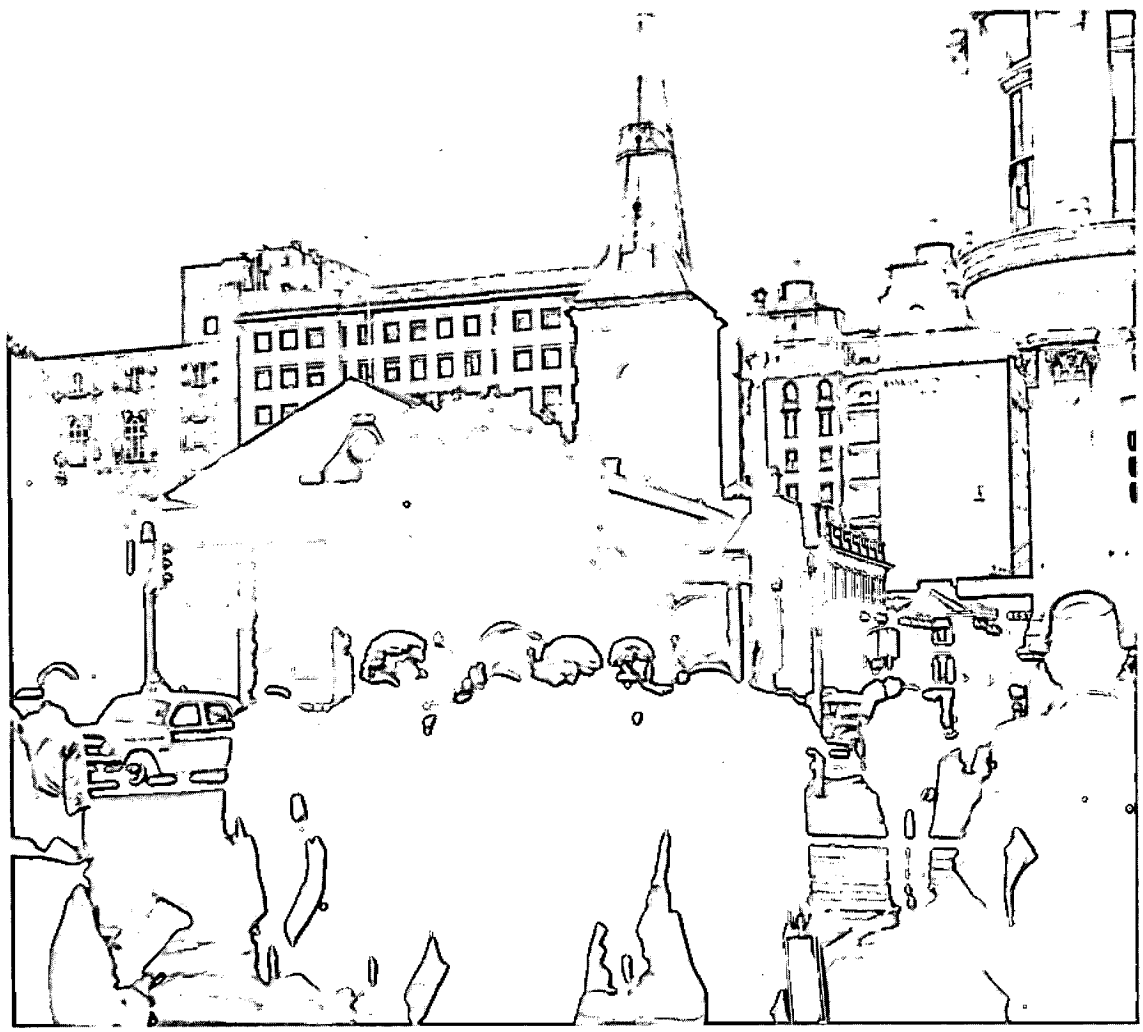
Seely was acquitted.

Barristers in Macquarie Street April 1965

C.A. Evatt and C.R. Evatt, Q.C. (dec'd)



Judge Herron, Q.C.



Who was H.R. Nicholls?

by J.W. SHAW and G.P. HARRIS

In the midst of recent controversy concerning the dismissal by Peko Wallsend of 1,100 workers at the Robe River undertaking in the Pilbara in Western Australia, mention has been made (often with conspiratorial connotations) of the H.R. Nicholls Society. This small group, formed in February this year, is dedicated to the radical restructuring (and, perhaps, abolition) of the statutory system of conciliation and arbitration which has been an entrenched feature of Australian society for most of the century. It appears that Charles Copeman, the chief executive of Peko Wallsend, is a member of the Society and is thus perceived by the media as being part of the union-busting New Right, together with other business and intellectual critics of a regulated labour market and the authority of industrial tribunals.

The impact of Mr. Copeman's personal political philosophy upon his company's confrontation with the Western Australian Government and industrial tribunal is a matter for conjecture. But the dispute has focussed attention upon the H.R. Nicholls Society and its leading figures, who include John Stone (former Treasury Head and now *Sydney Morning Herald* columnist), Hugh Morgan of the Western Mining Corporation, Gerard Henderson, Senior Advisor to Opposition Leader Howard, and leading officials of the National Farmers' Federation.

While members of the Society claim tactical impact upon the employer successes in the Mudginberri Abattoir dispute in the Northern Territory and the Dollar Sweets dispute in Victoria, Prime Minister Hawke has described the groups hardline anti-arbitrationist theory as economic lunacy.

Some clue as to the soundess or otherwise of the approach of this new industrial force may be gleaned from an understanding of the claim to fame of H.R. Nicholls, whose name the free marketeers have enthusiastically embraced. Who was H.R. Nicholls?

On 7th April 1911, the *Hobart Mercury* published an editorial entitled "A Modest Judge." It was written by Henry Nicholls, the newspaper's octagenarian editor. The newspaper vigorously attacked the then President of the Commonwealth Court of Conciliation and Arbitration, Henry Bournes Higgins. A pioneer of Australian arbitration, Higgins was both a justice of the High Court of Australia and a judge of the Arbitration Court. He is regarded, nowadays, by those of the deregulating Right as very much a foundation member of the Industrial Relations Club. Of Irish origins, Higgins was a lawyer, politician and judge in the same milieu as figures such as Alfred Deakin and Isaac Isaacs. He was a substantial character in Australian political history and is the subject of a scholarly biography by John Rickard, published in 1984, as "H.B. Higgins: The Rebel As Judge."

Nicholls, on the other hand, was not a man of established intellectual calibre in law, economics or industrial relations. He was a strongminded and polemical journalist who had for many years written for newspapers sold on the Australian goldfields. He edited the *Mercury* from 1883 until 1912, and was 82 at the time of his controversial article attacking Higgins.

In the Arbitration Court, Higgins had clashed with a barrister, H. E. Starke (subsequently appointed as a judge of the High Court), during which the judge admonished Starke not to speak disrespectfully of the Government which Higgins described, at one point, as "those above us." Starke had inferred that the Government encouraged Broken Hill labour organisations which he described as "the most tyrannical" he had known. A Labor Government, elected in April 1910 led by Andrew Fisher, was in power.

Slenderly based upon this transitory exchange, Nicholls' vitriolic journalism began by proclaiming that Mr. Justice Higgins was "a political judge . . . appointed because he had well-served a political party." The article then indicated that Higgins would not allow reflections upon those to whom he was indebted "for his judgeship."

Apparently upon the initiative of Higgins, the Attorney-General of the day (W.M. Hughes) commenced contempt proceedings against Nicholls in the High Court of Australia. In June 1911, the case came before the High Court sitting in Melbourne. But Nicholls was completely unprepared to defend either the accuracy or the tone of the article he had penned. His counsel rose before the High Court to admit that, insofar as the article might convey the meaning that the judge owed his appointment to a Labor Government, it was inaccurate. Nicholls withdrew the sentences which contained such an imputation and expressed his regret for their publication. This concession was described by Sir Samuel Griffith, the Chief Justice, as "very proper." The withdrawal and apology was manifestly appropriate both because the editorial attack represented a simplistic, prejudiced attack upon a judicial figure of substance and because the suggestion that Higgins was a Labor appointee was quite erroneous. Higgins was appointed to the High Court in 1906 and to the Arbitration Court in 1907, during the period of Deakinite Liberalism. Given this significant error in the editorial and the subsequent apology tendered by Nicholls to the High Court, the description of the article by Higgins' biographer as "slipshod" seems justifiable.

It is true that the High Court did not determine the contempt proceedings on the basis of the withdrawal and apology. Rather, in a commendable affirmation of the right of free and robust criticism of the courts, the judges took the view that even if an individual judge were libelled in a manner which might bring the individual judge into contempt, it would not follow that everything thus said amounted to a contempt of the court. Sir Samuel Griffith thought that the imputation of want of impartiality to a judge was not necessarily a contempt of the court. Moreover, the words written by Nicholls were not, so the High Court held, calculated to obstruct or interfere with the course of justice or the due administration of law in the Court. This piece of judicial liberalism did not, however, represent any ringing endorsement of either the style or content of Nicholls' journalism. And for the contemporary critics of the arbitration system, the 1911 High Court judgment represents a pretty hollow forensic victory.

The *Nicholls' Case* does not portray any heroic episode in Australian industrial relations or law. An erroneous and intemperate editorial, which its author was not prepared to defend, was held not in any technical contempt of the High Court. This is surely a rocky foundation from which to attempt to bring down centralised wage fixing in 1986. One is entitled to ask whether the H.R. Nicholls Society will produce more than the ill-informed bluster of the writer whose name it has adopted.

The Honourable H.L. Cantor, Q.C.

Eulogy delivered by his Honour Judge Shillington Q.C. at the memormal service held for the late The Honourable H.L. Cantor Q.C. at St. James Church on 8th October 1986

Henry Lawrence Cantor was born on the 20th April 1919 the son of Mr. Justice M.E. Cantor, a Justice of the Industrial Commission of New South Wales. He and his sister Jill lost their mother at an early age and it fell to their father's lot to guide their lives through the formative years. His background no doubt led him to the law and after war service in the A.I.F. and later the R.A.A.F. and graduating from Sydney University Law School in 1948 he was called to the Bar in 1949.

Before going to the Bar he spent a period as a clerk with Messrs. McLachlan Chilton & Co. This was invaluable experience since he was supervised by a solicitor of great drive and capacity, Dick Parker.

