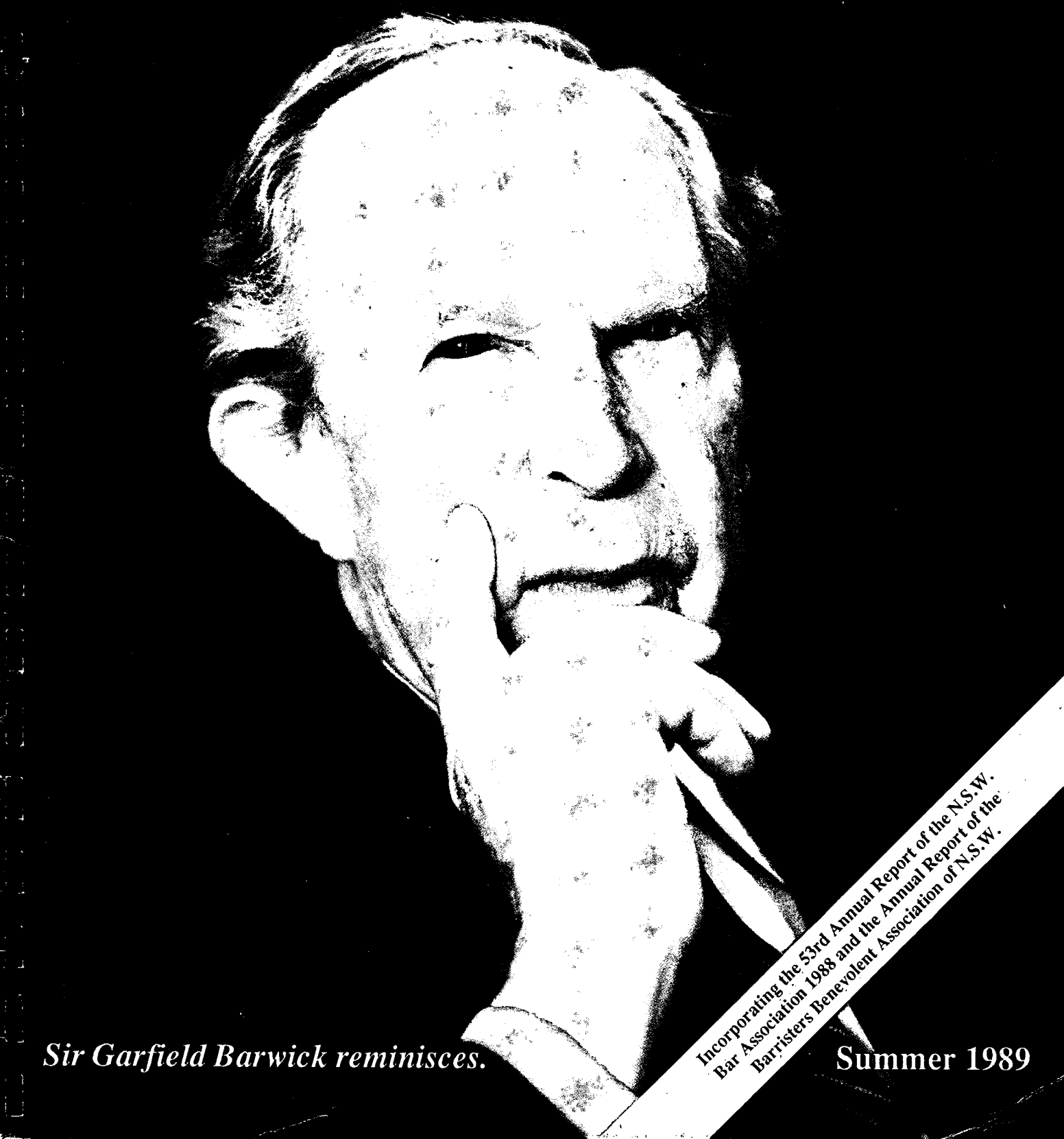
Bar News

The journal of the NSW Bar Association



Sir Garfield Barwick reminisces.

