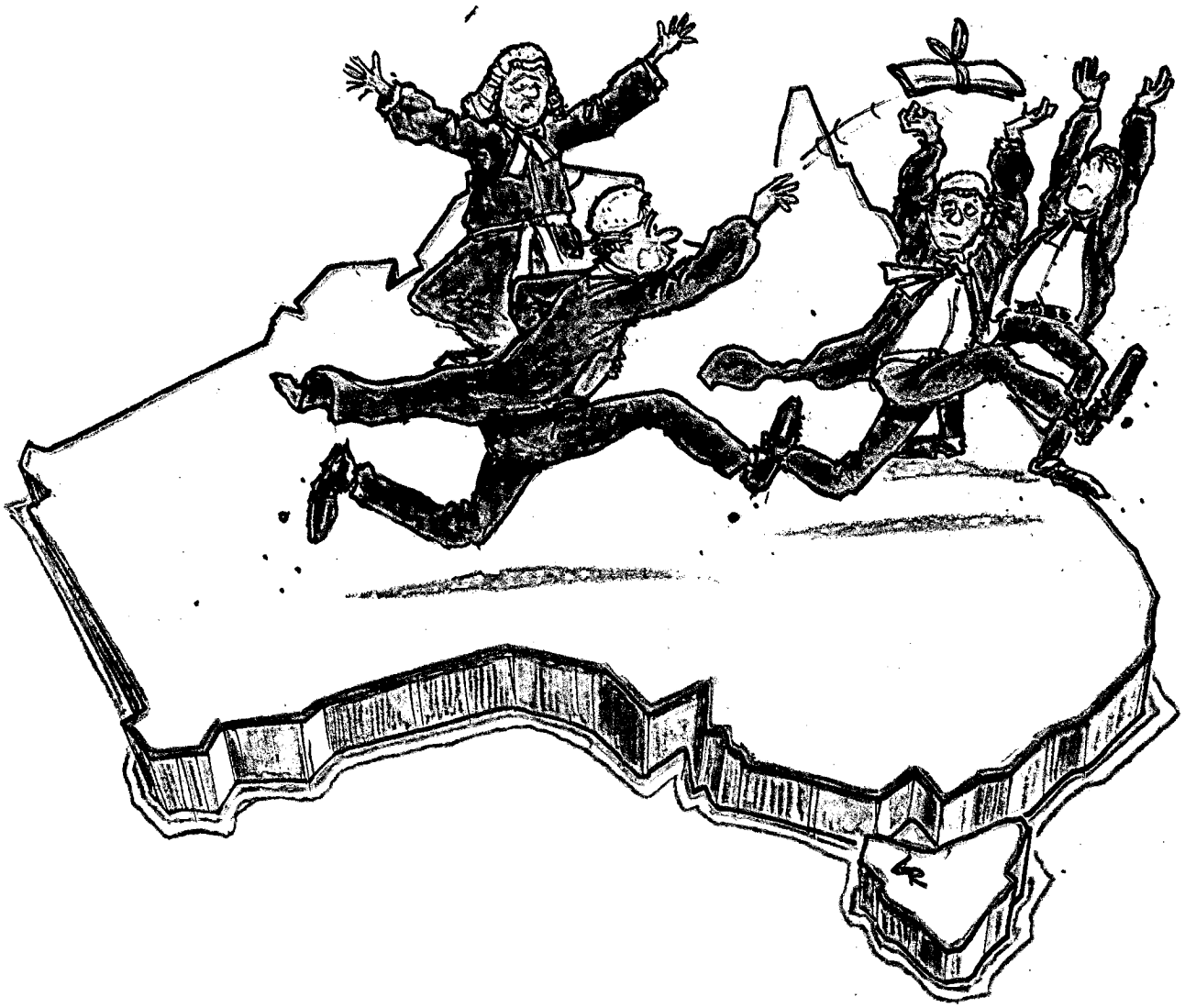
Bar News

The journal of the NSW Bar Association



Forward Pass!
Cross-Vesting - How Will it Work?

Spring 1988

(Advertisment)

NEW AUSTRALIAN ANNOTATOR TO BE LAUNCHED

Next month will see the launch of a new legal publication on to the Australian marketplace. *The Australasian Current Case Annotator* is being published by the *The Legal Notator* to fill the growing need of lawyers for comprehensive and up-to-date research materials.

Milestone

News of the book has been received enthusiastically by practitioners across the country.The book complements *The Legal Notator*, the publication from which it draws its annotations. The company's co-founder, Paul Hannah said that he viewed the book as a milestone in the company's history."We're very excited about it, and gearing up for a very high level of demand. We expect to see the day when a copy of the *'Annotator'* will be on every lawyer's desk, as essential as the reports themselves".

'Noting-Up'

The company was formed in July 1987 when Paul was working with a group of barristers in Brisbane. He established a computer system for one barrister and conducted 'on-line' computer database searches for others. At other times he did the 'noting up' of the Library. As anyone who has done'noting up' will attest, it is a very tedious job. "No other work in chambers can be quite so boring", Paul said. Yet as many lawyers know, the systematic cross-referencing of cited cases is invaluable in their research. Out of this tedium came the idea of an Australian series of notations - similar to the English "Noter-up" - produced as small adhesive tabs, to be placed in the Reports. The idea met with the same response around the country - lawyers everywhere said the same thing "Why hasn't someone done this sort of thing before?"

So Paul, with his colleague Debra Fallon, created a database of all current case references and produced *The Legal Notator*, a system of 'noting-up' so simple and so easy that an office junior could confidently be entrusted with the task.

Russell v Russell
(1976)134 CLR 495; 9 ALR 103
- Foll Dougherty v Dougherty 72 ALR 550; 163 CLR 278
- Cons/Appl Fisher v Fisher 161 CLR 8; 82 FLR 421

Sankey v Whitlam
(1978)142 CLR 1;21 ALR 505
- Appl Ninness v Graham 86 FLR 138
- Cons A-G(UK) v Heinemann Publishers 75 ALR 355;10 IPR 153
- Appl Kanthal Aust v Min for I.T. & Commerce 14 FCR 90;12 ALD 256

Sample section of the Australasian Current Case Annotator

The Legal Notator currently draws its notations each month from over 20 Reports relevant to Australian Law (All of the States' reports,CLR, ALR, ALJR, FCR, FLR, Lloyd's LR, as well as the more specialized reports - ACLR,Fam LR, MVR, IPR, APA, LGRA, ATR, A Crim R, and ALD) and divides them into four series for ease of use.

Invaluable

The Australasian Current Case Annotator is a collation of all of the Notations contained in *The Legal Notator*, for the year July 1987 to June 1988 and published in a single volume. Every year the volume will be enlarged to incorporate the current year and the previous volume until the book reaches a practical size for hard binding. This will reduce the time for research as the lawyer need only look up one case to be referred to all of the annotations for some years. "We believe the book will be an invaluable aid to subscribers of The Legal Notator and to non-subscribers alike." Debra said. "Non subscribers will be able to find out, quickly and easily, if any decision has been recently considered in Australia or New Zealand. Subscribers will be able to check references and be directed to cases in Reports which they currently do not hold".

The book is available direct from the publishers at a special pre-publication price of $25.00. (R.R.P $35.00 after 15/11/88)

To: **The Legal Notator**, 10 Patricia Street, Moorooka. Qld 4105. Telephone (07) 892 1780.
DX 40057, BRISBANE UPTOWN.

Yes, I agree, the Australasian Current Case Annotator is going to be very useful. Please send me .....copies as soon as it is published (approx. 15 November 1988).The R.R.P. will be $35.00, but I will only pay $25.00 if I order and pay for my copies now. (Adding $3.50 for postage & packing.)

Here is my cheque for $.....or charge my Bankcard ☐ Mastercard ☐ Visa ☐ Diners ☐ Amex ☐

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In this issue

COVER: and cartoons by Greg Richardson

Bicentennial News

On 1 July 1988 the President of the Court of Appeal, Mr. Justice Kirby, commemorated the 200th Anniversary of the First Civil Court Hearing in Australia.

KIRBY P: Before proceeding with the business of the Court, it is appropriate that I draw attention to a significant matter of history. Today is the two hundredth anniversary of the hearing of the first civil case by a court, as we know it, on the continent of Australia.

Between 1788 and 1823 the best known tribunal in the new colony of New South Wales was the Court of Criminal Jurisdiction. It held sway over the lives of all in the infant colony. Its chief officer was the Judge-Advocate. It applied English criminal law and procedure, except to the extent that this was unsuitable to the circumstances of the colony. Its first sitting took place on 11 February 1988, within a fortnight of the arrival at Sydney Cove.

Between 1788 and 1814, the chief tribunal for dealing with civil claims was the Court of Civil Jurisdiction. An appeal lay from that court to the Governor and, in some circumstances to the Privy Council. That court was replaced in 1814 by a Supreme Court established to deal with civil matters only. In due course under the Charter of Justice, the Supreme Court, as we now know it, was established. The Court of Appeal is part of that Supreme Court, which is continued by the Supreme Court Act 1970.

For more than 20 years a rudimentary form of civil justice was dispensed by the Civil Court sitting in Sydney. Most of the cases before it related to debts. The first sitting in the Court took place on 1 July 1788, exactly two hundred years ago this morning.

The proceedings in the first case held on that day are recorded. They have been criticised by subsequent commentators. They are described thus by Professor Castles in his notable book "An Australian Legal History", Law Book Co., 1982, 96: -

> "Two convicts were the plaintiffs in the cause. Under the English law of the day it seems clear that felons like these, whose punishment had been commuted to transportation, could not be allowed to sue in a civil court. Perhaps with this in mind, the records show that one of the plaintiffs, Henry Cable, was described judiciously in the minutes of the Court as a 'labourer'. Interestingly, too, the original summons which initiated the action referred to Cable and his wife as 'New Settlers in this place'. However, this phrase was struck out to leave no reference to their status. Whatever their status might have been under English law, however, Cable and his wife were permitted to recover £20 in damages from Duncan Sinclair, the Master of the transport Alexander, one of the ships of the First Fleet. Before leaving England, Sinclair had taken charge of a parcel of clothes and other articles which had been provided for the Cables by a group of well-wishers. These were either lost or stolen on the voyage to Australia."

Sir Victor Windeyer in an essay on the case "A Birthright and an Inheritence, the Establishment of the Rule of Law in Australia" (1962) Tas L Rev 635, 662 acknowledged that there were "some things to criticise" in this first sitting. The apparently deliberate refusal to apply the law of misprision of felony may have been seen as a necessity if there were to be even rudimentary justice available within the colony. Perhaps it was thought that this rule, wich was to offend many later commentators following Dugan v Mirror Newspapers Limited (1978) 142 CLR 583, was not appropriate to the exigencies of the place and time. However that may be, Sir Victor Windeyer concluded that the case involved "a vindication of the rule of law". So it would appear.

From the very beginning of the colony an endeavour was made to apply the forms and principles of English law, as they were understood. From the beginning of the history of the administration of civil law in this country, the doors of the court were opened to disadvantaged litigants. The principle of the rule of law was asserted, even against the seemingly powerful Master of a transport ship. The disadvantaged litigants were successful in their case. The principle of the peaceful resolution of claims and disputes, in a court of law, was asserted, even in the rustic circumstances which obtained, less than six months after the landing of the First Fleet at Sydney Cove.

Since that time, in differing courts and with a vastly expanded body of law and company of the legal profession, the courts of the colony and later of the State of New South Wales, have performed their duty. The duty to administer justice without fear or favour, affection or ill-will spread, in time, to courts sitting in every corner of this vast land. Many mistakes were made on the way, and doubtless some continue to be made which even the painstaking processes of appeal and of law reform cannot repair.

But it is worth calling to mind, as we embark upon the third century of the administration of civil justice in Australia, the beginnings in the rude circumstances of the early settlement. It is also worth remembering how, from the very start, the endeavour was made to translate to this country the substance of the principles of English law and to improve upon and adapt those principles so that they would be applicable to the circumstances of the new country.

As the President of the Bar (Mr. K.R. Handley QC) is in the part-heard case which is now before the Court, I thought I should call this historic occasion to his notice and, through him, to the notice of the legal profession of the State and beyond. Many achievements lie behind us in the past 200 years. Many challenges lie ahead. What began in the litigation of Cable v. Sinclair continues today in this Court and in courts sitting in every part of Australia. ❑

From the President

THE FUTURE

Every once in a while those of us who are concerned with the administration of the Bar's affairs need to stop and assess the future needs of the Bar. Will an independent Bar still be here in 20 years time? What will it be like? Will the Bar Council of 2008 look back and note a lack of foresight and initiative on the part of those with responsibility for the Bar's affairs in 1988?

We admire the vision and courage of Barwick Q.C. and Manning Q.C. who established Counsel's Chambers Limited in the 1950's. However, looking back over the 30 years since, we can but note lost opportunities, the current fragmentation of the Sydney Bar, and the high capital or rental cost of Chambers.

Those who attended the talk by Sir Michael Kerr of the English Court of Appeal will have heard of an English Bar under siege seeking to defend its exclusive rights of audience against solicitors who have themselves recently lost their legal monopoly over conveyancing. The talk prompted me to think about our corporate future. We do not have and do not need any legal monopoly and we are not under siege. However we cannot take for granted the future of our independent Bar. The rise of the mega firms of solicitors has created for the first time in our history the potential for groups of solicitors to practice "in house" as full time advocates. The mega firms seek to recruit and retain all graduates of ability. They can and do offer attractive salaries, security, and early partnerships.

Until comparatively recently young people with ability and ambition have been able to start at the New South Wales Bar without capital and without connections and rapidly establish successful practices. Recent developments however have for the first time raised significant economic barriers against entry to the Bar.

The history of this State, and indeed Australia, is crowded with the names of members of our Bar who started with "nothing" such as Holman, Hughes, H.V. Evatt, Barwick, McKell, McTiernan, Martin, Kerr, Wran, McHugh and many others.

How difficult is it for young graduates today who have "nothing" but ability and the wish to practise as an independent advocate to come to the Bar? How much more difficult will it be in 10 or 20 years time?

I am confident that the independent Bar will continue to attract young people of ability so long as we are able to keep barristers' overheads "reasonably" low compared with solicitors and prevent the capital cost of entry from becoming prohibitive.