He married Margaret McNiven in 1948 and there were born to the marriage three children Libby, Jane and James.

Our paths first crossed when as a young barrister, I joined those on the ground floor of the old University Chambers and we later became the nucleus of the 10th Floor in the new Wentworth Chambers. There his practice expanded; it was a varied one with many solicitors anxious to brief him. He was always generous with advice sought by his juniors on the Floor such as myself. With the taking of silk in 1971 came success as a leader of the Bar, with a busy and varied practice.

When the Attorney offered him the appointment as the first Master of the Common Law Division of the Supreme Court in 1972, he hesitated long but finally accepted. He loved the Bar which he served on the Bar Council for eleven years including three as Treasurer, Counsels Chambers Limited and Barristers Superannuation Limited and in many other ways. He established the role of Common Law Master in the life of the Supreme Court. The new rules of Court owed much to his work and advice.

He was appointed a Justice of the Supreme Court in 1975. His temperament well suited him to this new role. As a judge he displayed courtesy to counsel, but was impatient of cant and humbug. He instinctively isolated the issues. He was a shrewd judge of character with the ability to put issues to a jury in a commonsense and practical way.

In more recent years his natural concern for those less fortunate than himself led to his interest in the Child Abuse Prevention Service. He became a Director of the Service and worked hard for its recognition by Government and subsequent funding.

He was really a very emotional man — not always displayed. To his friends he was affectionate and generous — his keen sense of humour often showed itself in infectious laughter and the wry phrase. The false, the pompous and self-opinionated did not find in him a sympathetic response.

He took the news of his fatal illness in typical fashion, he told me later of the fear of the unknown which first struck him — but his natural courage then took over with the positive approach — "the rest of my life whether it be short or long must be led as fully as my health will allow." He bore the pain and humiliation of dependance without complaint.

Bill loved the physical world, His skiing — which found him at Perisher Valley each year; his squash and later sailing with Don McLachlan and Algie Smith on Pittwater. He was a most popular member of the Avalon Sailing Club and the club burgee draped his coffin at the funeral service.

Bill loved his family. I know all present, by their presence express their love and sympathy to Margaret, to Libby and her husband Steve and their sons Brendan and Lindsay and to Jane and Jim.

We rmember also Maureen Vaughan his dear friend, Doris Barnfield — his secretary and later his associate through all his years on the Bench — a loyal friend to the end. Edward McMurtrie ("Mac") his tipstaff over ten years.

Bill Cantor was a man of great realism about the meaning of life. A measure of that realism was that in his last days the proposal to hold this memorial service and its form was freely discussed with him. He died at his home at 5.45 p.m. on Thursday, 18th September, 1986.

Those of us who knew him well have lost a true friend, and one who we find it hard to realise is no longer with us, such was the strength of his personality, and his feeling for others. We are grateful for that friendship.

> "How often are we to die before we go quite off this stage? In every friend we lost part of ourselves, and the best part." — Pope

Detailed Statement of Proposed Reforms to the Structure of the Legal Profession

1. The Bar Association and the Law Society will continue to be responsible for regulation of the legal profession, and will be given enhanced powers to effectively carry out this function.

2. The Bar Council and the Law Society will submit to the Attorney General each year a list of the standing committees of each Council and at least one community representative (not legally qualified) will be appointed by each Council to such of those committees as the Attorney General after consultation considers appropriate.

3. Every person admitted as a barrister or solicitor and who wishes to practise as such will be required to hold a current practising certificate issued by the relevant Council. The Bar Council will be vested with powers similar to those currently held by the Law Society in relation to practising certificates. This will give the Bar Association power to control practising barristers which it does not presently have.

4. A two-tiered disciplinary system will be established comprising:
   - A Disciplinary Tribunal with the composition and powers generally recommended by the Law Reform Commission (primarily a judge, 2 practising members appointed by the governing body of the practitioner who is the subject of the complaint and 2 community representatives appointed by the Attorney General). It would determine matters of serious professional misconduct and questions of fitness to continue as a member of the profession with power to strike practitioner's names from the roll and to impose substantial fines.
   - A Professional Standards Board with the composition and powers generally recommended by the Law Reform Commission (2 practising members appointed by the governing body of the practitioner who is the subject of the complaint and 1 community representative appointed by the Attorney General). It would examine conduct which is unsatisfactory but which does not show a temporary or permanent unfitness to practise.

5. Where the Board makes a finding against a practitioner it will be able to make a broad range of orders, including:
   * that a restricted practising certificate be issued for up to one year;
   * that the practitioner complete a course of further legal education;
   * that the practitioner make his or her practice available for inspection;
   * that the practitioner cease to work in a particular field;
   * that the practitioner reduce his or her fees for a particular client;
   * that the practitioner be fined an amount not exceeding $5,000; or
   * that the practitioner be reprimanded.

   A party aggrieved by a finding or order of a Board will be able to appeal to the Disciplinary Tribunal, where there would be a new hearing.

6. A procedure will be established by both the Bar Council and the Law Society for complaints to be investigated by a Complaints/Conduct Committee which will recommend appropriate action to the respective Council. That Council will be empowered to refer matters to either the Tribunal or the Board;

7. A complainant dissatisfied with the handling of a complaint by either professional Council will be able to request the Professional Conduct Review Tribunal to review the matter. That Tribunal having reviewed the Council's handling of the complaint will be required to report and make appropriate recommendations to the relevant professional Council, and if the Tribunal remains unsatisfied it will be required to report and make appropriate recommendations to the Attorney General as to whether the complaint should be referred to the Tribunal or Board or simply dismissed.
   The Review Tribunal will comprise 5 members appointed by the Attorney General of whom:
   4 will be community representatives (non-legally qualified) appointed after consultation with the non-practitioner members of the Legal Aid Commission, the Law Foundation, the Consumer Affairs Council and with such other organisations and persons, if any, as the Attorney General may consider appropriate;
   1 will be a practising member nominated by the governing body of the practitioner who is the subject of the complaint (the nominated member could not be a member of his or her governing Council).
   The Review Tribunal will have no power to refer matters to the Tribunal or Board but would review the handling of complaints by the Bar or Law Society Council. It will have a quorum of 3 members, of whom one must be the relevant practising member. If the Review Tribunal is dissatisfied with the handling of a complaint it will report to the Attorney General who will be able to refer the matter to either the Disciplinary Tribunal or the Professional Standards Board.

8. A Legal Profession Advisory Council would be established to advise the Attorney General on matters relating to the regulation of the Legal Profession.
   The Advisory Council will be able to consider and make recommendations on any matters relating to the regulation of the legal profession, including those recommendations of the Law Reform Commission not specifically addressed by the present proposals. The Council will also be able to consider matters specifically referred to it by the Attorney General and by the professional bodies.

The Council would comprise 9 members appointed by the Attorney General of whom:

5 shall be legal practitioners (2 of whom shall be practising barristers of whom one shall be a barrister nominated by the Bar Council, and 3 of whom shall be practising solicitors of whom 2 shall be solicitors nominated by the Law Society Council);

4 shall be appointed as members representing the community interest (only one of whom may be legally qualified);

9. Recommendations to the Governor on the appointment of Queens Counsel would remain within the Attorney General's prerogative;

10. The Bar Council and Law Society Council would be given power to recommend regulations;

11. The Bar Council and Law Society Council would each be required to submit an annual report to the Attorney General on the discharge of its regulatory functions, for presentation to Parliament (the Report would include any prescribed information);

12. The Bar Council and Law Society Council or their respective representative would be consulted in settling the detail of these proposals and in the drafting of the necessary legislation to implement them;

13. The wearing of gowns by solicitors appearing as advocates in the Supreme Court or District Court would be optional, whilst the question of the appropriateness of wigs and other dress would be left to the Courts to regulate.

While the Law Reform Commission proposed common admission, it is not intended to proceed with this recommendation at the present time. The major reasons for this decision are:

The Law Reform Commission proposals envisage a separate and independent Bar, subject to control and regulation by the Bar Council and rulings by the Bar Association. Similarly, the Commission proposed the Law Society would be responsible for the regulation of members of the profession practising as solicitors or practitioners wishing to operate trust accounts.

In effect, under the Commission's proposals there would be common admission to the profession, whilst in practice there would be two distinct groups of practitioners regulated by two bodies exercising similar powers but ensuring that each branch of the profession fully performed its duties to the law and the community.

The present recommendations will achieve all the aims of the Law Reform Commission so far as the responsible regulation of the legal profession is concerned and it is considered that the proposals also contain sufficient safeguards by means of community representation. In these circumstances, it is not considered necessary to formally provide for the common admission of practitioners as "barristers and solicitors."

Letters (cont.)

Re Golden Jubilee Grand Ball

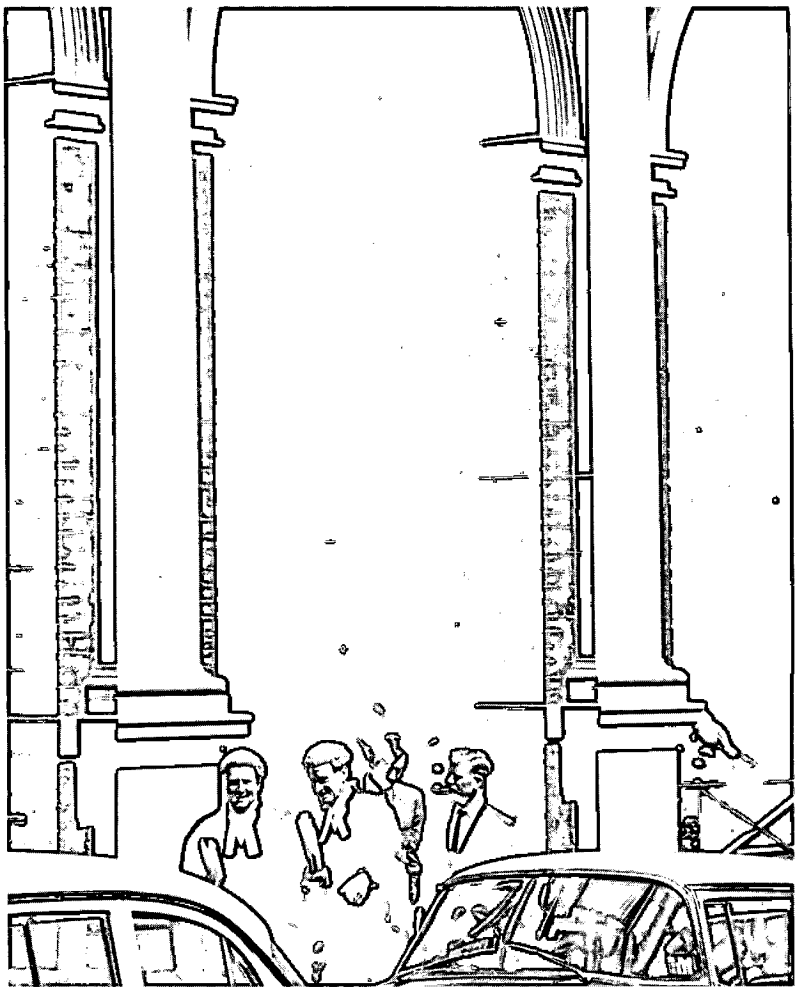
The Council received a gracious and informative response to its invitation to the Golden Jubilee Ball from the Honourable Sir Gordon Wallace:

"The reference in the recent circular to "marks the half century of incorporation" and "this notable occasion" surprise me. It is true that the New South Wales Bar Association was incorporated in 1936 (mainly I think, to clarify and legalise ownership of property — and there had long been an "Incorporated Law Institute of N.S.W.") but a Council of the Bar of New South Wales had previously existed for many years, as a reference to (for example) the 1932 and 1912 Law Almanacs will clearly indiciate — a Council which was elected annually, and included the AG (ex officio) and 20 barristers including 5 K.C.'s of note. In short, the 1935 "incorporation" was not constating a new and previously non-existing Council of the Bar as the circular seems to imply. I had been at the Bar 8 years when it took place and so far as I remember it made no difference to the status of barristers or their conduct or discipline.

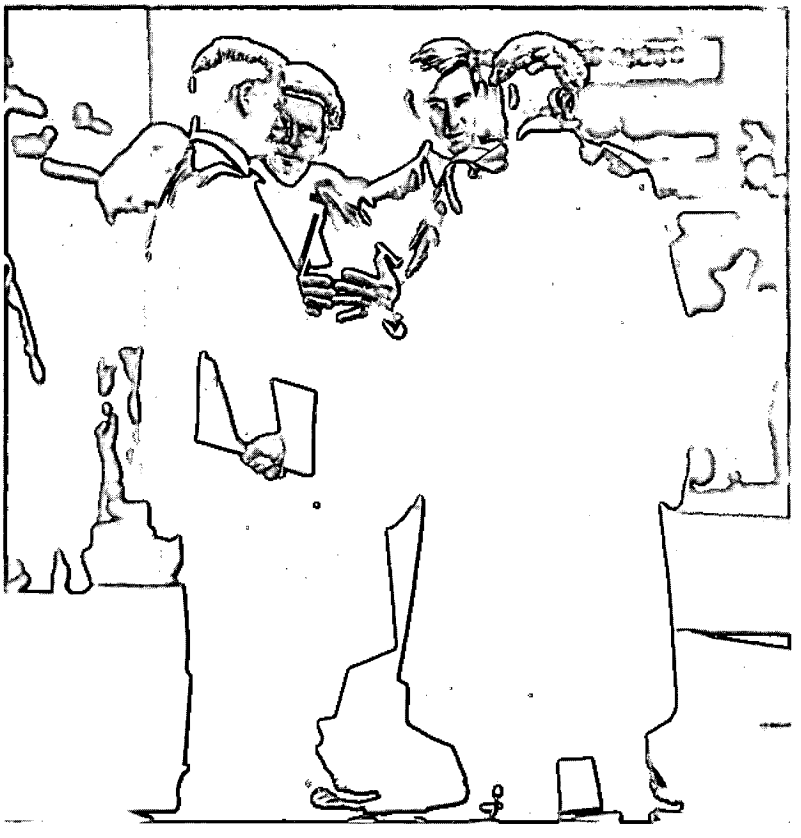
I fancy Spender, Q.C. (with whom I was then writing a book on Company Law published early in 1937) may have prompted the "incorporation" — which was undoubtedly a wise thing to do — but my reference to Spender is little more than a surmise.

At all events the incorporation was clearly wise, but with deference, I could scarcely describe it as a "notable occasion" attracting "a golden jubilee grand ball." However, it is excellent for the Bar to meet on social occasions, and I much regret owing to my age (86) I am unable to attend on this occasion.

With my best wishes,
Yours sincerely,
Gordon Wallace."



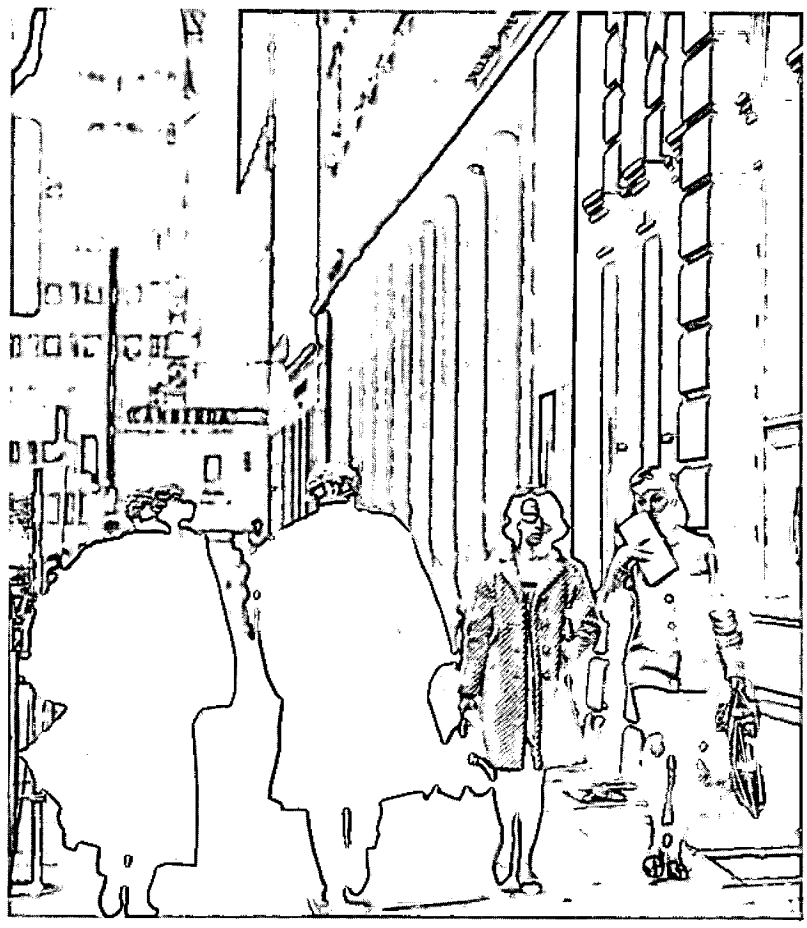
Barristers in Phillip Street
October 1966



T. Falkingham (dec'd) and A.W. Mayne

Corner King and Macquarie Streets, Sydney October 1966

His Honour Mr. Justice Beaumont and E. Bowen-Thomas



Phillip Street

Advertising and Touting

Address to the Second Biennial Conference of the Australian Bar Association, Alice Springs by G.L. Davies, Q.C. of the Queensland Bar.

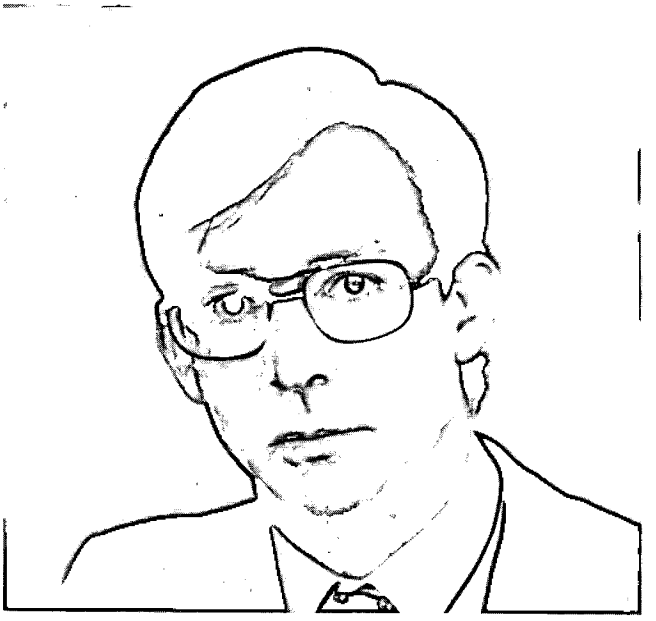
An outsider looking at our profession, and indeed some of our members also, might say that we are competing in a market place, not only against one another, but also against other professions, in particular the other branch of our own profession and accountants; and that therefore we ought, as they do, to advertise the services we provide and in other ways seek to induce solicitors and ultimate clients to avail themselves of those services; that advertising is inherent in a free economy, and, provided it is not misleading, helps the consumer to exercise choice in such an economy.

On the other hand, the more traditionally minded among us would say that advertising and touting are inconsistent with the whole conception of a professional man as one who joins his professional colleagues in the performance of a service to the community, who is bound by strict rules of conduct in his relations with his colleagues and his clients, and who recognises a higher duty than that of mere compliance with his clients' wishes, whatever they may be.

There is a great deal of middle ground between those two views. And once it is accepted that either advertising or touting is permissible at all, the question becomes, of course, one of degree. The purpose of this paper is to promote discussion on these competing views and on the middle ground which lies between. Although I shall develop my own views in the course of that discussion I thought I should state them at the outset. All touting is, I think, bad and should remain proscribed. My view about advertising is, as I shall explain, less easy to state in a concise form but, attempting to state it in a sentence, I would say that, as Aristotle might have said, too much or too little are both undesirable.

There is, of course, an important difference between barristers and most other professionals in that barristers do not deal directly with the public. Because they are briefed by solicitors it is they who, for the most part, choose barristers for specific cases or opinions. But that is not always so. Some barristers have acquired public reputations, or reputations among a section of the public. As long as I can remember there has been some public awareness of the names of some barristers, particularly in the field of criminal law. And no criticism of a barrister may justifiably be made if his public reputation has arisen from no more than his participation in a case or a number of cases of great public interest. Nor is it surprising that a client may ask that that barrister be briefed for him. But the public awareness of the names of specific barristers is no longer confined to those who have appeared in particularly gruesome criminal trials. There are, I think, a number of reasons for this. One is that a better educated and more sophisticated public is correctly perceived by journalists to be interested in, for example, some commercial litigation. The BHP takeover saga is a recent example. Another reason, to which I shall return later, is unfortunately the efforts of some barristers to ensure that they obtain or retain a public reputation.