Incorporating the 53rd Annual Report of the N.S.W. Bar Association 1988 and the Annual Report of the Barristers Benevolent Association of N.S.W.

Summer 1989

Published by: NSW Bar Association
174 Phillip Street, Sydney NSW 2000

Editor: R.S. McColl

Assistant Editor: P.M. Donohoe

Bar Council Committee Reports: Prepared by the members of each committee respectively.

Annual Report: Compiled by the Registrar of the Bar Association, Capt. Duchesne, Julie Farrand and the staff of the Association.

Produced by: The Business Link
7 Gunjulla Place, Avalon NSW 2107
Phone (02) 91.9288

Printed by:
Robert Burton Printers Pty. Ltd.
63 Carlingford Street
Sefton NSW 2162

Advertising:
Contact Ross Wishart (02) 918.9288

Photographs: "Barwick - The Young Advocate" on p.13 courtesy of Mirror Australian Telegraph Publications. All photographs taken at the Bench & Bar Dinner in honour of Chief Justice Gleeson were taken by Margo J. Photographics, Shop 417 Kingsgate Hyatt Shopping Centre, William Street, Kings Cross. Phone 358.1844. Proofs are available for inspection in the Bar Library.

Contributions are welcome, and should be addressed to the Editor, R.S. McColl, 7th floor, Wentworth Chambers, 180 Phillip Street, Sydney NSW 2000.

ISSN 0817-0002

In this issue

Bar Notes 2
Courts attack Congested Lists
Practising in South Australia
Middle Temple
UK Bar Changes Advertising Rules

From the President 3

The First 100 Days ..or so.. 5

Bar News Interviews Sir Garfield Barwick 9

The Great Appeaser 19
- Dinner in honour of Chief Justice Gleeson

11th Biennial Lawasia Conference 28

Review of UK Green Papers 29

The Barrister's Armoury 33

Reports from Bar Council Committees 34

Managing your own Money 39

Book Reviews 41

Tax Planning vs. Investment Planning 43

Mid-Atlantic Litigation 45

Poetry on Motion 46

Identification and Recollection 47

Restructuring the Attorney-General's Department 47

Around the Courts
Commercial Legal Aid Scheme 48
Local Court 48
Criminal Listing Directorate 49

Motions and Mentions 50

This Sporting Life 53

COVER: Photograph of Sir Garfield Barwick reproduced with permission of the the Law Institute Journal, Victoria

Bar Notes

Courts Attack Congested Lists

The Supreme Court and District Court have by recent rules of Court introduced a procedure which, if used by the lawyers on their clients' instructions, will reduce the number of cases to be heard in those Courts. It is called "offer of compromise" under which the plaintiff or the defendant, may make an offer to settle the case.

If the offer is as good as or better than the final judgment, costs are payable as follows: if the offer is made by a winning plaintiff, the plaintiff's costs of work done since the offer are payable by the defendant on a higher (indemnity) basis than a winning plaintiff otherwise gets; if the offer is made by a losing defendant the plaintiff has to pay the defendant's costs of work done after the offer was made.

The sooner a party makes an offer the greater is the pressure put on the other party to settle because costs are at risk and increasing. Cases can therefore be settled much earlier than at the day of trial.

It applies to all claims. It is not restricted to money claims. Payment into Court is not necessary nor is the former procedure of payment into Court any longer available.

The procedure was said by Professor Williams to be the most distinctive feature of the 1987 Victorian rules. It is said to be successful in Victoria and can be successful here if offers are made. ❑

Practising in South Australia

Some interstate practitioners have not realised that in order to practise in South Australia even as a visiting Counsel it is necessary to obtain a Practising Certificate.