At the same time we cannot afford to neglect computer technology as a tool of legal research and as a means of handling long cases. The mega firms are computer literate and we must be willing and able to change our methods of practice to take advantage of the benefits of changing technology. Our ability to provide reliable service in many areas of rapidly changing law depends on our success in this exercise. I was saddened therefore to learn that ESTOPL is not being used as it should. The bush telegraph and regular Court appearances used to be good enough. One may still get by with these methods but not for much longer I fear. The Bar Council strongly supports the ESTOPL project and we propose to take action to effectively promote the use of computer technology by the Bar.

The Special General Meeting of the Bar called to discuss the fee scales in Criminal Legal Aid matters revealed a most unsatisfactory state of affairs. Junior Counsel doing criminal work are heavily dependent on legal aid but the fees have been low and did not increase for some years. Overdue increases voted by the Legal Aid Commission in December 1987 could not be paid because of budgetary constraints. Eventually a 20% increase took effect from 1st July.

An independent Bar is underpinned by its financial independence. The erosion through inflation of the incomes of those doing criminal work on legal aid poses a major threat to the ability of non-salaried barristers to continue to do this work. What sort of independent Bar would we be if only salaried public defenders appeared for accused persons in criminal matters? The public defenders do a good job but I trust that other members of the Bar will continue to appear for accused persons in the Criminal Courts in the years to come.

Since writing the editorial for the Autumn issue the Bar Council has been moved to take a public position against proposed State legislation to curb the powers of the Ombudsman to deal with complaints against the Police and to establish an Independent Commission on Corruption. I wrote to all members of the Upper House, once on the Ombudsman Bill and twice on the ICAC Bill. The Ombudsman Bill is now before a Select Committee of the Upper House, and the Government has twice brought forward amending ICAC bills, first in June, and again in August which have removed some of the matters of concern to which we drew attention.

I acknowledge with gratitude the help of many barristers on and off the Council who have drawn attention to matters of concern or who have assisted with necessary research. The President cannot be a one-man band. Fortunately the Bar has tremendous resources of goodwill and expertise which are available to be drawn upon by the Bar Council on such occasions. We intend to remain active on civil rights issues and to take an independent and public stand on such issues as and when the need arises. ❑

K.R. Handley

Retirement of the Chief Justice

On 9 August, 1988 the Chief Justice Sir Laurence Street K.C.M.G. announced his retirement to take effect on and from 2 November, 1988. His retirement will not see his talents lost to the world of dispute resolution as he intends to pursue the establishment of a system of commercial arbitration in the Pacific region. The Bar wishes him well in those endeavours.

A dinner in his honour will be held by the Bar Association on 4 November, 1988 in the Dining Room at Parliament House. ❑

Well Appointed

A.M. Gleeson A.O. Q.C. is to become the next Chief Justice of New South Wales on and from 2 November, 1988. His impending appointment has been welcomed by the legal profession and the Bar in particular.

Rumours that he is intending to renovate the Chief Justice's garden in St. James Road to install a fish pond inhabited by his favourite fish - the piranha - are described by Gleeson as "partially unfounded".

Gleeson must have been reassured by The Sydney Morning Herald which offered as consolation for the substantial cut in income he would take in accepting the appointment, the fact that he could look forward to job security for life and a pension on retirement!

A dinner in his honour will be held by the Bar Association in early 1989.❑

Amendments to Supreme Court Rules

The Supreme Court Rules Committee has amended the Supreme Court Rules effective from 12 September, 1988. A full copy of the Amendments is available from the Registrar. The following explanatory note issued by the Supreme Court indicates the nature of the amendments. The purposes of the Amendment are -

1. to require particulars of a claim for aggravated compensatory damages;
2. to permit a subpoena for production to require attendance on any day;
3. to limit the time for applying for review of a registrar's or taxing officer's decision to 28 days after the decision unless time is extended;
4. to provide for cross-appeal and notice of contention on an appeal from a master to a Judge;
5. to rescind rules relating to defamation published before 1974;
6. to require an addition to the title of a document in relation to the Jurisdiction (Cross-vesting) Acts 1987;
7. to assign to a Division business relating to public assemblies, consequential on the Summary Offences Act 1988.
8. to make other provisions of a minor, consequential or ancillary nature. ❑

Barristers' Disbursements

The Bar Council recently considered a submission from the Library Committee which was considering the provision in the Bar Library of a more extensive data base service for members of the Association. However, the provision of any such service would involve the charging to members of an hourly rate for use of these services. This gave rise to the question as to whether it would be proper for barristers to include in their memoranda of fees a separate item with respect to the charge for the provision of such services. This in turn gave rise to a consideration of the entitlement of barristers to include in their memoranda a list of disbursements such as photocopying, fax charges, telex charges, telephone, air fares, accommodation, taxis, hire car, stationery and other similar expenses.

The Council was of the view that costs of the nature of the foregoing could, at the option of the barrister, either be incorporated in a global fee or itemised individually by way of a list of disbursements. In particular, the latter course may well be appropriate in respect of "big ticket" items such as air fares, accommodation and, in some cases, photocopying, telex and special secretarial charges where these constitute such an amount as would not otherwise and ordinarily be included as part of counsel's fee. The Council does not, however, wish to encourage a solicitor-type bill of costs. Further, in many cases, the Court allowed loading will cover travelling and accommodation costs. Whether or not counsel itemises a separate charge for the type of disbursements referred to is very much a matter of choice and, ultimately, taste. Where the expenses in question are "normal" then, generally speaking, they should not be charged for separately, but would, as they are now, be included in counsel's fee. However, as already indicated, where any of those expenses are significant such as, for instance, where there has been the necessity to engage special secretarial services or where extensive use of photocopying, the facsimile or data base services are required,

Appointment of Queen's Counsel

On 6 July His Excellency the Governor approved the appointment of the following Barristers as Her Majesty's Counsel with seniority at that date and in the following order of precedence:

Peter Dent
Lloyd Dengate Stacy Waddy
Anthony John Bellanto
Bruce Meredith James
Glen Thomas Watson Miller
Dean Letcher
Paul Menzies
Brian Harrie Kevin Donovan
John Anthony McCarthy

Small Claims Under the Trade Practices Act

The Chief Justice of the Federal Court, Sir Nigel Bowen, has asked the Bar Council to bring the following to the attention of the Bar.

Many practitioners are still bringing relatively small claims to the Federal Court notwithstanding the fact that since 1st September 1987, these cases could be brought in an appropriate State court. They are doing this despite being advised by the Registries that:

(i) the claims can be brought in State courts ;
(ii) s.86A TPA permits transfer of the particular claim by the Court to an appropriate State court;
(iii) Order 62 rule 36A allows for a reduction in costs by one third where less than $50,000 is recovered.

It would seem some practitioners are "dressing up" TPA claims by claiming injunctive relief and relief under s.87 TPA in an endeavour to permit the matters to remain in the Court. Perhaps some are not aware of the decisions of Mr. Justice Wilcox in Ewins & Ors. v. Buderim Imports Pty. Ltd. (1988) 76 ALR 157, Mr. Justice Gummow in McIntosh v. National Australia Bank Ltd. (NSW G127/87 - 4 March 1988), and Mr. Justice Northrop in Kinna and Anor. v. National Australia Bank Ltd. (Vic. G449/87, 4 June 1988) which dealt with transfers under s.86A where relief is sought under the Trade Practices Act.

By the time a clerk arrives at the registry with documents for filing it is too late to persuade him to bring the proceedings in some other court. It would seem some procedure needs to be followed to bring to the attention of practitioners the desirability of bringing small claims elsewhere than in the Federal Court . ❑

Federal Court Reporting Services

The President made a number of submissions to the Chief Justice of the Federal Court in April last, concerning suggested improvements to the Federal Court Transcription Service. The Chief Justice has now advised the President that, following the representations made by him on behalf of the Bar Association, the following new procedures have been implemented by the Federal Court Reporting Service ("C.R.S."):

1. Priority is to be given to the provision of transcript in witness actions. It is recognised by the C.R.S. that the supply of transcript in these matters has been badly delayed and steps will be undertaken to achieve the availability of each day's transcript by 6 p.m. on that day. To this end the C.R.S., unless specifically requested otherwise, will proceed as follows:
   (a) Opening and closing addresses will not be transcribed.
   (b) The tender of exhibits will not be referred to otherwise than by reference to the description of what is tendered, the exhibit letter or number given the exhibit and a statement whether the exhibit was admitted with or without objection. In a case where the tender of a document is rejected, the transcript will contain only a note of that fact. In short, argument and discussion in relation to the tender of documents will not be transcribed.
   (c) The procedure with respect to objections to evidence is to be the same. If there is an objection, there will be a note of that fact and a statement that the question has been rejected or allowed. That procedure will be followed in relation both to oral evidence and affidavit evidence.
   (d) If judges do not identify documents sufficiently or state clearly that a document or question has been objected to and admitted, allowed or rejected, discussion will nevertheless not be transcribed. The transcript will be restricted to the evidence.
2. If a request is made for a full transcript (including argument) it is unlikely to be available on a daily basis and it may be delayed for some days.
3. In single judge matters no opening or closing addresses or argument or discussion concerning evidence will be recorded unless the judge otherwise directs.
4. Transcripts of proceedings not involving the calling of oral evidence, e.g. directions hearings, motions (including interlocutory applications for injunctive relief) and appeals (whether to single judges or full courts) will not be given the same priority as transcripts of witness actions. But, except in the case of full court appeals, the same abbreviated form of transcript as is to be provided in witness actions will be provided in other proceedings. In the case of full court appeals, a full transcript will be available unless the Court indicates otherwise.

Steps have also been taken to improve the efficiency of the New South Wales Court Reporting Service. In particular, as and from 1 July, 1988, the Court Reporting Branch amalgamated with the Transcription Services Bureau and the transcription unit of the Local Courts Reporting Services Section. * The new Branch is to be known as the Reporting Services Branch. It is hoped that this step will further improve the efficiency of the court reporting services to be provided by the Branch. However, the Branch is still short staffed but attempts continue to be made to overcome this problem.

Two other matters may be of interest. The first is that the Reading Program now includes a lecture by a senior member of the Court Reporting Branch designed to instruct new barristers in courtroom techniques from the point of view of the court reporter. The second is that the Court Reporting Branch is preparing a publication entitled "Setting the Record Straight" based on a similar American publication published by the National Shorthand Reporters Association of the United States. This will, in due course, be distributed to all members of the Bar.

Finally, the Chief Court Reporter is keen to obtain as much feedback as possible from members of the Bar and would, therefore, welcome and encourage any comments or suggestions from members with a view to increasing the efficiency and the adequacy of the court reporting services being offered. Accordingly, any comments or suggestions from members should be forwarded to the Registrar who will convey them to the Chief Court Reporter. ❑

* See separate report in Motions & Mentions - Ed.

Decision of Disciplinary Tribunal No. 9 Barristers' direct contact with members of the public

A complaint was made that a member of the Bar had accepted an appointment as arbitrator in a matter in which he had given advice to the complainant about the matter in which he was to arbitrate. The complainant came directly to the barrister's chambers and saw him without a solicitor being present. There was a substantial dispute as to the content of what passed between the barrister and the complainant. It suffices to say that the complainant alleged that the barrister had given him advice on the prospects of success in the case, on the procedure for his own (i.e. the barrister's) appointment as arbitrator to arbitrate the dispute itself and the procedure to be followed at the proposed arbitration. It was also alleged that the barrister had told the complainant to write directly to the complainant's opponent suggesting that the barrister be appointed arbitrator.

Ultimately, the barrister was appointed arbitrator and decided the arbitration adversely to the complainant. The barrister denied the complainant's allegations and the Disciplinary Tribunal accepted the barrister's evidence and dismissed the complaint.

In the course of giving its decision, the Tribunal said :-

"We therefore advise the Bar Council that there has been no breach of the Bar Rules established in this case. The circumstances of this case do, however, emphasise the importance of these Rules and the need for their strict observance. They also indicate the general undesirability of counsel seeing members of the public at or in their chambers to discuss a matter which has legal connotationswithout an instructing solicitor being present even though no breach of the Rules occurs. This is because members of the public might, even though unfairly, misunderstand or misconstrue some statement by the barrister as being in the nature of legal advice. Such a situation could arise where a barrister is merely explaining to the public the practice and procedure in relation to arbitration. This is not, in our view, the giving of legal advice. It is, however, capable of being so construed by a member of the public."

What the Tribunal found was that the barrister had been telephoned by the complainant who had said that the barrister's name had been given to him as an arbitrator and asked whether he would be prepared to accept appointment. The barrister said that he would accept. A very short time later, the complainant just arrived at the barrister's chambers and asked to see him. The barrister went out to the foyer, saw the complainant who asked him whether he had been in touch with the opponent to see if he was acceptable as an arbitrator. The barrister was told that the complainant had not yet got the consent of the opponent and was then asked what would happen once that consent had been obtained. The barrister explained that there would then be a preliminary conference with whomever it was that was decided upon as being the arbitrator at which time procedural matters would be attended to and a date fixed for hearing. The barrister was also asked what would happen in respect of the award and said that, subject to any errors the arbitrator might make, as to matters of law, the award would be final and binding between the parties.

As the Tribunal concluded, by seeing the complainant directly, the barrister, although giving completely innocuous information to him, had placed himself in a position where, because there was no instructing solicitor present, and no other person who could act as a witness to the conversation, he could later become the subject of a complaint as to his conduct. Even the fairly innocuous statements as to matters of procedure in arbitrations were able to be misconstrued by the complainant and so found a reference to a disciplinary tribunal. ❑

Lunch- A Long or a Short Matter

A mere 12 minutes by taxi (or Hire Car for Silks) from Phillip Street is the Cricketers Arms Hotel. Eschew the bar which is likely to be stocked with sturdy women engaged in hearty arm wrestling contests over schooners of Reschs Draught.

On the first floor is a delightful restaurant, airy and not cramped. Cheerful and highly efficient service will see you through in an hour, if that is what you require.

The food is imaginative and delectable, focusing on fresh ingredients and not fussy. As a starter, I had slivers of raw beef marinated in tomato and garlic with lemon and served with crispy deep fried onion rings in a beer batter. This was a delicious novelty, not like a steak tartare at all.

My companion (who will be known in these chronicles as the party of the third part) had a pigeon salad. Thinly sliced and pink breast served over a bed of salad with a pink wine vinegar and olive oil dressing. This was at least as nice as the raw beef.