Because of increased sophistication, particularly among persons who engage in activities which frequently result in litigation (finance and insurance companies and accountants in the taxation field are examples) and because of increased awareness generally of the names of specific barristers, there is an increasing number of clients who seek to have some say in choosing their barristers. No doubt in many of these cases



G.L. Davies, Q.C.

the solicitor will seek to influence choice of barrister. But it is a bold one who will overrule his clients' choice. Consequently there is some point, for those intent on advertising or touting, to seek to influence not only solicitors but also the public generally or, depending on their kind of practice or the kind of practice they are seeking, a specific section of the public.

There is a good deal of evidence, or at least strong ground for suspicion, that both advertising and touting are practiced by barristers, though how widely it is impossible to say. Nevertheless so far as I am aware there has been no great pressure put on any of our controlling bodies to relax the existing rules. My own view is that advertising and touting by barristers will increase, albeit in subtle ways, and that there will be pressure upon our constituent bodies to relax their existing rules. In a number of specific areas — damages for personal injuries and workers' compensation are obvious examples —substantial areas of work have been or will shortly be lost to the bar. There is also generally an increasing intrusion of solicitors into areas of law once thought to be the sole province of the bar.

There is little doubt that solicitors, particularly those in the larger firms, are now frequently performing work once thought of as the sole province of barristers; in particular, drawing and settling pleadings and affidavits, giving written opinions and appearing in court. By way of example, a partner in one large Sydney firm told me that his firm now almost invariably draws its own pleadings in actions and rarely briefs counsel to give opinions, doing so only when they felt some "insurance" was necessary. This is a change which has taken place only over the last few years but which, with the continued growth of the larger firms at the expense of smaller ones, I would expect to continue at an accelerating pace.

The Australian Society of Accountants allows its members to advertise, with no restrictions other than those which may be imposed by trade practices legislation. In Victoria, Western Australia, New South Wales and The Australian Capital Territory a solicitor may now advertise in connection with his practice in whatever medium he chooses — radio, television or written publication; there being no restriction on what information the advertisement may convey, providing it is not misleading or deceptive, vulgar or senational, or suggests that he is a specialist or expert in a field. Other States are more restrictive. Touting is also widely permitted or at least tolerated.

My Bar, and I think most others in Australia, prohibits by its rules of conduct, advertising and touting. There are only minor exceptions to this.

So far I have not attempted to distinguish between advertising and touting and for the most part there is little point in doing so. I should say that I take touting to mean direct personal solicitation of work, and advertising to mean solicitation of a more public and general kind. But because there are some arguments in favour of advertising which I do not think can be advanced in favour of touting it is convenient, at least initially, to discuss them separately. Finally I will say something about the difficulty of policing some forms of advertising and touting.

Advertising

I intend to approach the topic by considering first what reasons may be advanced in favour of allowing barristers to advertise, and then to consider some reasons against it.

The main reasons which, it seems to me, may be advanced in favour of allowing advertising, roughly graduated in order of boldness, are:

(1) to assist newly admitted barristers in establishing their practices;
(2) (which is much the same thing) to assist those barristers who do not have the social or business contacts of some of their colleagues;
(3) to allow those who possess qualifications and/or experience either generally or in specific fields to advertise those facts;
(4) to better inform solicitors and the public so as to enable them to make a more informed choice;
(5) to stimulate competition thereby reducing fees, increasing efficiency and so providing a better service. The argument may be put less highly; the fact that a ban on advertising is anti-competitive is seen by some as sufficient; and
(6) advertising will result in more work for the bar.

As to the first and second of these it is undoubtedly true that, particularly at the larger bars, there are bright barristers who are not doing as well as their less bright colleagues, simply because they are not known. In Queensland, a newly admitted barrister is allowed to advertise in "The Proctor", the newsletter of the Queensland Law Society, though only once, the fact that he has recently gone into practice, together with his address and telephone number. Should he be allowed to do more? For example, if he obtained a first class Honours degree, or some university prize, should he be allowed to state that? Should he be allowed to disclose some or all of his university results? Should he be allowed to disclose his previous practical training? And should he be allowed to advertise more than once?

There is, I think, a good deal to be said for an affirmative answer to each of these questions, although there would be few, I imagine, who would think that such advertising should be uncontrolled as to what can be disclosed or the manner in which it can be disclosed. I would give an affirmative answer to each of these questions. It should not be difficult to implement a controlled system of advertising whether it be by means of a directory published by the Bar Association or by means of advertisements inserted in the appropriate solicitors' journal, or both. Once the decision is made to allow advertising of this kind for newly admitted barristers there is no reason in principle why it should not be allowed for all barristers. I would therefore also allow such a controlled system of advertising for all barristers. The precise form and content of this, though important, is not, I think, within the ambit of this paper.

Although as I have said I think that the advertising of qualifications and experience should be allowed in a controlled way, I think it would be wrong, at least at the present time, to allow a barrister to advertise that he possesses expertise either generally or in a specific area. I do not think that the question of specialist advertising can be considered in the absence of some system of specialist accreditation; in other words a course of specialist study and training which is acceptable to the controlling professional body. There is no doubt that the law is increasingly more complex and that there are now many barristers practicing as specialists. But at the present time in some cases barristers acquire specialist practices by accident rather than design and in some by design rather than expertise. No doubt allowing a newly admitted barrister to advertise the fact that he has an honours degree in family law or that he has a degree in town planning may help to launch him on a specialist career in family law or planning law. But it seems to me that more than this is needed; that there is a need for some system of specialist accreditation. Nevertheless it is sufficient to say here that until there is some such system of specialist accreditation it would be unwise to allow barristers to advertise expertise, rather than academic qualifications or experience, in any specific area. The distinction may be a fine one between advertising that one has practiced only in family law for five years on the one hand and, on the other, advertising that one is a specialist in family law. Nevertheless I am inclined to think that until there is some system of specialist accreditation the former should be allowed, subject to the sort of controls that I have mentioned, but the latter not allowed.

The fourth argument which I mentioned in favour of advertising was to better inform solicitors and the public so as to enable them to make a more informed choice. I would accept this argument to the extent that it would allow advertising of the kind I have already mentioned. But further than this I would not go. Advertising which is overtly persuasive rather than simply stating relevant facts about the barrister concerned clearly would not assist in relevantly informing the solicitor or client. And even some advertising which did no more than state facts, such as a percentage of cases won or amounts of damages that had been obtained would not, I think, be relevantly informative. There are as I shall mention a little later other good reasons why advertising of this kind should not be permitted.

The fifth reason which I mentioned, that advertising reduces fees and/or increases efficiency is more controversial. Some America surveys claim to demonstrate this. Whilst I would accept that allowing barristers to advertise the fees which will be charged in a specific matter may result in reduced fees I would be inclined to think that this would, more often than not, also result in a reduction of the quality of work resulting from the cutting of corners in order to do the work for a reduced advertised price whilst still making a profit. In any event, at least in the case of the surveys which I have seen, the situation in America before advertising of fees was allowed was that there was no restriction upon maximum fees; so that the American experience may not be relevant here where in almost all jurisdictions the maximum fees which barristers may charge, or at least which may be recovered in litigation, are either fixed by a scale or subject to taxation.

The final reason which I mentioned as being advanced in favour of advertising is that it will result in more work for the bar. Again American surveys claim to show that advertising by lawyers in America resulted in greater community awareness of lawyers' services and consequently in more work for the profession. Although, as I mentioned earlier, barristers may look not only to solicitors but also, in some cases, to others as persons who have some say in their engagement, it remains true that, for the most part, it is solicitors who will make the final choice. And I do not see advertising as having the effect upon solicitors of causing them to brief barristers more. Even if I am wrong in this I would be inclined to think that advertising to this end could adequately be done at a corporate level. It is possible, for example, that advertising by Bar Associations or this body might convince solicitors and such of those clients who frequently have some say in briefing barristers that work such as settling pleadings and affidavits and giving opinions on legal questions is (if that is the case) more efficiently and more cheaply and better done by barristers than solicitors.

There are a number of arguments which may be advanced against advertising. Some of those which are commonly advanced are, not in any particular order:

(1) That advertising places too much emphasis on achieving success rather than upon the ethical duties of a barrister including his overriding duty to the court;
(2) That in order to provide a cheaper and competitive service barristers may be tempted to cut corners and lower standards;
(3) That advertising, by emphasising the money earning aspect of our profession, lowers our own and other persons respect for the profession;
(4) That advertising promotes exaggeration and even dishonesty; and
(5) That misleading advertising is extremely difficult to police.

This argument that advertising may cause the erosion of a barristers ethical duties including the duty to the court because it places too much emphasis on success presupposes that such advertising will assert or imply that the barrister is likely to be more successful rather than better than his colleagues. No doubt the line between these two is a thin one but I do not think that the argument can be properly advanced against an advertisement which states only qualifications or experience either generally or in a particular field. Beyond that I consider that the argument is a valid one.

The same may be said of the argument that advertising will lower standards of competence in the race to compete.

I do not think there is any doubt that advertising other than of the kind which I would allow lowers our own and other persons respect for the profession. At first sight that argument may seem both pretentious and old fashioned. Yet one of the most important characteristics of our profession is its dignity which is inextricably linked with the dignity of the entire judicial system. I think that uncontrolled advertising and even controlled advertising which goes beyond the sort of information which I earlier envisaged, would result in the erosion of this dignity.

The fourth reason, that advertising promotes exaggeration and dishonesty is I think self evident. Our own experience in litigation, for example, actions pursuant to Section 52 of the *Trade Practices Act*, shows this to be true of others.

I shall defer consideration of the last argument advanced, that misleading advertising is difficult to police, to a little later.

In summary with respect to advertising I think that there is a good deal to be said for allowing barristers to advertise qualifications and experience. Furthermore if there were some system of specialist accreditation I would allow advertisement of that also. The way in which this is to be implemented should, I think, be controlled by the relevant controlling body by itself producing a directory and/or settling the form of advertisements to be inserted in solicitors' journals. Beyond that I would be reluctant to go. I can see no advantage to the public or to the profession in doing so; and I can see a real possibility of a consequent erosion of our ethical standards, of our standards of competence and of cherished characteristics of our profession.

Touting

Whilst advertising, when done, is generally so public as to be visible to all, touting may be and often is surreptitious. Despite the fact that it too is contrary to the rules of at least my Association, I have no doubt that it is prevalent.

Of course, it is not always easy to determine what is touting. A barrister may have mixed motives in taking a solicitor to lunch or inviting him to a party or attending a seminar. There is no doubt that many barristers do all of these things with a view, at least partly, to soliciting work.

There is no justification for it in principle. Whereas some limited form of advertising may be seen to be merely the conveying of relevant information about a practitioner, the better to enable the solicitor (or his client) to make a more informed choice of barrister, touting cannot have even that virtue.

Policing Advertising and Touting

So far I have discussed advertising in the sense of inserting an advertisement in a periodical or producing a directory for circulation among solicitors. That is not difficult to police. But there are more subtle means of advertising which are very difficult to police. I have already accepted that a barrister in an important case cannot be accused of advertising if the case and his name are reported in the newspaper. But have you wondered how it comes about that some barristers seem to be mentioned in the papers more frequently than others of their colleagues who seem to do the same kind of work; or that some barristers seem to be reported even in the most trivial cases? Have you noticed that there always happens to be a reported in court when you are appearing against a particular barrister? And have you sometimes wondered, when reading a newspaper article about a barrister (so common these days), at the diligence and investigative skill of the reporter who managed to glean some facts or statistics about the barrister which you thought must have been known only to the barrister?

There is at least good ground for suspecting that some barristers talk to the press with a view to self promotion. But I I can see no way of policing this. If a barrister is prepared to talk to the press and to ensure that an article is written about him without containing any direct quotations he is unlikely to admit that he did so.

The same is true of touting. You may at least strongly suspect that a barrister has taken a solicitor (or potential client) to lunch or invited him to dinner in order to solicit work from him. But it seems to me impossible to prove this.

Advertising of the above kind and touting may result in unfair advantages to the brazen and dishonest whilst being undetectable or at least unprovable. Perhaps all that a controlling body can do is to require an explanation and so at least to embarrass the barrister concerned into telling an untruth.

Accident Compensation Committee

1. At the time of going to press consideration is being given to the two green papers issued late in September by the New South Wales government, one on options for reform of the Transport Accident Compensation Scheme, the other options for reform of the New South Wales Workers Compensation Scheme. The government has announced its intention of putting into operation amendments to both schemes by the 1st January. Why this rush? No explanation has been given. Why both matters are being considered together is not presently clear. The two schemes of compensation relate to different areas of injury and are quite different in purpose and concept. The production by the government of the two papers has been accompanied by, in association with other significant issues, an attack upon the integrity of the Bar with allegations of self interest and vested interests being commonly made. These attacks no doubt are being made in an attempt to neutralise any opposition that the Bar may show to any scheme the government proposes no matter how wide ranging the changes may be. The Bar Council has accepted that such challenges might be made as part of the normal political ploys in circumstances where opposition to government proposals might be anticipated.

2. Compensation for motor accidents and compensation for workers injuries, other than the common law right of a worker to sue at common law for negligence when injured, raise different problems, particularly in the present context. Such defects as are seen in the motor accident compensation system appear to be purely financial being the result of the government's failure over a number of years to fix an appropriate premium to fund the motor traffic accident scheme on a fully funded basis. Until about 1982 the motor traffic compensation scheme was financed on a fully funded basis. In 1982 the government changed to a pay-as-you-go funded basis together with some other minor alterations to the scheme. This change and the failure of the government to fix an adequate premium to fund the scheme whether on a fully funded or pay-as-you-go basis has resulted in the motor traffic accident fund producing in 1985 a deficit in excess of one billion dollars.

3. The workers compensation scheme has in recent years, it is said, become excessively expensive. It would appear, however, subject to actuarial investigation presently under way, that changes recently made to the method of fixing the premium for a workers compensation insurance policy have been defective and have produced some considerable inappropriate inflation of the premium rates. However the Association takes the view that a number of amendments to the workers compensation scheme may well be appropriate at this stage. Every social security scheme of which the workers compensation scheme is one, needs review from time to time to ensure that the benefits payable under that scheme are reasonable in accord with the circumstances existing from time to time.

4. On motor traffic accident questions the Bar Council earlier this year adopted a basic policy which was then passed on to the government of the day. That policy is:
   (a) The fundamental common law right of a citizen who is injured by default of another to be properly compensated for what has been suffered and lost as a result of the injury should be retained.
   (b) The right of a citizen to have this compensation assessed by the ordinary Courts of the land should be retained.
   (c) No alterations to the law applicable to compensation for injuries should have any retrospective operation or effect.

   Those principles are not incompatible with a concurrent no-fault scheme of compensation for motor vehicle accident and permit flexibility in relation to the proper reform of the techniques of assessment and awarding of damages.

5. It is not possible in detail to set out all the activity in which your Council has been engaged in relation to consideration of the proposed government changes. However the following is a brief resume of the major activities which to date have been directed primarily towards the motor vehicle accident scheme since until the issue of the green paper, little or nothing was known of what the government proposed to do about workers compensation despite expressions of disquiet throughout the year in the commercial community at the level of workers compensation premiums:
   (i) Two major submissions including actuarial figures have been made to the State government. One was presented personally to the then Premier Mr. Wran, Q.C., the other delivered more recently to all members of the government with copies for information for the senior members of the Parliamentary Opposition. Copies of these are available to members.
   (ii) A great deal of research has been done including the briefing and obtaining of reports from actuaries on various aspects of the financial side of the scheme.
   (iii) A very well attended seminar was held at the Women's College at the University of Sydney with papers delivered by representatives of the insurance industry and the trade union movement, the medical profession, by members of the Bar and Law Society and a Supreme Court Judge. All speakers expressed strong opposition to the abolition of the "lump sum" method of assessing damage. Members of the New Zealand trade union movement were particularly critical of the New Zealand compensation scheme saying explicitly that it was a scheme not to be followed under any circumstances in Australia.
   (iv) There has been continual co-operation and discussion with the Law Society on the issues involved.
   (v) There has been constant talk and discussion with members of trade unions and the insurance industry on the issues involved.
   (vi) The advice of public relations consultants has

been sought to ascertain the best and most effective method of developing and explaining to the public the opposition to the abolition of the common law right for damages.

(vii) There has been constant contact with various members of the press and the media in an attempt to inform them of the true position and grounds of opposition to certain changes on the part of the Bar Association.

(viii) A submission to the government on the issue of workers compensation changes is presently under way. A copy of it will be available to members in due course.

(ix) The difficulty of having the issues presented by the media compelled the Council reluctantly to take paid advertisements on radio and in the press.

6. Anticipating earlier in the year that funds might be necessary to allow the Bar to put its case to the public a call was made for voluntary donations to a "fighting fund," and subsequently a levy for this purpose was imposed by the Bar Council. The proceeds of that levy are administered separately to the Association's funds. A statement of the position of that fund to date appears in the annual accounts. Payments from the fund in excess of $1,000 are made only upon resolution of the Council. It is proposed to distribute any remainder of the fund pro rata to contributors. This levy and the use to which it has been put, did not meet with universal approval of members. This is inevitable given a topic with social and political implications. Nonetheless an association with over a thousand members cannot act only where opinion is unanimous.

Legal Aid

The activities of the Legal Aid Committee during the past year have, primarily, been aimed at intercession on behalf of individual barristers, where, for one reason or another (and the reasons have been most diverse) the relevant legal aid authority has failed to meet the barrister's full claim of fees, together with liaison with, and lobbying of the legal aid bodies.

The confusion arising from the different requirements of the A.L.A.O. and the Legal Aid Commission, and their differing scales and method of payment, has been increased by speculation surrounding the long delayed merger of the two bodies. The Federal Government's publication of the Legal Aid Task Force Report and the lack of precise indication by the Government of its intentions has caused great apprehension.

This has led to a most difficult year. Nonetheless, it has been possible during the year to negotiate with the Legal Aid Commission an increase in the existing scale and a recognition of the need for greater flexibility in the implementation of that scale in criminal matters. Direct liaison between the Committee and the Senior Officers of both the A.L.A.O. and the Legal Aid Commission has been set up to facilitate intercession by the Bar Council in individual cases.

Much remains to be done in terms of a readjustment of the Legal Aid Criminal Law scales and submissions seeking a rate of Legal Aid fees more in accord with the necessities for those briefed in Legal Aid matters are presently being prepared.

Library

The Library Committee has continued its policy of upgrading and extending services/materials available to members within the budgetry constraints necessarily imposed upon it by the Council.

From October this year the self arrangement of the textbook collection will be altered. Previously, textbooks were arranged in one sequence; alphabetically under the name of the original author. To assist members who like to browse the collection, books will now be shelved by reference to subject, though within each subject heading the books will be arranged alphabetically as before.

Due to the heavy demand for photocopying facilities a new Rank Xerox 1040 photocopier has been installed. The new copier complements the present machine which is still the best photocopier available for copying from large bound volumes.

An agreement was reached at the beginning of the year between the Law Courts Library and the Bar Association to allow barristers' staff to once again use the Law Courts Library. Members are reminded that this facility only enables staff to photocopy materials. Books can only be removed from the library to courts by either the barrister or his/her instructing solicitor.

It was agreed that a course in instruction in the materials and systems of the Law Courts Library would be conducted by the Bar Association's Librarian. To date 80 clerks, secretaries and receptionists have attended the course.

The Committee is pleased to note that the Library is receiving extensive use especially from those members whose chambers are outside Wentworth and Selborne, as well as country and interstate members.

The Library collection now contains extensive source materials covering all fields of law relevant to the practice of members of the Association. Materials that are not available in the Library's collection can be obtained on inter-library loan.

An extensive submission has been lodged with the Law Foundation for funds to purchase sets of The Building Law Reports; Canadian Criminal Cases; Butterworths Company Law Cases (UK) and Queensland Reprinted Statute service.

Investigations are under way with a view to assessing the possibility of providing terminals in the library to enable members to access CLIRS and/or LEXIS. The Committee is hopeful that this will be achieved in a manner which will enable the library staff to provide a service in this regard at reasonable cost to members seeking to utilise it.