For a main course I had fillets of flathead fried in a wafer-thin batter and served with button mushrooms similarly encased. It came with a bernaise sauce stirred not whipped and therefore of the correct and thick consistency. A salad and chips of the size that one bought at the fish shop next to the Cremorne Orpheum in the '50's but crisp and hot, not soggy and warm! The P of TTP had a sweet only, fresh berries with a brandy cream sauce. This repast was washed down with a 1986 Wirra Wirra Rhine Riesling which was crisp, dry and softly flinty.

Do try it - and have the chips!

Cricketers Arms Hotel, 106 Fitzroy Street, SURRY HILLS (first right off South Dowling Street) Phone 331.6869

John Coombs

* Bar News welcomes contributions (in the form of reviews) to the endless search for the perfect restaurant - both for the quick (but elegant and gourmet) lunch within a stone's throw of chambers and the long, languid, equally elegant and gourmet lunch after the case has settled! - Ed.

The Inappropriate Confrontation, the Meaningless Average, and the Preposterous Generalisation

At the Bench & Bar Dinner held at the Southern Cross Hotel, at which the Attorney-General, John Dowd, was guest of honour, A.M. Gleeson Q.C. reminded the Bar of the desirability of supporting the Attorney-General in bringing to bear, in that position, the values of a lawyer.

As the President said, it is a great pleasure to be able to propose a toast to an Attorney-General who comes from the ranks of the Bar. I have to say that those of his predecessors with whom I had to deal I found very well disposed towards the Bar. I am sure that continues in his case, but with a special reason.

I thought of the Attorney-General last Sunday when I was reading the newspaper. The reason is something that I will come to in a little while. I should explain the process of thought that I went through. Because I earn my living as an advocate, I am conscious of the skills and defects of other advocates that I hear. By other advocates, of course, I do not refer to my professional colleagues. Wild horses would not drag out of me a hurtful remark about any of them. We are surrounded by advocates of all kinds. I have prepared in my mind a book on the subject of good and bad advocacy and in this book I have various chapters which are headed by reference to particular examples of good and bad advocacy that I come across. There are three particular chapter headings in that mental book of good and bad advocacy that I thought I would mention this evening by way of introduction to explain how it was that I came to be thinking last Sunday of the Attorney.

The first chapter heading in my mind is what I call "The Inappropriate Confrontation". We have all been brought up with stories of F.E. Smith travelling the English countryside insulting Judges. Those stories are hugely amusing but they never tell us how his clients got on. Most examples of fearless advocacy that I ever heard of have ended in forensic disaster. Recently, in the course of my practice, I came across a very good example of the inappropriate confrontation engaged in by an advocate who was not a barrister. I was briefed to appear for a corporation that had decided that it would benefit the residents of a particular suburban community by building for them a brand new steel mill. In their ingratitude, these people resisted this proposal. There was a Commission of Inquiry appointed, and it was presided over by an extremely courteous gentleman from the Department who conducted the Inquiry in masterly fashion. Members of the public were invited to make written submissions before the Inquiry began and most of these were couched in restrained and courteous language and put intelligent arguments for or against our proposal. But one particular written submission bore all signs of the impending inappropriate confrontation, and when the Commission sat on the first day, sitting in the front row of the members of the public was a man, the author, of choleric appearance and disposition. I will not mention his name. I will call him Mr. X. He was sitting there spoiling for a fight with the Commissioner and the occasion did not take long in coming. There was an altercation about when people were going to be given notification of certain sitting dates and finally, in an explosion of indignation, he said to the Commissioner: "We can't sit around here wasting our time while you carry on with this Inquiry." He said: "We're not all being paid to sit here". I thought "Here it comes." He said "Not like Mr. Gleeson sitting there, probably earning $500 a day." Well, my junior went pale and I made a mental note never to engage Mr. X as my clerk. But I thought it inexpedient to become engaged in a discussion on that issue; I knew that I was only a target of opportunity in his peripheral vision and that he really had his sights set on the Commissioner. Sure enough, before long he said to the Commissioner: "I can see what's going on here; you're not as stupid as you look." Whereupon, one of the local residents behind him said: "That's not fair." Mr. X turned to the local resident and said: "Oh, you say he is as stupid as he looks?" It had not previously occurred to me that an interesting preliminary issue to raise for discussion in a Court case would be whether or not the Judge is as stupid as he looks. That is an example of what I call the inappropriate confrontation.

A second technique of bad advocacy that I come across frequently is what I call: "The Meaningless Average". I refer to the use of statistical figures by people who draw upon averages that have no possible relevance to the argument they are seeking to make. Again, the best example I can think of in this regard, or one that I can use tonight, is outside the field of advocacy by barristers. When I used to live near Manly I was interested in swimming in the surf and as it became more and more polluted over the years I became more and more irritated by information that was published by the Metropolitan Water Sewerage & Drainage Board, which used to publish reassuring figures comparing the World Health Organisation levels of safe faecal matter in the water, with the average content of the water over a period of a month. Now that might have been of interest to somebody who went in the water and stayed there for a month, but for somebody who actually found himself in the water at 11.00 a.m. on 2 January surrounded by "solids", it was information of precious little relevance.

The third technique of bad advocacy that I will mention for your consideration is what I call : "The Preposterous

Generalisation". The best example I saw of this was years ago in the foyer of a hotel in London. I think it is still there today. It was a very respectable hotel and in that hotel they had a rack of pipes on display. They had a sign there which for stunning stupidity, when you think about it, is difficult to better. The sign said: "A pipe is always an acceptable gift." Now, when I am thinking of what to buy for Christmas for my fourteen year old daughter or my seventy-two year old mother-in-law, I find that piece of information of very little use. It is an excellent illustration of a broad proposition of breath-taking mendacity.

What made me think of the Attorney-General last Sunday was that I saw another example, in a newspaper, of the preposterous generalisation. The author of a leading article wrote this: "Corruption has been endemic in New South Wales for 200 years." I thought to myself when I read that, that if that journalist ever needs a job he could get one with the Public Relations Department of the Metropolitan Water Sewerage & Drainage Board, or writing material for advertisers of pipes. As a proposition it does not seem to be one that stands up to very close consideration. What precisely is it supposed to mean? And what is its point? Is it an argument for the restoration of the penal system? Perhaps the proposition for which the author was contending was that Sir James Rowland should be invested with the powers once enjoyed by Lachlan Macquarie. Then, I thought, to be the Attorney-General of such a State must be a very challenging task indeed. The broad sweep of history encapsulated by this sentence presumably conveys to the reader the notion that Sir Henry Parkes had a bagman and that Sir Frederick Jordan was bent. But the difficulty, I thought, of being the Attorney-General of such a State is not the obvious one, which lies in the suggestion that he is presiding over some kind of Wild West town. It occurred to me that the real difficulty is a different and more subtle one, because to be the Attorney-General of a State where leader writers say things like that means that you will be pressed constantly with popular and populist demands to stamp out this endemic corruption. It means that the public, and political colleagues, will be impatient with many of the values that a lawyer brings to the office of Attorney-General.

"It is for lawyers to hold fast to the truth that ends do not always justify means."

It occurs to me that one function of the Bar is to support the Attorney-General in his resistance to populist clamour for extreme change and to reinforce him in the values which a lawyer brings to this task. It is for lawyers to hold fast to the truth that ends do not always justify means. Let me give an example of that in an area away from any particular area of concern of this Attorney-General. I refer to the area of tax avoidance. Nobody has ever had the slightest difficulty in formulating a statutory provision or a principle of law that would strike down tax avoidance. The problem is to formulate one that does not at the same time strike down perfectly legitimate activities which, although motivated at least in part by a desire to minimise tax, are regarded by most people as perfectly proper. There is a pressure on politicians in this area to resort to what is sometimes called, fairly I think, "terrorist" or "mafia" legislation. You know that if a terrorist or a member of the mafia sees his intended victim in the middle of a crowd, he does not hesitate to fire a hail of bullets in the victim's general direction. If he mows down a lot of innocent by-standers at the same time, that is too bad. But that is the tendency of much populist clamour against things like tax avoidance and perhaps even against things like drug abuse or corruption.

There is a great example for the Attorney-General, and a great example for all lawyers, which I remember being referred to in a speech given last year at a law conference by a Justice of the Supreme Court of the United States. The example was given of a former Lord Chancellor of England who is now venerated as a saint. The author of a play concerning him put into the mouths of the characters in that play some of the difficulties that have to be confronted on issues like this. Thomas Moore was resisting popular demands and pressure for change, and irritating people, including a King who wanted a new wife, by standing on legalities to the great cost, not only of himself, but also of his family. He was admonished for taking such an obdurate and legalistic stand. He pointed out, in reply, that he regarded the laws as woods and thickets and trees with which he was familiar and behind which he could take shelter and hide. He said that if they were all cut down then a mighty wind would roar through the land and there would be nowhere to shelter. He said:

"I would give the devil himself the benefit of law; not for his sake, but for my own."

Sometimes proposals for extreme measures can seem embarrassing with the benefit of hindsight. How many Liberal voters are there here this evening who really wish that there was in force a law that made it a criminal offence to be a member of the Communist Party? How many Labor voters are there in this room who really wish that there was in force a law that made it an offence for any corporation except the Commonwealth Bank to carry on the business of banking? The lawyer can take the long view and stand on conservative principle and the Attorney-General, an heir to conservative political principles, by taking the long view can be a force for upholding traditional lawyer-like values even when that involves resistance to superficially attractive but extreme measures for change. In that he will need and deserve our support. ❑

JUGGLING THE CROCKERY - CROSS-VESTING BETWEEN THE STATES

Leo Grey examines the potential pitfalls of the system of cross-vesting between State Courts which commenced on 1 July 1988.

Recently, in the Equity Division, a number of learned counsel had gathered to argue an interesting case in which a person was attempting to sue in New South Wales to restrain a New South Wales company from carrying on proceedings in Victoria.

Issues of some complexity were involved relating to the doctrine of *forum non conveniens*, and for various reasons it was agreed between counsel that the matter should be adjourned for a time.

At this suggestion, a Cheshire cat grin spread slowly across the slightly florid complexion of the judge (who shall remain nameless).

"I suppose you would like me to adjourn it until after the first of July", His Honour said - rather too casually, I thought.

There was a momentary silence at the bar table.

"What's happening on the first of July?", whispered counsel on his feet, out of the corner of his mouth.

"I don't know", was the equally side-mouthed response from counsel opposing.

Unfortunately, His Honour did not enlighten any of us. However, discretion suggested that the hint of a date after the first of July might best be taken up, and it was. Later in chambers, the reason why this was a prudent course became apparent.

In short, 1 July 1988 marked the commencement of the package of Federal and State cross-vesting Acts. This article takes a brief and rather whimsical look at the State to State cross-vesting legislation relevant to the little vignette recounted above. For those wishing to read a more learned exposition by eminent authority, there is the excellent and recent article by Keith Mason QC (Solicitor-General for New South Wales) and Professor James Crawford of the University of Sydney : (1988) 62 ALJ 328.

In New South Wales, the relevant State Act is the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (No 125 of 1987; assent 16 June 1987; commencement 1 July 1988, notified in *Gazette* No. 105, 24 June 1988, at 3263), hereafter called "the Cross-vesting Act". This has the same short title, assent date and commencement date as the complementary Commonwealth Act (Act No 24 of 1987), and analogous content, but should not be confused with it. Similar Acts have also been passed by each of the other States.

The first and central function of the Cross-vesting Act is to empower another Supreme Court to "exercise original and appellate jurisdiction" with respect to matters in which the Supreme Court of New South Wales has jurisdiction under New South Wales law: see s.4(3). Corresponding provisions are found in the Cross-vesting Acts applicable to the other States and Territories, which confer jurisdiction under their State laws on the Supreme Court of New South Wales. The Cross-vesting Act then empowers the Supreme Court of New South Wales to accept the jurisdiction conferred on it by the other States: see s.9. In exercising that jurisdiction, the Supreme Court is empowered to "apply the written and unwritten law of that other State or Territory": see s.11.

Taken alone, the effect of these provisions might be seen as creating one modularised fuzzy-edged national Supreme Court administering simultaneously several parallel bodies of non-Federal law. One romantic metaphor for the result is to imagine each of the Supreme Courts as a kind of judicial rainbow. But with no disrespect intended, I prefer the less romantic image of the Supreme Courts as a troupe of jugglers each required to be able, in theory, to keep at least eight different items of crockery in the air at the one time.

I say "in theory" because, of course, each Court deals mostly with its own State's laws, as the jugglers in my hypothetical troupe might specialise in plates, bowls or saucers, and because the requirement to be able to juggle eight bits of crockery at once is balanced by a safety net to keep the breakages down. This safety net is the power to transfer proceedings to another Supreme Court: see s.5(2). A broad discretion is conferred upon the judges of the various Supreme Courts to give directions intended to enable proceedings to be dealt with in the most appropriate and convenient place. In short, when the plate juggler is thrown a saucer to juggle amongst the plates, (s)he can decide to flick it across to the juggler whose specialty it is to juggle saucers.

Although the discretion conferred on the judges is broad, the Cross-vesting Act does set out some general criteria to be taken into account in the exercise of the power to transfer.

If the proceeding before the Supreme Court of New South Wales "arises out of, or is related to" a proceeding pending in another Supreme Court, the New South Wales judge may transfer the proceeding before him or her to that other Court if it appears to be "more appropriate" that the proceeding should be determined by that other Court: s.5 (2) (b) (i).

Even where no proceeding is on foot before the Supreme Court of another State, a New South Wales judge might still decide to transfer the proceeding to another Supreme Court where the judge believes it is a "more appropriate" forum because (s.5(2)(b)(ii)) -

(a) if it were not for the cross-vesting legislation the proceeding could not be brought in New South Wales;
(b) the proceeding involves questions as to the "application, interpretation or validity" of a

law of the other State which (apart from the cross-vesting legislation) would be outside the jurisdiction of the Supreme Court of New South Wales; and

(c) it would be in the interests of justice.

In case these criteria are not broad enough, the judge can decide to transfer the proceeding if he or she believes it to be "otherwise in the interests of justice" to do so: s.5(2)(b)(iii).

It is clear that the success of the cross-vesting scheme depends on the ruthlessness with which judges will be prepared to "flick pass" matters to another Supreme Court. Their resolve to do so is likely to be strengthened by the knowledge that decisions transferring proceedings to another Court cannot be taken on appeal : see s.13. *

So far I have mentioned only transfer between Supreme Courts. But what about transfers between inferior courts and tribunals, such as between the District Court of New South Wales and the County Court of Victoria? The simple answer is that it can be done, but only by an indirect route through the Supreme Courts of each State: see s.8. An application could be made to remit the matter to the County Court.

Well, you say, isn't this fascinating, but where's the catch?

As I read the legislation, the greatest potential for smashed crockery arises under s.11, and it is worth spending a little time to consider what it says.

Section 11 deals with the conduct of proceedings where, for example, the Supreme Court of New South Wales proposes (for whatever reason of convenience) to deal with a matter arising out of a sequence of events taking place in Victoria. As a primary rule of thumb, the Court must still apply New South Wales law to the facts, notwithstanding that all the relevant events happened out of the State; s.11(1)(a). That seems fairly straightforward. For example, if the case involves only common law issues, it is the common law of New South Wales that will apply, not that of Victoria (to the extent that it may be different).

But suppose the cause of action arises under a Victorian statute? In that case, the New South Wales Supreme Court must apply both the Victorian statute and any Victorian case law which interprets it; s.11(1)(b). It is possible to imagine a situation where the relevant provisions of the Victorian statute were similar to provisions in an analogous New South Wales statute, but had been interpreted rather differently by the Victorian Full Court compared with the view taken by the New South Wales Court of Appeal. In such a case, a wise New South Wales judge might decide the best course is to despatch the matter to Victoria as quickly as possible. But if the judge chooses not to do that, he or she must be bound by whatever judicial line applies in Victoria.

Now here is the tricky bit: in interpreting and applying the Victorian legislation, is the Court of Appeal bound to follow the line taken by the Victorian Full Court, rather than the line it had taken with the analogous New South Wales legislation? As I read s.11, the obligation on the Court of Appeal is the same as that on the judge at first instance, and the answer is therefore 'yes'. Nevertheless, the opportunity will always remain for the Court of Appeal to draw a distinction on the facts, or make a creative restatement of the Victorian law which on close analysis shifts its emphasis ever so slightly northwards. Then, the interesting question will be the weight such a decision would carry in Victoria, especially in a case heard by a single judge.

The other interesting aspect of s.11 concerns the procedure that is to apply. A New South Wales judge hearing a case arising under cross-vested jurisdiction is at liberty to apply whatever rules of evidence and procedure he or she considers appropriate, "being rules that are applied in a superior court in Australia or an an external Territory" s.11(1)(c). Technically, this would allow the New South Wales judge hearing my hypothetical case of Victorian law to announce to counsel at the beginning of the case that the rules applicable in the Supreme Court of Christmas Island should govern the hearing, and such a decision would not be appellable: see s.13(b). One has to concede that this is probably unlikely to happen in practice.

More realistically, this power could be used in my hypothetical case to deal with a situation where the party commencing the matter in New South Wales gets a procedural advantage (whatever it may be) that would not have been available had the matter been commenced in Victoria. If that would be manifestly unfair to the other side, the judge could, in effect, replace the local rules with so much of the Victorian rules as may be necessary to eliminate the unfairness. For counsel involved in cases involving cross-vested jurisdiction, this means being alive to the differences between the rules applicable in the different jurisdictions, and the tactical advantages and disadvantages that might arise.

For counsel (and solicitors), the Cross-vesting Acts confer some interesting rights of practice. In effect, it allows a

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* (In Bankinvest AG v. L.F. Seabrook & Ors. on 4 August 1988, Mr. Justice Rogers heard a motion filed by the defendants to transfer the proceedings to Queensland pursuant to the Jurisdiction of Courts (Cross-vesting) Act 1987. In view of the fact that there was no appeal from such a decision, and having regard to the importance of the question of construction of the Act, he referred the case to the Court of Appeal where it was re-argued before the Chief Justice, Sir Laurence Street, the President of the Court of Appeal, Mr. Justice Kirby, and Mr. Justice Rogers on 16 August 1988. The Court reserved its decision - Ed.)

practitioner to follow a case transferred into another State jurisdiction, where he or she is not admitted, and exercise the same rights of practice as he or she would have if the transferee court were a federal court exercising federal jurisdiction: see s.5 (8). In other words, as long as you are admitted to practice in the High Court of Australia, you may appear before the Supreme Court of any other State in Australia in a matter transferred to that Court, under the cross-vesting scheme, from the Supreme Court of New South Wales. Does this mean that all New South Wales counsel will be advising any Queensland solicitor wishing to use their services to file the originating process in New South Wales?

There are other interesting and novel features of this legislation, and it is apparent that a number of unforeseen glitches will surface as time goes by. State and Federal Governments have recognised that the scheme will need to be kept under review, and have provided a mechanism for its suspension or cessation if this becomes necessary in the future: see s.16. Nevertheless, this kind of legislation is a serious step along the road to a truly national legal system. ❑

Regina v. Lee Owen Henderson

31 May 1988

Mr. K. RYAN: Did you believe that he might have been working for the police?

A. Nobody ever said that to me.

Q. At what stage did nobody say that to you? (Objected to; rejected). ❑

Regina v. Tony Smith

Bail Application

Q. Mrs. Smith, are you the natural mother of the applicant, Tony Smith?

A. Yes.

Q. How long have you known him?

A. (with some surprise) Since he was born! ❑

Dispute Resolution in the Pacific Region

On 6 September 1988, the Chief Justice, Sir Laurence Street, speaking at the Trustee Companies Association National Council Dinner, predicted that Australia would play an important role in establishing arbitral mechanisms to resolve commercial disputes in the Pacific region.

I have chosen as the subject of this address the role of Australia in providing a dispute resolution facility to service the requirements of international commerce in the Pacific region.

On 11 December 1985 the United Nations General Assembly in Plenary Session passed a resolution recommending that:

> " All states give due consideration to the Model Law on International CommercialArbitration in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."

The Model Law referred to in that resolution was the product of a United Nations Working Group established in 1982 by the United Nations Commission on International Trade Law (UNCITRAL). All the major trading nations of the world contributed to the deliberations of the Working Group. The model arbitration law that it produced for UNCITRAL has been described as:

> "a compilation of global philosophies workable above the differences of economic, social and legal systems on how the most ideal law of international commercial arbitration should be. It may become a candle light towards which everyone concerned could move forward, perhaps step by step, to attain the eventual unification of national laws on a global scale." 1

It is highly gratifying that the Australian Government has responded constructively and promptly to the General Assembly resolution. In the very near future the UNCITRAL Model Law will be enacted as part of the law of this country, precisely in the terms recommended. The passing of that Act, together with the recent redrawing of guidelines in New South Wales allowing foreign lawyers to render professional services in this State to overseas clients, are essential pre-requisites to our nation becoming a significant legal service base able to meet the dispute resolution requirements of the flow of commerce throughout the whole Pacific region.

For too long we in Australia have been content to leave the international field of commercial law to be serviced through mechanisms that have their homes in Europe. The Pacific nations, albeit of widely divergent character, occupy an identifiable geographic part of the world.

We share trading relations that bind us all together as commerce ebbs and flows around its rim and transversely across its midst. The whole Pacific region is pulsating with a new found vitality and a sense of geographic self-identity. Australia is uniquely placed to play a major part in this region by servicing its requirement for dispute resolution facilities.

Our nation has the enormous advantages of political and economic stability and of soundly based, well established financial and legal capacity. We are not aggressive or acquisitive on the international stage. We present no political or military threat. We enjoy the trust and confidence of our sister nations in the Pacific, from the super powers down to the tiniest of the island states.

In short, Australia's statute within the Pacific places us well to fulfil both the geographic and the substantive role of a reliable honest broker in servicing the flow of commerce within this large region of the world.

The Pacific nations cannot, of course, be identified as an economic group comparable to the European Economic Community. They do not occupy a single land mass. The international spectrum of power differs, as do the inherent natures of the nations going to make up the Pacific. There is no common ideological threat operating to unite them. At the same time there is a growing recognition that pursuit of common economic goals throughout the region can bring great benefits, political as well as economic, to the Pacific nations.

There is a challenge to us in this part of the world in the example of Europe having selected 1992 as the target date for the achievement of far-reaching progress towards integration. The goal in Europe is conformity in social, fiscal and professional areas coupled with enhancement of the role of the European Court. Inevitably this will flow on to benefit and strengthen the European arbitral mechanisms that service commerce both within the EEC and beyond.

I have no expert status to expound the political and financial advantages of the Pacific being stimulated by the European example to progress towards widening recognition of the interdependence of the nations going to make up the Pacific region. I do, however, have some understanding of the need for the legal mechanisms that are an indispensable part of the service substrata of the free flow of international commerce. I have, moreover, a sense of idealism in relation to the part that Australia can play in providing a home for, and in furnishing a significant mechanism in aid of, the legal service requirements of commerce throughout the Pacific.

The mechanism to which I refer is not that of a conventional court system. It is the service of an established national body providing alternative dispute resolution procedures. Principal amongst these is arbitration. Indeed, arbitration has been until very recent years the sole procedure for dispute resolution in disputes between commercial entities of different nations.

1 Professor Sono, ICCA Congress Series No. 2, 1984, p 28

We in the law have something for which to reproach ourselves in that, certainly in the common law countries, we have allowed arbitration to become cumbersome and over-legalistic. The great advantages that arbitration has in contrast to conventional court hearings were submerged by this growing legalism. International legal practice has been slow to recognise and adapt its mechanisms to this growing disenchantment on the part of its users.

In the field of domestic commercial disputation there have in the last couple of decades been enormous advances in evolving new alternative procedures. Structured mediation, formalised conciliation and the procedure of a mini trial have all been evolved in parallel with a rejuvenation of the longer-standing processes of valuation, appraisal and assessment as alternative means of resolving commercial disputes.

These, together with conventional arbitration, present a wide range of alternatives from which to choose, either singly, or perhaps in sequence or combination, those which will best meet the particular requirements of the dispute in hand.

We already have such facilities available in Australia for domestic disputes. Once the UNCITRAL Model Law is in place, we must marshall our resources and actively project into the Pacific region a single Australian based organisation providing this service to those engaged in international commerce.

I quoted at the outset the United Nations resolution recommending the enactment by nations of the Model Law. The mere passing in the near future of the legislation in Canberra will not be the end of the road. Rather it will be the beginning. A distinguished international lawyer has pointed out that:

> "adoption of legislation based on the Model Law provides only the statutory part of the necessary hospitable environment. It should be, and in practice often is, accompanied by any needed organisational measures improving the infrastructure and by programmes of training and information which should help arbitrators, lawyers, judges and, in particular, businessmen to better understand and appreciate the arbitral process." 2

These words have particular relevance for Australia. Our geographic location, our stability and our neutrality place us in a clearly favourable position in comparison with other Pacific nations that already are moving into this field.

We must join those other nations as at least co-equal participants. To do so we must capitalise on the interest that will be generated by the enactment of the Model Law. We must examine our existing infrastructure in the field of alternative dispute resolution. The object will be to make whatever administrative and organisational adjustments that are necessary to enable Australia to make a significant impact in marketing our capacity to service the dispute resolving requirement of international commerce in the Pacific.

At the same time we must enlist the vigorous support of our own commercial community in both promoting and using the mechanisms in this country for the resolution - better still the prevention at an early stage - of both domestic and international commercial disputes.

This is the exciting challenge and prospect that presently lies ahead - a challenge to take up the advantage that we have over other nations, and a prospect of our being able to fulfil in the Pacific region the role of a trusted and neutral provider of this service to international commerce.

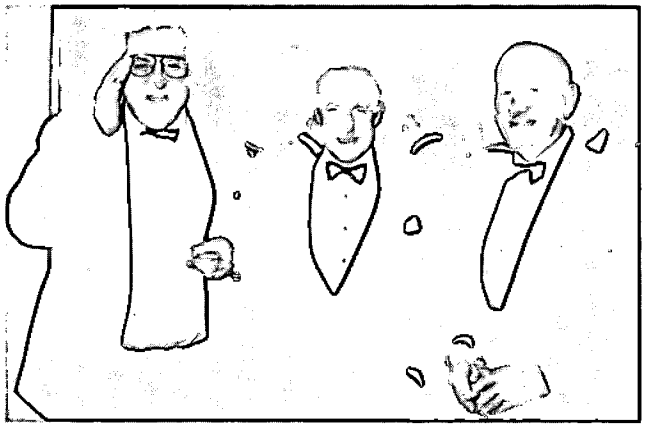
With the support of Australian commercial interests, lawyers and arbitrators we should be able to establish a major presence in this particular aspect of the flow of Pacific commerce. Achievement of this goal will play a significant part in projecting our Australian nation into a pivotal place in international commerce in the Pacific. ❑

2 Professor G. Herrmann "Overcoming Regional Differences", a paper delivered at the ICCA Tokyo Conference, June 1988, p 13

Classifieds:

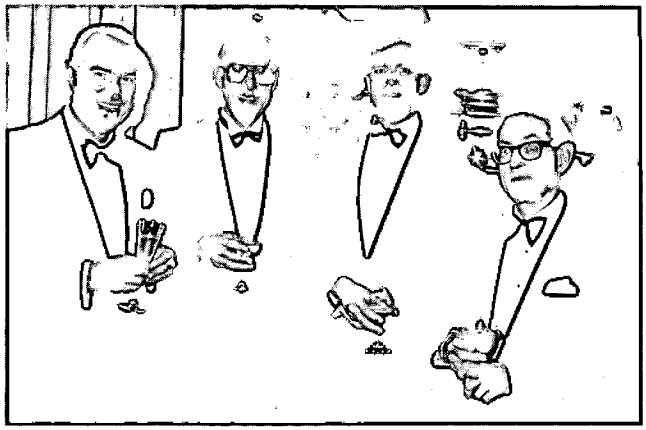
"Another Bar Extravaganza"

" As the night wore on .....