Members are again reminded in the strongest terms that marking of materials borrowed from the library, even if only in pencil, is totally unacceptable. Unfortunately, it is a practice that is still occurring.

Further, members are advised that they must return borrowed materials within the time limits set by the Librarian. Failure to do so only causes extra work for the staff and frustration to other members seeking access to such materials. Accordingly, members must, if only in deference and fairness to fellow members, return borrowed materials within the limits referred to. This is a matter of basic courtesy and consideration to others.

It is appropriate for the Committee to publicly recognise the unstinting efforts of the library staff, Mrs. Farmer, Miss Willard and Miss Ackland, during the past year. Without their unfailing courtesy and assistance the library could not possibly have provided the high standard of service to members which has been achieved. The gratitude of all concerned is accordingly acknowledged.

New Barristers

The expanded committee met regularly throughout 1986 under the continued chairmanship of O'Keefe, Q.C. The committee conducted a successful malt whisky tasting in the Common Room in May; the function was well attended by a large number of members including Judges and popular demand seems to indicate that a similar function could be conducted each year. Additionally, the committee conducted a short informal gathering of readers and other members following the readers' practice management workshop on 14 August 1986. O'Keefe, Q.C. and other members of the committee participated in the workshop which was the first of its kind to be conducted within the Reading Programme. Readers who attended considered the workshop to be of benefit as well as the informal party which provided them with an early opportunity to meet other readers and more senior members of the Bar.

As in previous years the committee held another open forum seminar for new barristers in the Common Room. A number of matters of interest were raised for discussion and were referred by the committee to the Rules Committee; those items, together with other recommendations for change made by the committee resulted in various amendments to the Association's rules.

More recently, the Council has adopted a recommendation by the Committee that a "Meet the New Silk" function be held shortly after the announcement of new silk in 1986. The function will be in the format of a 'fifteen bobber' and will be conducted for the purpose of congratulating the successful applicants for silk and to introduce them to the Bar in a semi-formal manner. It is also hoped that the function would have the further effect of promoting the corporate identity of the Bar as a whole.

Whilst the attendance of new barristers at the functions conducted in 1986 was highly encouraging and productive, it appears that only a modest proportion of members of less than five years seniority took advantage of these occasions. The committee envisages a similar programme of meetings and functions for 1987 and it is hoped that more new barristers will involve themselves.

In addition to their participation at meetings and functions, members are also strongly encouraged to bring matters of interest to the committee's attention.

Listing

1. The perennial problem of delays in the Supreme Court common law list has been the subject of continuous discussion between Slattery CJ at CL and Court officers and the Association's listing sub-committe consisting of Gormly QC, Cummins Qc, Carr and Biscoe. There are regular meetings between the two groups.
2. The problems arise from:
   (a) The number of cases;
   (b) The fact that the common law list has to supply judges for common law, the Court of criminal appeal, the administrative division, the commercial causes jurisdiction, country circuits and any stray enquiry. The judges' workload is therefore extremely heavy and stretched to the limit, particularly when it is considered that at any one time there may be judges sick or on leave.
3. Below is a table of the listing statistics for 1985 and to September 1986. It will be seen that in 1986 the number of not reached matters increased considerably. This appears to have been the result of an experimental policy of listing more cases for hearing in the hope that by listing cases there would be a greater settlement rate. The Bar Council supported this experiment which has turned out to be not very successful and the number of cases being listed is now fewer, in an attempt to reduce wastage of time and costs in having many not reached cases.
4. The list for long cases (cases lasting more than five days) is already booked up into June 1987. As a result of a request from the Bar that list has been retained despite some misgivings by Slattery CJ at CL. It seemed to the Bar that this was the only way long cases could be assured of a hearing. Slattery CJ at CL and his officers are inclined to the view that the existence of the long list upsets the balance of the list and would prefer to see it go but are prepared to leave it in position for the time being.
5. Consideration is to be given to changes to the callover procedure with the introduction of compulsory conferences before a judge for the purpose of settlement negotiations.
6. Generally lists in other jurisdictions seem to be working reasonably smoothly, though some complaints have been received particularly about the operation of the District Court Commercial list on which there have been discussions with the Chief Judge who at this stage wants the system to remain in place for further experience.

1985

MONTH		TOTAL MATTERS LISTED	NOT REACHED JURY	NOT REACHED NON JURY	NOT REACHED MOTOR VEHICLE ASSESSMENT	TOTAL % NOT REACHED ALL MATTERS
JANUARY AND FEBRUARY	JURY	105	29	8	—	37 = 14%
	NON-JURY	75				
	M/V ASS	86				
	TOTAL	266				
MARCH	JURY	102	20	4	8	32 = 15.3%
	NON-JURY	58				
	M/V ASS	49				
	TOTAL	209				
APRIL	JURY	81	6	1	2	9 = 5%
	NON-JURY	50				
	M/V ASS	48				
	TOTAL	179				
MAY	JURY	68	7	6	3	16 = 8.2%
	NON-JURY	60				
	M/V ASS	67				
	TOTAL	195				
JUNE	JURY	96	14	6	3	23 = 11%
	NON-JURY	54				
	M/V ASS	59				
	TOTAL	209				
JULY	JURY	68	13	Nil	Nil	13 = 7.5%
	NON-JURY	59				
	M/V ASS	52				
	TOTAL	179				
AUGUST	JURY	71	3	4	Nil	7 = 4.1%
	NON-JURY	44				
	M/V ASS	53				
	TOTAL	168				
SEPTEMBER	JURY	63	5	2	Nil	7 = 4.7%
	NON-JURY	54				
	M/V ASS	55				
	TOTAL	172				
OCTOBER	JURY	65	12	5	Nil	17 = 9.71%
	NON-JURY	53				
	M/V ASS	57				
	TOTAL	175				
NOVEMBER	JURY	62	5	Nil	2	7 = 4%
	NON-JURY	63				
	M/V ASS	53				
	TOTAL	178				
DECEMBER	JURY	65	18	6	4	28 = 16.37%
	NON-JURY	56				
	M/V ASS	50				
	TOTAL	171				

1986

MONTH		TOTAL MATTERS LISTED	NOT REACHED JURY	NOT REACHED NON JURY	NOT REACHED MOTOR VEHICLE ASSESSMENT	NOT REACHED NOT REACHED ALL MATTERS
FEBRUARY	JURY	93				
	NON JURY	109	20	7	9	36 = 12.90%
	M/V ASS	77				
	TOTAL	279				
MARCH	JURY	102				
	NON JURY	92	41	18	11	70 = 24%
	M/V ASS	89				
	TOTAL	283				
APRIL	JURY	96				
	NON JURY	76	31	15	8	54 = 20%
	M/V ASS	97				
	TOTAL	269				
MAY	JURY	106				
	NON JURY	71	26	9	11	46 = 17%
	M/V ASS	85				
	TOTAL	262				
JUNE	JURY	65				
	NON JURY	72	28	23	11	62 = 28%
	M/V ASS	81				
	TOTAL	218				
JULY	JURY	90				
	NON JURY	78	32	10	4	46 = 18.32%
	M/V ASS	83				
	TOTAL	251				
AUGUST						
	TOTAL	191	20	14	7	41 = 21%
SEPTEMBER	JURY	69				
	NON JURY	70	13	10	3	26 = 12%
	M/V ASS	74				
	TOTAL	213				

Prospects and Problems of Reading and Continuing Legal Education

The most important development in reading in 1986 has been the expansion of the Reading programme to include on-the-feet training for new barristers.

Readers are now required to prepare exercises which are heard in a simulated Court constituted by Judges or counsel. Most involve the drafting of originating process as well as preparation for Court.

Earlier this year, the Chairman and a number of members of the Reading Committee attended a full day of such exercises. The Committee has perceived a need to incorporate more of this type of training in its programme with emphasis on the correct form of affidavit evidence, adducing evidence-in-chief, cross-examination, and the presentation of cases in court rather than technical legal arguments alone.

Earlier this year the Bar Association was financially assisted by the Law Foundation of New South Wales in purchasing video equipment, for which help we are most grateful. The video equipment enables the Readers to review their taped performance with other Counsel. It is a most valuable teaching aid.

While the programme has expanded the number of readers enrolled therein has decreased. In 1985 105 Readers were enrolled in the two programmes. In 1986 only 70 have enrolled.

The downturn in the numbers admitted as practising Barristers is believed to be influenced by the lack of initial Reading accommodation and the lack of affordable accommodation after the reading year has concluded.

This problem, perhaps the greatest facing readers, is also causing concern to the Reading and Accommodation Committees. The Accommodation Committee has canvassed the views of Readers about the problem and is attempting to devise a workable solution.

Multiple admission dates also continue to cause problems, particularly in the administration of the programmes.

Non-attendance by Readers at lectures is also a problem. Many Readers are away on circuit for weeks at a time, and others schedule conferences for lecture times. This problem adds strength to the suggestion that there be some certification at the completion of the period of Reading or at least a more stringent application of Rule 98 (b) of the Bar Rules (A reader shall not, during a period of three months commencing on the date of his enrolment in the Reading Programme, appear in any Court or Tribunal other than with, or with the approval of, or on behalf of, his Master).

On the whole, however, the prospects for the programme look good. The willingness of Judges, Counsel and Court Officers to participate in the programme is a credit to the New South Wales Bar and Judiciary. Comments by Readers about the programme are overwhelmingly favourable, and every attempt is made to accommodate suggested changes which benefit Readers.

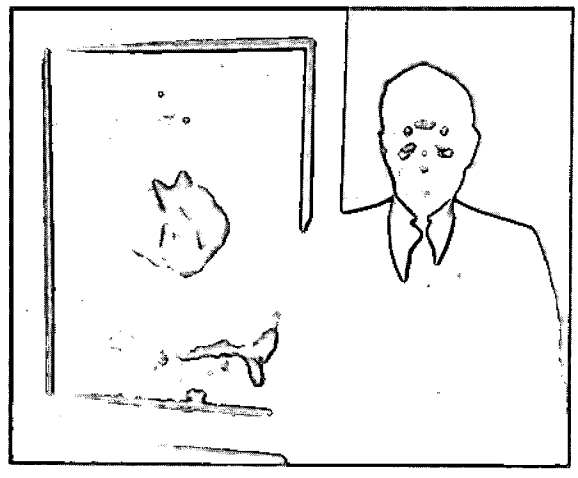
1986 has perhaps seen more CLE seminars than ever before. First, there was the series of seminars on Evidence Law Reform, organized in conjunction with the Australian and New South Wales Law Reform Commissions.

These were followed by Professor Irving Younger's visit in June, and more recently of course Linton Morris QC's popular lecture on Jury Trials.

Much of the material published in the Australian Bar Review to date has been drawn from the Bar's CLE programmes.

In addition, the reading notes have been advertised for sale to all members and selective reading papers have been more particularly advertised.

It is the aim of the Legal Education Committee to increase the availability of CLE seminars, and it is to be hoped that the demand for them will also increase. Any suggestions members may have for CLE topics and speakers will be welcomed by the Reading Committee.



Professor Irving Younger before his lecture at the Bar Association on 10 June 1986.

Obituaries

With deep regret the Association records the names of those members and ex-members who have died since the last report.

L.F. Osborne
R.L. Migodzinski
The Honourable H.L. Cantor Q.C.
G.T.A. Sullivan Q.C.
M-L Hervic
L.G. Tanner Q.C.
The Honourable Mr. Justice Murphy

Duty of the Bar in the Conduct of Criminal Trials

A recent matter which came before the Bar Council raises an issue as to the duty of the Bar of which all barristers should be aware.

A barrister was appearing in a Criminal Trial. The judge was in the course of summing up when the trial was adjourned at the end of the day to the following day. The barrister had previously been briefed as junior counsel with senior counsel for a plaintiff in a civil trial the following day. It was a matter in which much preparation with senior counsel had taken place. The barrister was faced with a dilemma: which could should be attend?

He chose to appear in the civil matter with his leader. He arranged for the barrister appearing for the co-accused in the trial to look after his accused's interests.

The matter came to the attention of the Bar Council and was referred to a Disciplinary Tribunal comprised of Murray, Q.C., Martin, Q.C., and Horler to investigate and determine the question of whether the barrister had acted in breach of Rules 9 or 21 of the Bar Rules.

The Tribunal found that the barrister had breached Rule 9. It regarded his duty as clear. He should have made arrangements with his solicitor and senior counsel in the civil trial for alternative representation.

In its reasons for determination the Disciplinary Tribunal said:

> "The Bench is entitled to be able to count on the Bar for every appropriate assistance during any trial: the community is entitled to have the Bar fearlessly and competently pursue, within the system, the interest of a client. Whilst the realities of practice as the pursuit of a living must be recognised by all, no competent barrister would permit self-interest to distort the paramount duty to the client: to be useful you must be present.
>
> No competent practitioner would fail to appreciate the importance of the charge or summing up to the Jury, and the necessity of the presence of Counsel engaged during that procedure. Whether a written set of rules of legal professional conduct includes such a requirement or not, the all powerful standards of the Bar demand such conduct.
>
> It is difficult to conceive of a situation short of emergency such as accident or illness which would involve the absence from the summing up of Counsel engaged: this requirement transcends any obligation of the Bar to accept a criminal defence task where the only conflict is a non-criminal brief — the N.S.W. Bar Association Rule 9 is merely an example of one aspect of this duty."

There were some matters of mitigation in the present case which led to a reprimand for the barrister and a requirement that he undertake three months extra pupillage.

The Bar Council reminds the Bar that Rule 9 requires criminal trials in which a brief is already held to be given priority over civil proceedings. This is all the more so where the criminal trial is part heard.

The trial judge's summing up is no less an important stage of the trial than any other. It is not proper conduct within Rule 9 to abandon the criminal trial in the above circumstances. In certain circumstances such conduct may well be a breach of Rule 21 in that it is conduct contrary to the standards of practice becoming a barrister.

Membership

1058 practising barristers were members as at 8th October 1986. They were in chambers as follows:

Wentworth	224
Selborne	175
University	42
Wardell	84
Edmund Barton	75
Blackstone	32
Frederick Jordan	54
Chalfont	30
Culwulla	16
Garfield Barwick	60
Windeyer	84
Mirvac	6
Lionel Murphy	4
Crowns Prosecutors and Public Defenders	23
A.C.T.	19
Newcastle, Wollongong, Parramatta and Coffs Harbour	43
Others	29
Interstate and Overseas	58

There were 16 Life Members and 290 Ordinary Members Classes "B" and "C"; the total membership being 1364.

Gifts

The Hon. D.F. McGregor, Q.C. presented the Library with Corben on Contracts. (This gift was made in 1985 and the Editor apologises for this late acknowledgment).

The Hon. Sir Gerard Brennan, K.B.E. presented the Library with 'The Inns of Court and Chancery' by W.J. Loftie and illustrated by Herbert Railton.

B.W. Walker presented the Library with 'Great Legal Fiascos' (S. Tumim) and 'Samuel Walker Griffith' (R. Joyce).

Four silver menu holders were donated by A.M. Gleeson, A.O., Q.C.

The Association appreciates these gifts and thanks the donors.

Religious Services

Services to mark the beginning of the Law Term were held as follows:

On Monday 3rd February a Red Mass was celebrated in St. Mary's Basilica. The Celebrant and Preacher was His Lordship Bishop David Cremin, D.D., Bishop of the Southern Region.

Also on Monday 3rd February the Reverend John Mallison, Th.L., Past Moderator of the Uniting Church, preached at a Service held in St. James', Queen's Square.

On Wednesday 5th February a Service was held in the Greek Orthodox Cathedral of the Annunciation.

On Saturday 8th February a Law Sabbath Service was held in the Great Synagogue. The Rabbi Apple was the Minister.

A mid-year Service was held at St. Stephen's Uniting Church on Wednesday 23rd July.

Reform of the Highway Non-Feasance Rule

The New South Wales Law Reform Commission is seeking comments on its reference on the reform of the non-feasance rule.

The Non-Feasance Rule

Because of the non-feasance rule, highway authorities are under no duty to road users to undertake positive measures to ensure that highways under their control are safe for normal use. Accordingly they incur no civil liability for injuries or damage caused by their failure to maintain or repair a highway. Nor can they be liable for failing to act to ensure the safety of the public in other ways, such as sign-posting or fencing off dangers occurring on or near the highway, or for failure to remove obstructions on the highway. Such failures to act amount to non-feasance.

Terms of Reference

The terms of reference which the Commission has received from the Attorney General under its Community Law Reform Programme require it to examine whether the non-feasance rule should be modified or abolished.

Need to Reform

A great deal of confusion surrounds the operation of the rule. The rule is subject to various ill defined exceptions and the central distinction between non-feasance and mis-feasance is unworkable and its operation unpredictable. However, this legal confusion is not the main reason for reform.

The major argument for reform is that individuals whose loss may be great are denied a legal remedy even if they are able to show that their injuries were caused by the negligence of a highway authority. On general principles of tort law those who can show fault are entitled to compensation. The non-feasance rule is anomalous in denying compensation.

Tentative Proposal for Reform

The Commission's tentative view is that the rule should be abolished. However we are conscious that limits must be placed on the liability of highway authorities. Limits could be provided by the enactment of statutory guidelines which define the circumstances in which liability is to be imposed. However the Commission believes that greater flexibility can be achieved by relying on the common law. Developments in the law concerning the liability of public authorities in other matters indicate that the courts are alive to the need to balance public and private interests.

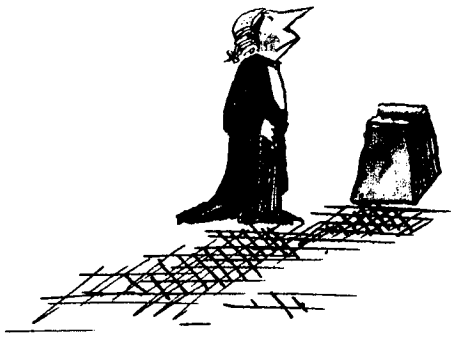
Effect of Abolition

On abolition of the non-feasance rule the Commission would expect the common law to impose a duty on highway authorities to protect the public from unnecessary risk. This would not necessarily impose a duty to repair or maintain as on many occasions the obligations could be met by placing warning signs or protective barriers. The standard of care required would vary with the circumstances of each case, in particular with the class of road involved. This liability will be further tempered by the immunity for policy decisions taken by public authorities recognised by the High Court in *Heyman's* case 59 ALJR 564. This immunity would allow highway authorities scope to set their financial priorities free from judicial scrutiny. In *Heyman,* Mason J said "a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care."

Comments Sought

The Commission seeks comments on the matters raised above. As we intend to complete our Report in December we would like comments by mid-November. They should be sent to Ms Helen Gamble, Commissioner in charge of the Community Law Reform Programme, New South Wales Law Reform Commission, GPO Box 6, Sydney, 2001.

The Commission has expanded on the views expressed here in a consultative paper which it has provided to the President of the Bar Association. Copies are available from the Commission on request.



That Sinking Feeling . . .

In the course of the *Special Commission of Inquiry into the Policy Investigtion of the death of Donald Mackay,* some counsel got very involved . . .

Bongiorno Q.C. (Victorian Bar)

Q: I tell you this that in the report of Mr. Justice Stewart into the Age tapes he has reported that Sgt Seedsman — and I will give it to you exactly as he said it — that Sgt Seedsman had had some 20 contacts with Trimbole shortly prior to his leaving Australia and that those contacts had been brought to the attention by Seedsman of the Assistant Commission for Crime, Mr. Abbott. If that were the case would it not have been do you think, and you may not be able to answer this, appropriate that someone should have told you that the police had some sort of contact with Trimbole at a time when you were contemplating charging him with conspiracy to murder. Should not the system have been such, assume that Sgt Seedsman's contact with Trimbole was at the request of and with the knowledge of his senior officers should it not in ordinary proper police communications have somehow been brought to your attention that this was occurring. (Objected to; allowed).

The question was read out by the shorthand reporter.

Bongiorno, Q.C.: "That's an appalling question — I withdraw it."