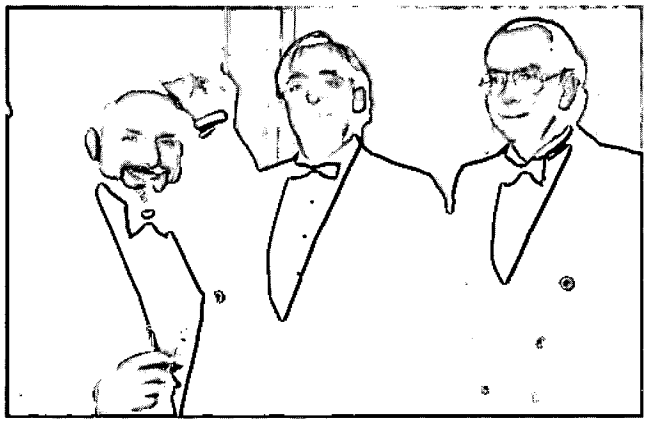
Meagher QC, Sir Laurence Street, Ritchie

Stitt QC, Wright, Mr. Justice Samuels, the Chief Justice, Sir Laurence Street

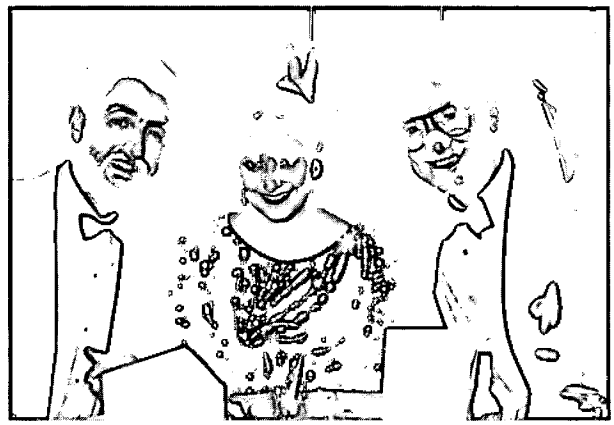


Grogan, Simos QC., Underwood, Parker QC.

Johnson, Gyles QC, Fagan



Poulos, Mr. Justice Cripps and McLaughlin



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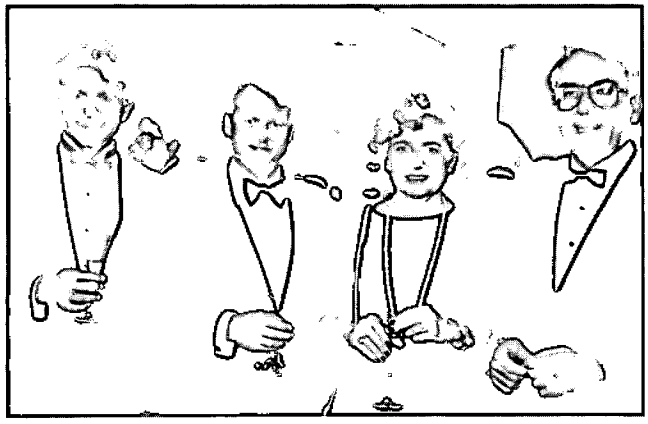
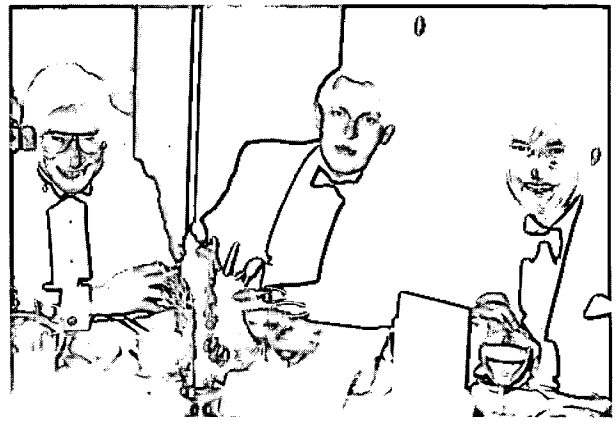


Stratton QC., Barry, Lydiard, Mr. Justice McHugh



McClintock, Harris, Grogan

The 1988 Bench and Bar Dinner was held at the Southern Cross Hotel.

.....people tended to relax."

The Chief Justice, Sir Laurence Street, the Attorney-General, John Dowd and Handley QC

Coolahan, Macfarlan QC, Cowan

Crittle, Quirk

Tobins QC, Frank Jones

Lindgren, Stitt QC

Hartigan, Whitlam QC, Moore

Emmett, Meagher QC, Rares

Mr. Justice Wilcox, Garnsey, Parker QC

Mr. Justice Bryson, Nicholas QC

Hartigan, Whitlam QC

Please Fence Us In

Obviously stung to the quick by the "The Interstate Lawyers Lament" (Bar News - Autumn 1988) the Queensland Bar responded in a predictably xenophobic way at the Australian Bar Association Conference held in Townsville with the following dirge sung to the tune of "Don't Fence Me In".

Oh! Give us briefs, lots of briefs up in
Queensland where we tout
Please fence us in.
Turn the heat on Mr. Street and keep the Southern
BARstards out.
Please fence us in.
Let us be by ourselves earning lots of fees,
Ignoring all the whingings of the southern Q.C.s
Keep them out forever, and we ask you please
Please fence us in.

Just turn us loose
Let us plunder while you wonder underneath the
Southern sky,
With our great skill, we'll fill the bill and swell the till,
And we'll leave you high and dry,
We want to try in the High where our skills are tested,
Litigate and arbitrate 'til you're divested
We can't stand competition and we won't be pestered.
Please fence us in.

Just turn us loose
We'll operate in every state with enormous enterprise
Just take our word
In our cases in all places, we will cut you down to size
We want to state on your fate, we won't take debate,
We tell you now we never will reciprocate
Cross-vesting is distressing and may make a gate,
Please fence us in.

PRACTICE COMPANIES & SERVICE ENTITIES

At the Australian Bar Association Conference held in Townsville in July, David Bloom Q.C. discussed aspects of tax planning and incorporation for Barristers.

The nature of a Barrister's practice does not permit of much tax planning - short of negatively geared investments, home investment (Capital Gains Tax Free) and Service companies or trusts, there is very little a barrister can do.

One of the greatest problems is the barrister himself. A barrister is typically a person who can afford the price of a good suit but not the time it takes to have it measured.

In Sydney, barristers wanting chambers in Wentworth or Selborne must purchase shares in Counsels Chambers Ltd. Apparently, in 1957 when Garfield Barwick led his fledgling group into Wentworth, shares relating to a single room cost 1,000 Pounds; a good young barrister could earn for a year 1,000 Pounds out of which he paid 100 Pounds in tax. Today, the same shares cost $200,000. A young barrister will be lucky to net, before tax, $50,000 and tax on that will be approximately $20,000. The shares purchased for $200,000 could not be valued at half that on an asset-backing basis.

Clearly, there is a very large element equivalent to goodwill. But it is not goodwill - which means that for Capital Gains Tax purposes, the Sydney barrister can't even take advantage of the reduction in Capital Gains Tax for which S.160ZZR provides on disposals of businesses under $1m.!

The young barrister in Sydney will thus try to make ends meet until he takes silk. Then - for a limited period in most cases - he will have a high income and pay high tax. Superannuation is his own responsibility and he will for that now get the "massive" deduction of $3,000. p.a. There is no averaging of incomes for barristers.

Incorporation, then, may be of some superficial interest. It will - at least for a limited time - provide tax benefits in the sense of a lower tax rate of 39% compared with the present highest personal rate of 49%. "Super" contributions can be made by the company at better than $3,000 p.a. tax deductible - although the contributions will now themselves be taxable at 15%; and there are the other new limitations to which Ian Gzell has made detailed reference in his paper.

Spouses and other relatives may be employed by the company without the possibility of the Commissioner using S.65 of the Income Tax Assessment Act, 1936 to reduce the deduction allowable to such amount as the Commissioner thinks reasonable; and in those places which permit incorporation - the Northern Territory and South Australia - spouses and other relatives can be shareholders.

Further, quarterly instalments of company tax are, in effect, paid in the year of income, not in advance. And in IT Ruling 25, the Commissioner has said that he will permit a practice company which satisfies his criteria to return on a cash basis, thus preserving the barrister's greatest single advaantage.

That's the good news. However, for income tax purposes the benefits of incorporation are largely illusory. In the first place, unless the practice company represents the first vehicle whereby the barrister practices, the Commission may well be entitled to treat all its income as income of the practitioner. Certainly, he has said he will do so unless the following four criteria are satisfied:

1. there is nothing in State or Territory law or professional rules to prevent incorporation;

2. there are sound business or commercial reasons for incorporation;

3. there is no diversion of income to family members;

4. the only advantage for income tax purposes is access to greater superannuation benefits.

I have quoted these four criteria from a paper delivered by Mr. Mills, First Assistant Commissioner, on 16 June, 1988. It is worth examining these four propositions individually. But in doing so, it is necessary to warn practitioners that, in modern Australia, as Mr. Mills candidly admits, the taxpayer must satisfy three standards -

First - those imposed by the Statute;
Secondly - those imposed by the Courts;
Thirdly - those imposed by the Commissioner in indicating what he finds to be "acceptable".

He will indicate, in general terms, what he finds to be "acceptable" in "Rulings". These are so voluminous that C.C.H. now publishes them. You can have the service for a large fee.

Rulings Nos. 2 and following must be read subject to Ruling 1. That provides, in effect, that the Commissioner is not bound by anything in a Ruling.

But taxpayers who behave in a way which the Commissioner finds unacceptable, do so at their own peril!

To return to Mr. Mills' four categories - the first you will recall is only capable of being satisfied in South Australia and the Northern Territory - and soon, perhaps, Victoria. The second, according to the Commissioner, can never be satisfied where family members can share in the income. This is because the income is personal service income, which is as inalienable as your left foot - at least for tax purposes.

He relies on the decisions of the High Court in Gulland, Watson & Pincus v. F.C.T. (1986) 160 C.L.R. 55. These were, of course, decisions on their own facts. But they make it sufficiently clear that a sole practitioner can never assume that

he can share his pre-tax income with his family in such a way as to make it income of theirs for tax purposes.

They were, of course, cases involving trusts and not companies. But where the company tax rate is less than the individual rate, the same may apply i.e. it is, arguably, impossible to determine any commercial benefit aside from potential tax saving. (cf. Sir Anthony Mason's judgment in Patcorp 140 C.L.R. at 253). Where the company rate is, however, as high as the highest personal tax rate, as may soon turn out to again be the case, it is harder to see that tax avoidance is a motivation. The family's right as shareholders to receive franked dividends is a right to share in after-tax income - no different to their receipts from the sole trader after he has paid his tax.

That brings me to the third requisite. Here we are departing from the realm of Statute and case law to what the Commissioner finds "acceptable". Insofar as pre-tax income is able to be diverted to family members, this third requisite is but a variant of the second.

"....the Commissioner is not bound by anything in a Ruling."

But where it is after-tax income we are talking about, there seems no propriety in the requisite at all. Yet it is far from clear that the Commissioner accepts this distinction. Further the Commissioner departs from settled case law and the Statute in failing to distinguish between cases where a practitioner starts up for the first time, with a practice company, and those where the existing practitioner incorporates.

The latter - and only the latter - are arguably within Part IVA on its terms. The former are not. The cases have always - in strong dicta - excluded the application of S.260 to new sources of income. But in IT Ruling 2330, the Commissioner says

> "Until such time as it is shown by court decisions that the position is otherwise it is proposed to adopt the view that S.260 (and Part IVA) applies in cases of this nature (i.e. a professional who commences practice for the first time and is employed by a trust or company which provides his services)."

Mr. Mills, in his June paper, admits that "uncertainty exists in this area"; but expresses the - unsupported - view that "new sources of income are equally at risk of being caught by the provisions". In other words "caveat new barrister".

Mr. Mills' fourth criteria is that the only benefit for tax purposes should be that relating to superannuation.

In essence, the Commissioner is equating Practice companies with Administration companies. He will tolerate them as long as their only tax benefit is "super". But if, for instance, the Company provides a car for which it gets a deduction, and pays fringe benefits tax (at, as it happens, a lesser rate than income tax), the Commissioner will not allow it. In a draft ruling recently provided, the Commissioner says about this:

"5. The sole justification for accepting administration entities is to enable employee/partners access to section 23F superannuation benefits. This approach was accepted on the clear understanding that the remuneration that the administration entity would pay to an employee/partner would consist solely of a reasonable amount of salary, as defined in Taxation Ruling No. IT 2067. Thus, in accordance with that Ruling, the provision of cars and other fringe benefits are not to be taken into account in superannuation purposes. Accordingly, administration entities that provide cars and other fringe benefits to employee/partners are not acceptable within the arrangements previously accepted for income tax purposes.....

8. It may be argued that such an arrangement for the provision of cars to employee/partners should be acceptable where the combined service/administration entity pays the fringe benefits tax liability. However, this would lead to the professional partnership obtaining an overall taxation benefit that was not intended. This is because the overall tax effect would be that, even though some fringe benefits tax might be paid, the professional partnership would obain an advantage by being able to deduct the full cost of the administration and service charges - which would reflect the full cost of the provision of cars to employee/partners - notwithstanding that the cars may be used by the partners partly for private purposes.

9. Given that service entities providing services to professional practices have been accepted in the past on the basis that the partners are not employees of the service entity, and bearing in mind the limited justification for the acceptance of administration entities, combined service/administration entities are also not acceptable within the arrangements previously accepted for income tax purposes."

Once again, we are in the area of what is acceptable - not what the law i.e. Statute and case law permits. Ian Gzell has said enough about Administration companies. I will say no more about them.

But as to Practice companies, two more things remain to be noted: -

1. The Effect of Imputation

It is clear that appropriate dividends paid by practice companies can be franked. Where they are, the dividend will, in effect, be tax free to the shareholder. But where the shareholder's tax rate is 49% and the company's rate is 39%, the benefits of the company's lower rate will effectively be lost; the imputation being to the extent of 39% only. However, it may be said that now that Division 7 is gone, there is no obligation to distribute. Hence the funds may be kept in the company. That brings me to the second aspect.

2. How does the barrister use the surplus funds of the company?

The company can acquire such assets as it thinks fit. But it cannot make loans to shareholders or associates or otherwise pay out moneys for their benefit. Such loans or other payments will, by S.108 of the Income Tax Assessment Act, 1936, be deemed to be dividends and will not be "frankable" (if such a word exists). In other words, the S.108 deemed dividend is assessable income of the recipient, whether a shareholder or not, and he gets the benefit of no franking rebate.

Monies can be paid by the service company to relatives for services; or indeed to Service companies or trusts. That brings me to the second topic in this paper, namely Service entities.

The Service company or trust is distinguished by the Commissioner from the Administration company on the basis that the Service company or trust does not provide the professional person's own services to him. Thus no question arises of fringe benefits for the professional person himself.

Since the decision in Phillips' Case 20 A.L.R. 607, the Service entity has achieved some respectability. Typically, it employs staff and owns capital assets such as land, plant and equipment, and hires those to the professional. That it may do so where the charges are comparable to arm's length charges is established by Phillips' Case and accepted by the Commissioner.

It is worth reading what Mr. Mills had to say about Service entities in his June paper :

" These are entities that provide various services to a professional firm. The services could include provision of office furniture and equipment, non-professional staff, share registry services etc. Indeed these were among the services provided by the service trust in the Phillips' Case, where the Federal Court held that the firm in question was entitled to a deduction under subsection 51(1) for the service fees - notwithstanding that the effect of the arrangements was to divert income from the partners of the firm to those interested in the trust (the latter generally being directly or indirectly, members of partners' families).

Crucial to this decision was the finding that the service fees charged were realistic and not in excess of commercial rates. It was also accepted that there were sound commercial (non-tax) reasons for the arrangements. So, where these elements are present, it can be expected that service entity arrangements would be accepted. Of course, as indicated in Taxation Ruling No. IT 276, if there were grossly excessive payments for the services provided, the presumption would arise that the payments were not wholly made for business purposes; to the extent that they were not, an income tax deduction would not be allowable. You might ask whether the Commisisoner can deny a deduction where the parties agree to the level of payments, even if they are grossly excessive. Reliance for that sort of argument might be placed on the well known statement by the High Court in Ronpibon Tin N.L., and affirmed in Cecil Bros., that it 'is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income but only how much he has spent'. We do not, however, see that the statement has such a wide ambit.

In Phillip's Case itself, Fisher J. (who provided the main judgment of the Federal Court), after referring to Ronpibon Tin N.L., and pointing out that the payments were commercially realistic, made the point referred to above and I quote:

'....if the expenditure was grossly excessive, it would raise the presumption that it was not wholly payable for the services and equipment provided, but was for some other purpose.'

What, you may ask, would make the expenditure grossly excessive? We in the Tax Office don't have a clear answer to that. A mark up on cost that produces a result that is comparable to an arm's length or market price is acceptable. But what if it is twice, six times or perhaps ten times the cost? Another threshold question that arises in such cases is whether the matter is to be determined under general principles that have been evolved over many years on the interpretation of section 51 - or whether the new general anti-avoidance provisions of Part IVA provide a more ready and workable solution to the problem.

The answer may not be very different under either approach. In recent times I think we have seen developments in the Courts specifically in the area of subsection 51 (1)(i), e.g. a development that has involved the Courts moving away from accepting that the tax consequences of an arrangement will be determined solely by reference to the contractual agreement between two parties. That agreement will be a relevant factor, particularly where the parties are at arm's length, but there also appears to be a greater preparedness to look more closely at the commercial basis and the effect of, and the essential reason for, a transaction. To find this essential reason, a court may adopt a test of characterising the expenditure in question - is it predominantly incurred for earning assessable income or for other purposes?

In Ure, for example, the Federal Court looked at all the evidence surrounding the loan of money to see what the various purposes of the loan were. To the extent that it was for family or private purposes, interest on the loan was held to be non deductible.

More recently, Rogers J. seemed to recognise the judicial development taking place at least in relation to the second limb of subsection 51(1) when he stated:

> 'At present, the necessary degree of connection is commonly tested by application of the principles enunciated in the joint judgment in Magna Alloys & Research Pty. Ltd. v. F.C.of T. 80 ATC 4542 at p.4559:
>
> "The controlling factor is that, viewed objectively, the outgoing must, in the circumstances, be reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of the business ends of the business being carried on for the purpose of earning assessable income."

The application of the test has been the subject of recent exposition by the Full Court of the Federal Court in F.C.of T. v Gwynvill Properties Pty. Limited 86 ATC 4512. As was pointed out by Jackson J. (at p.4525), the authorities recognise 'that there should be some expenditure incurred and the carrying on of the business in question' (emphasis added). Later in his judgment, his Honour pointed out that the Court was not required, indeed not entitled, to take into account that the same economic result might have been achieved for the taxpayer if a difficult procedure had been adopted. He then went on (at p.4526) :

> 'Having said that, however, there seems no reason why the economic result achieved by the transactions may not be examined in order to cast some light on whether the outgoings by way of interest were capable of being regarded as being desirable or appropriate from the point of view of the business ends of the respondent's business as a property owner, developer, etc.' Robinson v. F.C.of T. 86 4784, 4794)

The message from these cases on section 51 that is worth recognising is that arrangements designed to 'achieve the greatest possible tax advantage', to use the words of Rogers J. in Robinson's Case, may not succeed under the general provisions, let alone under the anti-avoidance provisions, of the income tax law. Of course, section 260 and Part IVA have to be considered (the latter as a provision of last resort)."

It is clear enough from the judgments - particularly that of Fisher J. in Phillips' Case itself, that the payments must not be grossly excessive. But between "grossly excessive" and "normal commercial or arm's length" there seems to be a fair leeway. One thing is certain, however, namely that the Commissioner is not given power to reduce such deductions to such amounts as he thinks reasonable - cf. S.65.

S.260, of course, could not apply to a deduction properly available under S.51(1). That is the accepted result of the High Court's decision in Cecil Bros. (1964) 111 C.L.R. 430 - see the decision of the Full Federal Court in Oakey Abbatoirs 55 ALR 291 and, more recently F.C. of T. v. Janmor Nominees Pty. Ltd. 87 ATC 4813. This is, of course, subject to what the High Court may have to say in John's Case which was argued recently.

But, leaving aside for the moment the effect of Part IVA, it seems that unless the payment is so excessive as to make it impossible, objectively, to say that it is entirely for the service provided, it will be an allowable deduction - in full - under S.51 (1).

Part IVA is certainly to be reckoned with in this context. There is no doubt that it, unlike S.260, applies to deductions. But for it to apply, it must appear that the taxpayer, objectively, had a dominant purpose of obtaining the tax benefit which is the deduction. Where the service for which the payment in question is made is an essential service, such a dominant purpose will, it is submitted, only be apparent where the payment is grossly excessive. In other words, the test is probably no different, in practical terms, from that applicable to S.51(1). I stress, however that both Part IVA and S.51(1) apply in terms to part of a deduction.

The great benefit of a Service entity, of course, is that it involves an acceptable sharing by family members in income. Thus, anyone can be a beneficiary under the Service trust, a shareholder in the Service company or an employee of either.

A question commonly asked at the moment is whether, having regard to the reduction in company tax rates to 39%, a company may take income under the Service trust. My own view is that if the company is an existing beneficiary, there is no impediment to its becoming presently entitled to trust income this year - a fortiori if it has received such income in the past.

But if it is specifically added for that purpose, the Commissioner may well argue that Part IVA applies and that the income derived by the company as a beneficiary is income diverted, in effect, from other beneficiaries.

Let me finish precisely as Mr. Mills finished his June paper, with a part of his paper with which I am - reluctantly - in full agreement :

> "I suggest that the topic of income splitting for professional people is one that has taken more time and interest of tax practitioners over many years than any other tax topic. The position is far from clear and I am sure that there will be further developments in future cases. Whether it be for your own affairs or for your clients, I suggest that restraint be exercised in attempts to save tax.
>
> Part IVA has to operate in the real world. Recent commentators both here and in England have suggested that if a scheme or plan appears to offer tax savings that are too good to be true then the odds are that indeed, it is too good to be true." ❑

Common Law Listing Liaison

The most important work of this Committee has been preparation for and participation in the delay reduction and case management project presided over by Mr. Justice Woods.

The Committee organised a discussion group with experienced practitioners and clerks. The Chairman (Coombs Q.C.) prepared a detailed list of proposals for improvement of the system and to deal with the current crisis, a summary of which is set out below.

Proposals having no Budgetary Implications:

1. Abolish the present variable or floating vacation of 4 weeks a year which is taken by different Judges at different times during the year and restore the fixed short vacation in July each year.
2. Change the present listing procedures so that cases would be fixed not more than 6 weeks ahead, thus enabling more accurate assessmeent of the probable length of the cases listed, and of the judicial resources available for their disposal.
3. As in the Commercial Division, require exchange of statements of witnesses 2 weeks before the hearing date. (Sydney cases only at this stage).
4. Before the case is fixed for hearing each Solicitor to file and serve a Statement of Issues. The rules should provide cost penalties in respect of issues included on such statements and not seriously litigated at the trial.
5. Bail applications in District Court criminal cases should be dealt with by the District Court and not in the Supreme Court as at present.
6. Renewed applications for bail should only be permitted if there has been a change of circumstances. Second or subsequent applications for bail should require the leave of a Judge granted without an oral hearing after consideration of the Affidavit material.
7. The Court of Criminal Appeal should have regular sittings of 1-2 weeks a month and should sit continuously during those sittings. This would achieve a more efficient use of Judges than the existing system whereby the Court sits 2 days a week every week.
8. The jurisdiction of Supreme Court Masters should be extended to include actions for the recovery of possession of land. The evidence in these cases tends to be largely formal or documentary.
9. Amend the Supreme Court rules to allow applications for summary judgment for damages to be assessed in personal injury cases where liability is clear e.g. passenger cases.
10. The daily list of actions for trial should be under the control of the List Judge and not a Registrar as at present.
11. The Common Law Division should try civil jury cases for 2 weeks a month, and non jury cases for the other weeks.

Proposals with Budgetary Implications:

1. Appoint additional Judges.
2. Amend the Supreme Court Act to allow the Chief Justice and/or Heads of Divisions to appoint or call back retired Judges for judicial work. In the first instance this could be up to age 72 (the retiring age in Victoria). Later, if the scheme proves successful, the age could be lifted to 75 (retiring age in U.K.).
3. Appoint a significant number of acting Judges (at least six) to try accident cases in the last three weeks of the long vacation in January 1989, and during the short vacation of four weeks in July 1989.
4. Establish "circuit" Courts in the Metropolitan area e.g. Parramatta, Penrith, Glebe, Balmain, Newtown, and also in Sutherland and Warringah if suitable premises are available in those centres.
5. Act on Bar Association proposals for simplifying and shortening criminal proceedings in the Supreme Court.

O'Keefe Q.C. (alternate Coombs) was appointed to the Woods Committee and several meetings have been held. A seminar was conducted on the topic by the Institute of Judicial Administration on 17 September which was attended by many Judges of the Supreme Court and members of the Bar. ❑

Finance Committee

The Association's Finances are in good order. During the last 18 months, the office systems have been dramatically upgraded with the assistance of consultants. The result is a smooth running office with excellent morale. Additional space has assisted in these regards.

The Council was able to reduce "subscriptions" for junior members for the year 1988/89. The Treasurer has reduced or waived payment, in confidence, in cases of special need.

One hundred new members joined the Association during May, June and July. There are now 1,179 full members and 353 non-members plus associates. We hope all will join since the fee is the same whether one joins or not and there are real benefits to us all from a unified collegiality.

In both the last and the current financial years, the Bar has received a grant for the Law Society's Statutory Interest Account for its part in administering professional conduct matters. This was an unexpected benefit, worth $68,000 in the current year. This, combined with early and more certain payment of "subscriptions", has contributed to a sound financial basis. ❑

Criminal Law Committee

The Criminal Law Committee has had a number of urgent problems to deal with over the last year due to the rush of legislation passed by the old Government at the end of 1987 prior to the election announcement in early 1988 and due to changes introduced by the new Government after the election. There were a very large number of Acts which came into force on 18th December. These were largely procedural but the procedures greatly affected the rights of an accused - for example the cross examination of the victim at committal proceedings and the reduction of jury challenges to three. Although it was not possible to procure copies of all Bills prior to their being passed, representations were made concerning a number of them.

The Task Force Against Violence to Women and Children set up by the Labor Government put forward a very radical discussion paper. This was the genesis of the legislation permitting television evidence of child victims. Both written submissions and oral argument were addressed to the Task Force. Donovan, who made the main oral argument to the Committee in conjunction with the Law Society's Criminal Law Committee, received a cool reception from some members of the Task Force. Representations were further made when the legislation was drafted. These were unsuccessful. Since then the present Attorney General has kindly invited the committee with many others to view the current technology. In the Committee's view, apart from the question of principle, the technology is crude - you cannot see the whole person (e.g. hands) and the picture does not show subtleties of expression. Also the procedure is unsatisfactory - the demonstration witness looked at a person off camera from time to time giving an impression of being prompted. The general feeling at the demonstration was that the procedure was unsatisfactory. The Committee believes it cannot safely be introduced at this time.

In a calmer environment the Committee for Review of Commonwealth Criminal Law has issued 15 discussion papers since the middle of last year dealing with a variety of topics ranging through the common law of the Commonwealth Conspiracy, Drugs and Security. Because the Law Council did not have a functioning criminal law committee, the Bar Association's Criminal Law Committee made submissions on almost all the papers (there are also two outstanding). Of particular controversy was the submission on conspiracy. It is hoped that a shortened version of the submission can be published in Bar News. The Committee is particularly grateful to Cowdery Q.C. for his submission to the Council which set out many matters which the Committee had not fully considered, particularly as his great experience in Commonwealth prosecutions for the D.P.P. enabled him to give the Council a different perspective on conspiracy.

There were three discussion papers on sentencing issued by the Australian Law Reform Commission toward the end of 1987 and submissions were made in response to all three. A member of the Association raised with the Council whether circulars could be issued setting out changes in criminal procedure, particularly where Rules such as the new District Court Criminal Rules are involved. The Committee in response has issued information circulars. It must be emphasized, however, that not always are changes in procedure brought to the attention of the Committee and members should not presume that circulars will be up to date. If members could bring these matters to the attention of the Committee it would be of assistance.

Finally the Committee wishes to express its gratitude to the President and Adams Q.C. for their extensive work in making representations about the Independent Commission against Corruption Bill. Although strictly this matter was not within the province of the Criminal Law Committee members should be aware of the extensive work done by others than those on the Committee. ❑

Legal Education and Reading

The number of new barristers coming to the Bar is on the increase again.

With the introduction of Practising Certificates from 1 July, all current Readers have been issued with a certificate bearing the following restriction:

> 'The holder of this certificate is subject to the conditions and restrictions imposed on pupils by the Rulesof the New South Wales Bar Association.'