Conferences 1986-87

Date	Conference	Place	Contact
November 12-13	Symposium — Financing in the new liberalised Japanese market	Tokyo	Lawasia
November 13-14	IBA Seminar Protection of Sellers in Transnational Sales	Hong Kong	International Bar Association 2 Harewood Place, London WIR.9HB, England
November 14-16	5th Victorian Legal Convention	Geelong	The Secretariat, P.O. Box 180, Geelong, Vic. 3220
November 17-20	Lawasia Energy Section 1986 Conference	Bangkok	Lawasia, 170 Phillip Street, Sydney
November 24-25	Seminar — National and International financing of commercial real estate: legal and business issues	Frankfurt	IBA, 2 Harewood Place, London WIR 9HB, England
1987			
January 22-25	Conference and workshop — Commercial arbitration	Colombo, Sri Lanka	Bar Association of Sri Lanka, 129 Hultsdorp Street, Colombo 12, Sri Lanka
February 15-18	International Bar Association Arab Regional Conference	Cairo	IBA, 2 Harewood Place, London WIR 9HB, England
March 6-7	IBA Seminar — rights and obligations of the parties to insurance contracts	Zurich	IBA, 2 Harewood Place, London WIR 9HB, England
May	IBA Seminar — International and financial law	Paris	IBA, 2 Harewood Place, London WIR 9HB, England
June 28-July 1	Section on General Practice Conference	Montreaux	IBA, 2 Harewood Place, London WIR 9HB, England
June 29-July 4	10th Lawasia Conference	Kuala Lumpur	Lawasia, 170 Phillip Street, Sydney
August 24-28	8th World Conference on Procedural Law	Utrecht, Holland	Utrecht University, Utrecht, Holland
September 10-11	Seminar — international arbitration	London	IBA, 2 Harewood Place, London WIR 9HB, England
September 14	IBA Seminar — Life after big bang	London	IBA, 2 Harewood Place, London WIR 9HB, England
September 14-18	Section on Business Law Conference	London	IBA, 2 Harewood Place, London WIR 9HB, England
September 18-20	9th National Labor Lawyers Conference	Perth	Nuala Keeting, Society of Labor Lawyers, G.P.O. Box P1596
September 20-25	24th Australian Legal Convention	Perth	Law Society of Western Australia G.P.O. Box A35, Perth
October 1-5	New Zealand Law Conference	Christchurch	Organising Committee, 1987 New Zealand Law Conference, P.O. Box 4459, Christchurch, New Zealand

This Sporting Life

Golf

The Bench and Bar v. Solicitors' Golf Day was held on 23rd January 1986 at the Manly Golf Club. The event was a four ball best ball stableford and apart from the individual prizes for the best 18 and best 9 holes, teams from the Bench and Bar and the solicitors competed for the Sir Leslie Herron Trophy.

This annual competition attracted 125 players including 30 members of the Bench and Bar. Although Rick Seaton and Christian Vinden, two younger members of the Bar won the individual events with 50 points, the Bench and Bar team was defeated by the solicitors eleven matches to four and the Sir Leslie Herron Trophy was, therefore, retained by the solicitors.

Mr. Justice Brian Cohen thanked the Solicitors Golfing Society for organising the day and presented the Sir Leslie Herron Trophy to John Ferris on behalf of the Law Society's Golfing Society. John Ferris, on his part, thanked the Bench and Bar for their continuing support of the event and wished them well for the return match in January, 1987.

Bench and Bar team members J.K. O'Reilly and Judge Bill Nash, as well as John Hislop and Neil Francey received minor prizes.

Bar Takes Soccer Cup

An outstanding performance by the New South Wales Bar Team this year has brought the Challenge Cup for Soccer between barristers and solicitors back to the Bar Association.

Since the series began in 1980, the Bar has won the trophy only twice, the first time being in 1984 on a penalty shoot-out after the score at full-time was one goal all.

Last year also the game ended in each side scoring an even number of goals (two each) but one of the Bar's goals was an own-goal for the other side, so that the match resulted in a 3-1 win for the solicitors.

This year the barristers decided to put such uncertainty to rest. From the kick-off the pressure was on. Eleven seconds later the first goal for the barristers (by Mathew Rowe who was to score a hat-trick) was in the back of the solicitors' net.

Although temporarily stunned by such an early goal against them, the solicitors fought back with several good chances going astray.

Then, 25 minutes into the first half, a low cross by Nick Tiffen was turned into the solicitors' net by a defender trying to clear the ball. The score was then 2-nil to the Bar.

Two minutes later, another good goal by the Bar's team and the solicitors went in at the half-time break down 3-nil (the Bar's best half-time score ever).

A determined counter-attack by the solicitors after half-time lasted but three minutes before the Bar scored again with a well supported goal. This was followed by three more goals after five, eight and thirteen minutes of play in the second half. The score then stood at 7-nil! (Visions of a 7-2 drubbing at the hands of the solicitors in 1980 were beginning to fade into sweet revenge).

The score however, did not truly reflect the relative ability and effort of the solicitors' team and, not to give up, they struck back with a well-worked goal.

Then, under sustained pressure from the solicitors, the Bar conceded an own goal just before full-time to bring up a final score of 7-2.

This year's venue was the No. 1 soccer field at Centennial Park which proved to be a most pleasant spot on a warm 21st September. Judge Walsh was on hand to present the Cup and the best and fairest player trophy (which was won by Alan Goldsworthy).

John de Meyrick (minus wig and gown) refereed a fast-moving and incident-free game, whilst Nick Tiffen and John Fisicaro organised the Bar and Solicitor Teams, respectively.

Playing for the Bar this year were: Gary Charney, Dennis Flaherty, Chris Fox, Alan Goldsworthy, Peter Grey, Alistair Little, Brian Ralston, Mathew Rowe, Bill Purves, Peter Stone, Nick Tiffen, Paul Smith.

The Victorious 1986 Soccer Team

Back row (standing L-R): Judge Walsh, Brian Ralston, Gary Charney, Mathew Rowe, Alistair Little, Paul Smith, John de Meyrick.
Front row (Kneeling L-R): Peter Gray, Dennis Flaherty, Peter Stone, Nick Tiffen, Alan Goldsworthy, David Williams

Hockey

On 29th June 1986 a valiant Bar team went down to the Solicitors 1-4, having pegged them back to 1-1 for much of the match.

Katzman made history by being the first person in present memory to volunteer to play in goal and also by being the first female to play in one of these vicious contests. Hers was a valiant effort and Gyles, Q.C., Masterman, W.C., and Graham, Q.C., (a silken back-line!) were vigorous in assisting.

Warburton was again prominent in attack and was well supported up front by Bellanto and Travers. Ainsworth, Flaherty, L. King, A.S. Morrison, L.G. Stone and others participated enthusiastically.

Despite the loss, and despite a cold wind, victors, vanquished and supporters (including our loyal Registrar) enjoyed a pleasant gathering afterwards.

Callaghan remains confident that the Bar will win next year.

Book Review

Geoff Cahill,

"Promotion and Disciplinary Appeals in Government Service"

Published by Law Book Co., 1986

Reviewed by J.W. SHAW

Amongst the proliferating administrative tribunals found in contemporary Australian life are those concerned with promotion and discipline within public sector employment. The tribunals deal with vital rights of public servants when they adjudicate upon disciplinary matters — dismissals, demotions, fines and the like. However, the predominant work of the tribunals (in quantitative terms) is to be found in the assessment of officers for promotion. Lockhart J (in *Hamblin v Duffey (No. 2)* (1981) 55 FLR 228) thought it clear that such appeals could "adversely affect the rights, person and legitimate expectations . . ." of the officers concerned.

Hunt J had doubts, expressed in *Osmond v Public Service Board* (1983) 1 NSWLR 702, whether the officer had any more than "an interest" at stake until he had convinced a decision-maker of his superior fitness.

Whatever might be the precise outcome of this analysis, it is plain that the tribunals are performing important functions, with an aggregate impact upon the competence of the public sector. Much has changed from the times when seniority dominated public service progression, when the longest serving employee had what Sir Owen Dixon referred to as the "presumptive claim" to a vacant promotional position. Nowadays, most of the statutes make "efficiency" either the predominant or the exclusive criterion of advancement.

Despite the obvious impact of promotion and disciplinary appeal tribunals upon the approximately one third of the workforce engaged in public employment, little has been written about their work and little published analysis is obtainable about their decisions or their reasoning. Notwithstanding the involvement of legal practitioners appearing before such tribunals and in argument in the superior courts arising from their processes, the tribunals have led a cloistered existence.

Whilst general in its title, the Law Book Co.'s recent publication by Mr. Cahill turns the spotlight on only one, but an important one, of these tribunals, namely the Government and Related Employee's Appeal Tribunal which deals with the New South Wales Public Service and most statutory corporations created by the New South Wales Parliament. The author is a legally qualified chairman of the tribunal whose senior chairman (Mr. Justice W.B. Perrignon) has sat for many years in the statutory predecessors of the present forum. In an era of acronym, it is wholly unsurprising that this tribunal is known colloquially and (even) in the superior courts as the "GREAT."

The book is a workmanlike and useful account of the legislation governing the tribunal and the way that the legislation has been developed in practice. It includes references to many unreported decisions of the tribunal as well as an analysis of judgments given by the Court of Appeal — to which appeals go on questions of law — both reported and unreported. Obviously, the author was in a unique position to assimilate the material and to put it in a coherent form for publication. One of the chief dangers of any such publication — judicial decisions overtaking and indeed contradicting the text — has been largely overcome by the publisher's inclusion of an "update" at the start of the book which draws attention to and comments on a series of recent judgments. For example, the overturning by the High Court of the Court of Appeal's judgment in *Osmond* (concerning the giving of reasons for administrative decisions) and the as yet unreported judgment of the Court of Appeal given in July 1986 in *Strange-Muir v Corrective Services Commission of New South Wales,* wherein the Court of Appeal decided (by majority) that the withdrawal of a successful appointee from his or her promotional position did not destroy the continued obligation of the tribunal to determine an appeal lodged against that appointment are dealt with.

The work is graced by an elegant foreword contributed by Mr. Justice M.D. Kirby, who kindly records for posterity the role of Miss Irene Bradshaw, an administrative mainstay of the Crown Employee's Appeal Board during the 1960s and 1970s.

As usual, criticisms could be made. The text would have been illuminated by reference to the works of G.J. McCarry of the Sydney University Law School whose contributions in the area of public sector employment law in journals of industrial relations and public administration have been substantial. The author has, ambitiously, provided his own cartoons to enliven the publication. Kirby J has kindly compared these to the artwork and humour to be found in Professor Wilenski's survey of New South Wales public administration. But those cartoons were the talented product of Patrick Cook, and the publishers might have been well advised to have commissioned works of that calibre.

These quibbles aside, the book has both readability and utility. For practitioners concerned with the area, either at first instance or in the appellate courts, it is essential.