The Reading Programme is for the benefit of two groups - the public and newly admitted barristers. As a consequence the Reading Committee has been vigilant to ensure that those who are part of the Readers Course gain the benefits which flow from it. Without an examination system of the kind adopted in some jurisdictions in the United States, attendance at lectures and exercises and fulfilment of the formal requirements has been adopted as the measure of satisfactory completion.

A total of twenty barristers have had their pupillage extended for failing to complete pupillage satisfactorily.

Of those, fifteen had failed to attend a satisfactory number of Reading lectures and to read for a period of two weeks with a Crown Prosecutor or Public Defender. The remaining five failed to satisfy the latter requirement.

On a brighter note, the Bar's Continuing Legal Education programme continues to expand. In March of this year Handley Q.C. and Tobias Q.C. gave us an insight into the workings of the new Legal Profession Act and in July, Lord Justice Kerr gave us the benefit of his knowledge about proposed changes to the English legal system.

Two lectures on Forensic Chemistry and Biology took place in late August and a seminar on Legislative Drafting is proposed for 12 October 1988.

The Reading Committee wishes to thank all lecturers for their continued support and looks forward to further improvements in the programme in 1989. ❑

Accident Compensation Committee

The Transcover Committee was convened under the Chairmanship of the Attorney General. Coombs Q.C. is the Bar's delegate (alternate Morris Q.C.) and Maurie Stack represents the Law Society.

The Committee has met a number of times, and despite some vigorous debate is proceeding towards finalising the main options for consideration by the Government.

The next stage is to arrange independent costings of the main options, as this will determine the extent to which private insurer involvement in any new arrangements will be possible.

It seems to be generally agreed that any new arrangements are likely to retain some features of Transcover, particularly in relation to small claims with emphasis on quick processing of an initial decision on liability and provision for structured settlements where appropriate in the view of the court and ongoing payments of medical and rehabilitation expenses for seriously injured accident victims.

Coombs Q.C. acknowledges the vigorous and effective Chairmanship of the Attorney General who has brooked no nonsense and made it clear that in his view the pre-election commitment is to be met. ❑

Professional Conduct Committee # 2

1. A client complained about the conduct of a barrister who had expressed considerable reservations about her prospects of success in a proposed medical negligence action. The complaint was not that the barrister had acted unprofessionally, dishonestly or discourteously, but rather that he did not share the client's convictions about the merits of the proposed action. After investigation, the complaint was dismissed on the ground that it did not raise any matter amounting to professional misconduct or to a breach of any Bar Rule.

2. A barrister who was the subject of a complaint and who failed to respond to a number of requests by the Bar Association for his comments on the complaint was fined $1,000.00 by the Bar Council for breaching Bar Rule 67 after he failed to show cause why he should not be so fined for his failure to respond to the Bar Association's requests.❑

Professional Conduct Committee # 3

The Professional Conduct Committee No. 3 has dealt with 10 complaints. Nine were dismissed and one was referred to Bar Council for referral to a Disciplinary Tribunal.

A number related to claims by litigants that they had been unduly pressured into settlement. This points up the need for the client to feel that he has in fact the right to choose whether he/she wishes to settle or not. Others were directed to claimed excesses in cross-examination, emphasising the need for counsel to strictly observe Rules 47, 48, 51 and 52. In a number of cases, no breach of the rules was found, but the Committee and the Council felt that the particular barrister would benefit from counselling, which is fraternal and designed to produce effective and correct behaviour in the future. ❑

Fees

The Bar's submission on a long-overdue increase in loadings was formally accepted by the District Court Rule Committee on 31 May 1988 and there has now been published a new set of loadings for country towns visited by that court. It is substantially in accordance with the Bar's submission. It is proposed to make regular submissions for increases in the loadings to reflect upward movement in components which go to calculating the loadings (e.g. airfares). The new scale of loadings has been accepted in principle by the Supreme Court for its relevant towns and it is understood that taxing officers will allow loadings at the increased rate pending their formal implementation.

The Committee's next task will be to examine the question of interstate loadings in response to enquiries from some members who do a fair amount of interstate work in the Federal Court and other tribunals. A set of proposed or recommended loadings for capital cities will be assembled shortly.

So far as recoveries of fees are concerned, members are reminded to check each issue of the list of defaulting solicitors published by the Registrar to ensure that they are not accepting briefs from thos esolicitors without complying with Rule 85 (fee upon delivery of brief). Members are also reminded that, in the absence of special circumstances, fees are regarded as "stale" if a period of more than four years has elapsed between the time when the fees were first rendered and the time of the first complaint to the Bar Council. ❑

Commercial Liaison
Commercial Legal Aid Scheme

On 1 September 1988, the Bar Council approved in principle a scheme designed to assist indigent litigants in the commercial list, primarily defendants, who are unable to obtain legal aid.

The principles which govern the organisation of this scheme are as follows:-

1. The scheme is confined to the commercial list where legal aid is not normally granted.

2. It is not intended to be a panacea for a social problem. It is merely intended to provide some amelioration for the general failure of legal aid to operate in the commercial list.

3. It is designed primarily for defendants (including cross claimants) in proceedings already commenced. While we would not refuse to consider applications by intending plaintiffs, the scheme will not be advertised in a way which would encourage them.

4. The commercial judges would be invited to advise the Committee when a case comes before them which they consider might be appropriate for our scheme. A pupil doing his "time" will attend (on a roster system) all Friday motion days as "duty barrister" to discuss potential applications when the judge refers litigants to him. In appropriate cases he might apply for adjournments - this would require a general dispensation to permit him to appear for that purpose only without any instructing solicitor. As the procedure thus far is analogous to dock briefs, the dispensation has a respectable history.

5. The commercial committee or a member of it would interview applicants with a view to determining whether the case is an appropriate one. In general, the criteria would be:-

(a) a meritorious case;
(b) not too heavy a case;
(c) inability of the litigant to finance the case.

6. It will be necessary for the Solicitors' Commercial Court Committee to be invited to participate in the scheme so that a firm of solicitors could be provided.

7. The initial proof-taking and perhaps the commercial mentions or some of them could be carried out by pupils doing their three months time as part of their pupillage. Their work in this regard should, however, be checked by their masters. The master would not normally interview the client but the master would explain to the pupil how to take a statement and vet the statement ultimately obtained possibly suggesting a second conference at which further questions would be asked. Similarly the master would be expected to give the pupil some specific advice in relation to the commercial list mentions.

8. Work done would be recorded and a notional bill would be prepared and sent to the solicitor for all work done.

9. The solicitor would be advised that, in the event of failure in the litigation, it would not be the intention either of the pupil or of the barrister ultimately conducting the case that his bill should be met. The result would be that, in practice, the solicitor would not render a bill unless the litigation were successful and an order for costs made.

10. Everyone would receive scale party/party costs in the event of success of the litigation and an order for costs being made against the other party.

11. The committee would select a barrister who appears in the commercial list to conduct the case. In normal circumstances the case would be conducted by a senior junior although, in exceptional cases, silk and a junior might be briefed.

12. In general, no-one should be asked to do more than one a year.

13. The committee would make up a list of barristers to whom it would entrust aided litigation. Such a list might be compiled by a dragooning process assisted by a circular inviting volunteers.

14. The solicitors should be asked to provide their services on a corresponding basis. In general, as this is to be our scheme, it is not proposed that a heavy burden should be placed on the participating solicitors. ❑

Rules

Three amendments have been made to the Rules during the last few weeks.

1. Rule 17 has been repealed. That rule provided:-

> A barrister shall not express any views or opinion, whetheroral or in writing, for the purpose of being used as evidence as to the duties or responsibilities of registrars, magistrates, mining wardens or persons holding similar positions in connection with any applications by such persons relating to salaries, emoluments or seniority.

No-one knows why this rule was first introduced but it seems to be singularly pointless. One would have thought that if there were some issue before a public service tribunal of some kind as to the appropriate public service designation of registrars or the like, it would be quite appropriate for members of the Bar, if asked, to express their views.

If the Rule was originally intended to prevent barristers ingratiating themselves with such persons by giving them glowing references, it fails to achieve that purpose because the prohibition relates not to commenting on the merits of individuals, but to commenting on the nature of their duties or responsibilities. There would seem to be no reason for such prohibition.

2. Rule 33 has been replaced by a more elaborate code of three rules governing the situations in which a barrister may confer or appear without an instructing solicitor being present. The rule is designed to cover situations in which it is reasonable to do this while not relaxing the strictness of the prohibition in cases where it should not occur. The full text of the new rules is as follows:-

> 33. A barrister shall require the attendance of his/her instructing solicitor (or the solicitor's clerk or the city agent of a country solicitor or the country agent of a city solicitor) at any conference with a lay client or with any witness and may only dispense with such attendance if:
> (a) he is satisfied that no prejudice will be suffered either by the barrister or by the lay client due to the absence of such solicitor (or clerk or agent) ; and

(b)(i) it is not anticipated that there will be any instructions for settlement given directly from the client to the barrister or any advice concerning settlement given or any offer of settlement suggested or considered ; or

(ii) compelling circumstances so require in the interests of the client; or

(iii) the Council gives permission.

33A. Subject to the requirements of Rule 33 above, a barrister may dispense with the attendance of his/her instructing solicitor (or the solicitor's clerk or the city agent of a country solicitor or the country agent of a city solicitor) at the hearing of any proceedings in which that barrister is briefed if:

(i) the barrister is satisfied that no prejudice will be suffered either by that barrister or by the lay client due to the absence of such solicitor or clerk or agent; and

(ii) (a) the barrister is of the opinion that the presence of the solicitor or clerk is unnecessary having regard to the following matters:

(I) the complexity of the matter;

(II) the extent of the barrister's written instructions;

(III) the distance or time or cost involved in requiring the attendance of the solicitor or clerk or agent;

(IV) the jurisdiction in which the matter is being heard;

(V) whether the hearing is of any nterlocutory or final nature;

(VI) the improbability of the matter being settled;

(VII) in a civil action, the amount in issue;

(VIII) in a criminal matter, the seriousness of the charge preferred against the lay client and the nature of the plea to be entered; or

(b) the Council gives permission.

33B Paragraphs (b)(i) and (b)(ii) of Rule 33 and paragraph (ii)(a) of Rule 33A shall not apply in relation to attendance at prisons.

3. There has been considerable controversy about the provisions of the rules dealing with the giving of private seminars and the like to individual firms of solicitors or government departments. The Bar Council has resolved to adopt a rule in the following terms:-

79B 1. Subject to sub-rule 2, a barrister may give a lecture or paper or participate in any public or professional function, seminar or course concerned with legal or quasi-legal education.

2. A barrister may not participate in accordance with sub-rule 1 where the persons invited or eligible to attend the occasion are substantially confined to persons associated with one or more firms of solicitors, commercial organisations or government departments. ❑

Amalgamation of Reporting Services

On 1 July 1988 the three separate reporting and recording services within the Attorney General's Department amalgamated, these being the Court Reporting Branch, Transcription Services Bureau and the Recording Services Branch of Local Courts Administration.

This amalgamation resulted in the establishment of the new Reporting Services Branch.

This new Branch will provide a more efficient service to the courts due to a greater flexibility in allocating court reporters and monitors.

The effects of the amalgamation will not be seen immediately, however, as many structural changes have to take place within management areas and some positions have yet to be advertised and filled.

A new position of Director, Reporting Services, has been created to oversee the successful amalgamation of the three services, as well as the development and implementation of both technical and procedural improvements to the provision of services to all levels of courts.

Mr. Michael McLoon (ex Chief Court Reporter, Court Reporting Branch) has been appointed Acting Director pending the filling of the position after applications close on 26 August.

The title "Chief Court Reporter" has been abolished. A lot of tradition goes with it, as there has been a Chief Court Reporter since World War I. In its stead is "Manager Reporting". Mrs. Jenny Davis is currently acting in this position, she normally being the Assignment Officer at Court Reporting.

With the exception of the Compensation Courts and some District Court Civil circuits, court reporters are still covering the same courts and providing the same services. It is anticipated that in the future some of the lower priority courts will be sound recorded, thus freeing more reporters to work on the higher priority daily transcript courts.

The Court Reporting Unit is still situated at Level 7, 185 Macquarie Street. The jurisdictions covered by Transcription Services Bureau and Local Courts Recording Services are located at Level 6, 302 Castlereagh Steet. ❑

Report on Evidence

The New South Wales Law Reform Commission has released its Report on Evidence. Its major recommendations are:

* that uniform evidence laws be applied by all tribunals sitting in New South Wales; and

* that legislation proposed by the Australian Law Reform Commission in its Report on Evidence(1987) be implemented in New South Wales.

Evidence laws vary greatly amongst the States and Territories. At present federal courts apply the law applicable in the State or Territory where they happen to be sitting. This is confusing and can lead to injustice. In its Report the ALRC sought to eliminate these anomalies by drafting uniform legislation to be applied in all proceedings before Federal courts.

If this legislation is implemented at the federal level, different laws may apply in State and Federal courts sitting within New South Wales. The Commission wishes to avoid the confusion and uncertainty this would generate and therefore recommends the adoption with very little amendment of the ALRC's draft legislation for implementation in New South Wales.

Implementation of the ALRC recommendation, the Commission says, will also bring about badly needed reform of the laws of evidence. They are said to be excessively technical and unsystematic, having developed over centuries in an ad hoc manner. The draft legislation in the ALRC Report is clear, comprehensive, based on a set of internally consistent policies, and takes into account modern knowledge of human behaviour and technological developments.

Copies of the Report have been forwarded to the Floor Clerks in chambers located in Sydney, Parramatta and Wollongong and are also available on request from the Secretary to the Commission. ❑

Compensation Court - Application for Part Transcripts

In view of the high priority being given to alleviate delays in transcript production, considerable funds have been committed to the purchase and installation of 300 new sound recording units aimed at standardization and improvement of transcript production.

As a result of recent representations it is appropriate to remind all "users" of the Department's reporting services that applications for transcripts need not always be for the entire transcript.

If a portion of evidence only, is required, application for that portion of evidence can and should be made. By specifically applying for, for example, the prosecution's cross examination of witness Bill Smith, courts administration staff are able to identify the piece of evidence required from the master tape history sheet completed by the Monitor.

Obviously, adopting this course would maximise the efficient use of resources. It would be beneficial to applicants who could expect a speedier preparation of transcript or

cassette. Also, reporting services would benefit by not having to prepare an entire transcript when it may not be necessary.

J.B. Cross,
Registrar of the Compensation Court of New South Wales. ❑

Commonwealth Law Conference - 1990

The 1990 Commonwealth Law Conference will be held in Auckland in the period 16 to 20 April 1990, the week after Easter. New Zealand is a fitting choice for the Conference as in 1990 the country will celebrate 150 years of formal association with the British Crown.

The Conference is recognised as one of the most important fixtures on the international law conference calendar. It attracts many distinguished Commonwealth lawyers, including judges, political leaders, academics, practitioners and government officers.

The Organising Committee is planning a broad-ranging programme of business sessions. Well over 100 speakers will address delegates in a variety of gatherings ranging from special-interest workshops and field trips to major plenary sessions. At most times delegates will be able to choose from a number of concurrent sessions.

Attendance of about 4,000 is expected. A number of special-interest meetings will coincide with the Auckland Conference, incuding a conference of Commonwealth law ministers.

There will be a range of New Zealand sightseeing tours available to overseas delegates before and after the Conference as well as tours and social gatherings in the Auckland area during the five days of the Conference.

For further information about the 1990 Commonwealth Law Conference please contact:

The Organising Committee, Commonwealth Law Conference, P.O. Box 58 Auckland New Zealand
International Telephone: 64-9-31-036
International Facsimile: 64-9-393-726 ❑

Convention Papers Available

The Law Council still has some copies of the published papers given at the 24th Australian Legal Convention in Perth last year.

Thirty-seven of the papers, covering a wide range of issues, have been published in a book which is now available at a nominal cost of $10 (including postage).

Copies are available from: Convention Officer, Law Council of Australia, G.P.O. Box 1989, Canberra City A.C.T. 2601 or DX 5719 Canberra. Telephone (062) 47.3788. ❑

Changing Roles

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 20th May, 1988:

James Paul Hasson
Linda May Huppatz
Stephen James McMillan
Peter John Dominic Robinson
Claudia Jame Walton
Amelia Jane Boundy
Michelle Emily McAuslan
Russell Scott
Gary Raymond Stewart
Edward Bernard Gilchrist
Gregory Stewart Hogg
James John Jolliffe
Paul Douglas Nash
Gordon Philip Renouf
Donald Colin Evans
Kathleen Mary Harrison
Walter Danaraj Moses
Sara Rose Pantzer

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 1st July, 1988:

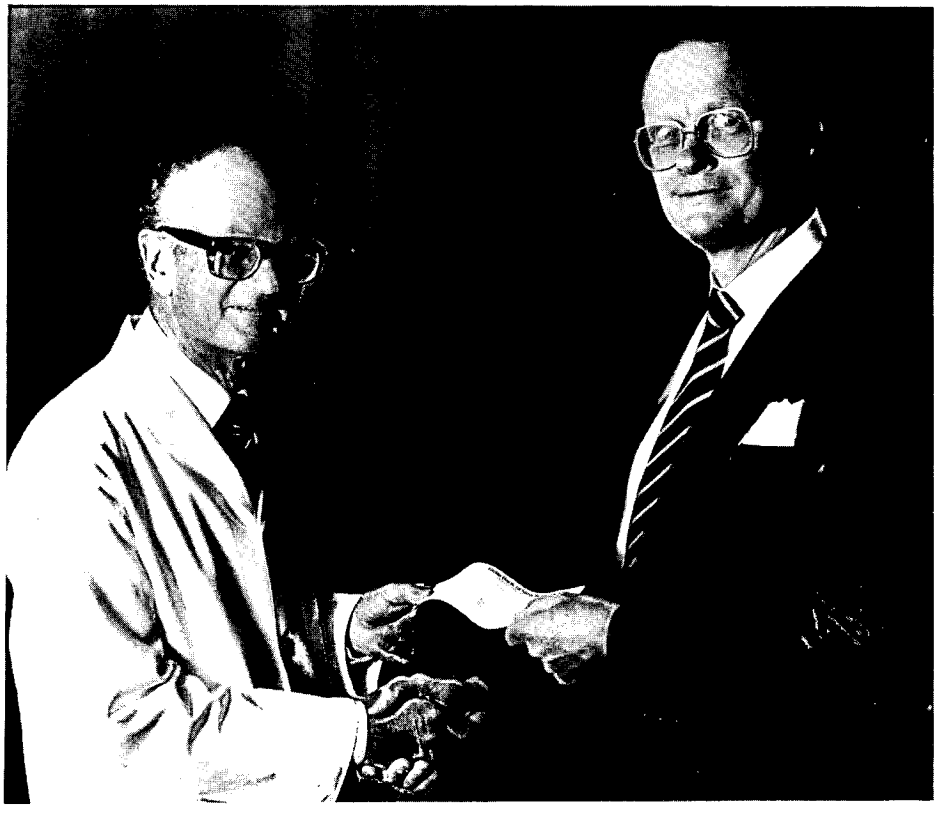
Mary Cecilia Castle
Peter George Dodd
Claudia Brigitte Douglas
Bruce Harris
Margaret Anne Jones
Phillip Frederick Liney
Terence Patrick Morrish
John Morgan Muldoon
Angela Margaret Everard Nanson
Terence William Sheahan
John Henton Tuckfield
David Kenyon Wells
Nanette Lee Williams
Neil Stewart Williamson
Kenneth Hudson Youdale

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 5th August, 1988:

Matthew Shearman Allen
Marcus Kessel Bannister
Anthony Christopher Ginn
John Brian Goldrick
Brian Gordon Graham
Timothy Stewart Harris
Kenneth Joffre Maddén
Andrew Peter Quigley
Russell Malcolm Squires

One of the many groups of readers visiting with Mr. Justice Kirby on a Motions Day in the Court of Appeal.

(L to R) McColm, Tregenza, Broadhead, Walsh, Duncombe, H. Barrett, (Education Officer), Justice Kirby, Beavis, Molomby, Ying, Burton.



President of the New South Wales Bar Association Mr. Ken Handley, presented a cheque for $24,000 to clinical director Professor John Beveridge at the Prince of Wales Children's Hospital. The money, raised by the Bar Association members, will be used to fund research projects into paediatrics and orthopaedics, through the Prince of Wales Children's Hospital Foundation.

At the cheque hand-over ceremony Mr. Handley and Professor John Beveridge discussed the various areas where the research will concentrate and Mr. Handley said "We are delighted to have been able to raise this amount towards the valuable research needed in these areas."

The Heart of the Matter

Frank Jones, Registrar of the High Court, imparts some words of wisdom about attracting the court's interest.

I am frequently asked by counsel, making their first appearance in a criminal application, what is the best way of opening the application. I usually reply, get to the special leave point quickly, and if you can, get the Court's interest in those early minutes of the application. Sir Harry Gibbs summed it up appropriately when he said:

> "Advocacy is the art of persuasion, and members of the High Court are no less likely than others to be more readily persuaded by an argument that captures their interest, or one that insinuates that it has the merits as well as the law on its side. However, persuasion depends on the exercise of tact and counsel presenting an argument before the High Court must take into account the nature of the audience.")

A young counsel recently presenting his first application to the Court opened in the following way:

" **Counsel**: The court will see that I have set out on page 2, the proposition for which I am contending in this appeal and the three sets of arguments are directed to that proposition. Turning then to the historical reasons and by way of introduction to that, the Statute of Forcible Entry of Richard II was enacted more than four centuries before the First Fleet sailed to Australia. But there are factors in the history of that period which are helpful in understanding the sections of the Victorian Crimes Act.

1381 was the year of the peasants' revolt and this Statute was enacted soon afterwards in an attempt to remove a particular cause of civil disturbance and unrest. There are two historical factors which are important at that time:
the first is that in 1349, just a generation earlier, the black death had swept through Europe and in one year a third of the population of Europe, from Iceland to India died. That meant obviously labour shortages, demands for more wages, greater social mobility and inheritance of land became confused; whole villages were wiped out and quite distant claims of inheritance were disputed and there was a great deal of dispute as to who owned what land. The second factor is that this was also the time of the 100 year war between England and France. In those days armies were recruited from untrained men and for the most part, they were not paid. They were required to get their living from plunder. That was all very well while the army was over fighting in France, but when they came back to England they tended to want to support themselves in the same way. So rich and powerful people had a ready source of repossession agents to use when they wanted to claim a particular property."

Counsel was congratulated by the Court at the conclusion of his argument and eventually after the Court had reserved its decision won his appeal 5-nil. ❑

SUPREME COURT OF NEW SOUTH WALES
Appointment of Circuit Sittings for 1989

Court	Date	Duration
Albury	Monday 26th June (Civil)	2
Armidale	Monday 3rd July (Civil)	1
Bathurst	Monday 13th February (Criminal)	4
	Monday 24th July (Civil)	2
Broken Hill	Monday 5th June (Civil and Criminal)	3
Coffs Harbour	Monday 24th July (Civil)	2
Dubbo	Monday 10th July (Civil)	2
Goulburn	Monday 30th January (Criminal & Civil)	3
Grafton	Monday 10th July (Civil)	2
Griffith	Monday 10th July (Civil)	2
Lismore	Monday 1st May (Criminal)	4
	Monday 26th June (Civil)	2
Narrabri	Monday 10th July (Civil)	1
Newcastle	Monday 6th February (Civil - Jury)	3
	Monday 6th March (Criminal)	3
	Monday 10th April (Non-Jury)	2
	Monday 1st May (Criminal)	3
	Monday 22nd May (Jury)	3
	Monday 19th June (Civil - Non-Jury)	2
	Monday 10th July (Criminal)	3
	Monday 31st July (Civil - Jury)	3
	Monday 4th September (Non-Jury)	2
	Monday 9th October (Criminal)	3
	Monday 6th November (Jury)	3
Orange	Monday 26th June (Civil)	2
Tamworth	Tuesday 28th March (Criminal)	3
	Monday 19th June (Civil)	2
Wagga Wagga	Monday 24th July (Civil)	2
	Monday 7th August (Criminal)	4
Wollongong	Monday 13th February (Jury)	3
	Monday 6th March (Criminal)	4
	Monday 3rd April (Criminal)	4
	Monday 1st May (Non-Jury)	2
	Monday 29th May (Jury)	3
	Monday 19th June (Criminal)	4
	Monday 17th July (Criminal)	5
	Monday 21st August (Non-Jury)	2
	Monday 4th September (Criminal)	5
	Monday 9th October (Criminal)	5
	Monday 13th November (Jury)	2

The fixed vacation begins on 16th December, 1989 and the first day of term in 1990 will be 29th January.

Note:

Bathurst Criminal sittings will also deal with Criminal Trials usually listed for Orange and Dubbo.

Wagga Wagga Criminal sittings will also deal with Criminal Trials usually listed for Albury and Griffith.

Lismore Criminal sittings will also deal with Criminal Trials usually listed for Grafton and Coffs Harbour.

Tamworth Criminal sittings will also deal with Criminal Trials usually listed for Armidale and Narrabri. ❑

This Sporting Life

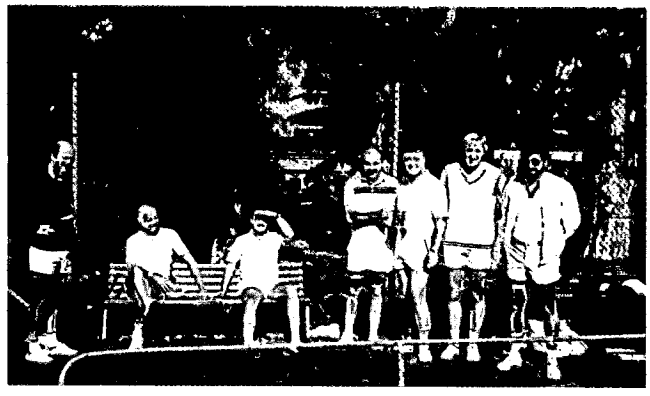
Golf - Bench and Bar v. Services

For the second year running the Bench & Bar scooped the pool, winning all three trophies in the annual July match against the Services.

Elanora Country Club was again the venue on a sunny winter day with dinner to follow in the Club House. Judge Gallen accepted the bronze gong trophy for the overall result as well as the cartridge case and wooden shield for "A" and "B" Grade. The victory was due in no small measure to Wheelahan/Hrouda and Delaney/Skiller each of whom managed 44 points in "A" Grade with Peter Gray and John Rowe contributing 40 points in "B" Grade. None of the Bench & Bar participants demonstrated sufficient skill to win the long drive or nearest the pin prizes.

Wheelahan distinguished himself as Dining President by arriving 30 minutes late which, in some incomprehensible way that made sense on the night, provoked after dinner speeches about the Big Bearded Boring Barrister and the Poor but Passionate Prussian Prince. Those readers who were not present and are intrigued to know the full details will now regret not having attended. On that note, every encouragement is extended to members of the Bench and Bar to participate in this day including the dinner at night which is one of the highlights of the Golfing Society Calendar.

The date for next year's fixture against Services will be notified in Bar News early in 1989, in conjunction with a report on the Solicitors Golf Day which is scheduled for January next year, the precise date and entry forms for which will be circulated before the end of Term. ❑ **Neil Francey**



(L to R) Mr. Justice Beaumont, Mr. Justice Giles, Gary Walsh, Michael G. Ikraim, M.B. Williams, Michael Sexton and Des Kennedy.

Tennis Day - 1st August 1988

In stark contrast to conditions which prevailed between 1984-87, the Bench Bar Tennis Day was held in glorious sunny weather on 1st August 1988 in the "Great Gatsby Gardens" of Royal Sydney Golf Club.

Although numbers were somewhat down on previous years, an enthusiastic and dexterous group gathered (under the watchful eye of a News Program helicopter) to pit youthful agility against the guile and subtlety of experience.

After a very enjoyable morning's tennis and an even more enjoyable lunch at the Clubhouse, Judge McCredie and Wynyard did battle against the powerful combination of Sexton and Newport for the minor placings with Mr. Justice Giles and Kennedy taking on Mr. Justice Beaumont and Deakin in the finals.

After a closely fought battle with only a few breaks of service despite the after effects of a heavy lunch, the pinpoint consistency of Mr. Justice Beaumont and the aggression of Deakin at the net finally prevailed.

Special thanks to the Registrar and the organisers for a great day. It is to be hoped next year a greater number of players can be enticed out of chambers and onto the courts to compete for the R.T.H. Barbour Cup which is the oldest Sporting Trophy of the N.S.W. Bar. ❑

The A.B.A. Conference brought out the eccentric in many, as witness the strange garb and posture adopted by Bennett Q.C.