Practising Certificates run from the 1st January to the 31st December in each year. Practitioners who do not receive trust monies in South Australia are obliged to obtain an exemption from the Registrar of the Supreme Court from appointing an auditor. They then lodge a Regulation 58 Statutory Declaration on or before the 31st October in each year to the effect that they neither received nor held any trust monies in this State for the audit year 1st July to 30th June.

Normally at the time of admission the Supreme Court Admissions Clerk does remind practitioners of the need to obtain a Practising Certificate. However sometimes in the rush of the moment (especially insofar as some practitioners apply for admission on the day they intend to appear) the need for a Practising Certificate may be overlooked. ❑

Middle Temple

The Chief Justice of New South Wales, Mr. Justice Murray Gleeson, has been elected an Honorary Master of the Bench of Middle Temple. ❑

UK Bar Changes Advertising Rules

The U.K Bar has removed restrictions on advertising and allowed direct access to their services by members of seven professional bodies.

A meeting of the Bar Council on Saturday July 15 approved new, simplified regulations on advertising in the Bar Code of Conduct, reducing them to the minimum necessary to conform to the British Code of Advertising Practice and maintain confidence in the profession. Under the new rules barristers can, for instance:

- advertise their rates and methods of charging;
- use photographs or other illustrations;
- make claims about the nature and content of service offered;
- use clients' names (with their permission) in advertising.

At the same meeting the Bar Council also approved direct professional access to barristers for advice and opinions by members of the following bodies: Institution of Mechanical Engineers, Institution of Chemical Engineers, Institute of Taxation, Institute of Chartered Accountants of Scotland, Institute of Chartered Accountants in Ireland, The Institute of Chartered Secretaries & Administrators, and Incorporated Society of Valuers and Auctioneers.

The other bodies granted direct professional access are the Royal Town Planning Institute, the Royal Institution of Chartered Surveyors, the Institute of Chartered Accountants, the Association of Average Adjusters, and the Chartered Association of Certified Accountants. ❑

Bar Reading Notes Available for Sale

Many members may not be aware that the Reading Notes are not only available to Pupils - but to all members of the Association.

The knowledge contained in them has helped many a Pupil before his foray into a previously unknown (to him) area of the law. All the papers have been written by Judges or members of the Bar with specialist knowledge in the field.

Some of the papers are general in nature (e.g. conduct of civil and criminal trials; evidence), others deal with specialist areas of practice such as the Commercial Division, Land and Environment Court, Bankruptcy, etc.

At $300 a set, which includes two Bar Association ensignia folders for storage, they are good value.

Contact Helen Barrett
Telephone (02) 232 4055

From the President

"MAY YOU LIVE IN INTERESTING TIMES!" is said to be a Chinese curse. The Bar is certainly living in interesting times.

Some of my predecessors spent much of their time in office fighting for the existence of an independent Bar against Government proposals for fusion or common admission.

As soon as this issue was resolved my immediate predecessor was faced with the Workcover and Transcover legislation of 1987 and the controversies and public attacks which accompanied that legislation. The last two years of the Bar Council's work have been overshadowed by the issues surrounding that legislation. However, we have not worked in vain. The Transcover legislation was repealed, with retrospective effect, and the new legislation came into force on 1 July 1989. During August legislation to extensively amend the Workcover legislation of 1987 was introduced into the State Parliament and eventually passed after some uncertainty and drama in the Upper House. The jurisdiction has been restored to the Compensation Court and the Commissioners henceforth will function as officers of that Court. Limited common law rights for injured workers have been restored retrospectively to 1 July 1987, with more liberal common law rights for injuries sustained after 1 July 1989. However, workers injured at their place of work (otherwise than by a registered motor vehicle) are still dramatically disadvantaged in comparison with road accident victims. The Bar will continue to work towards restoring a fair measure of common law rights for work accident victims. The thanks of the Bar are due to the members of the Workcover Committee, particularly Coombs Q.C., McCarthy Q.C., Poulos, Ferrari and Johns for their efforts in achieving this limited result.

In Barton v. The Queen (1980) at 147 C.L.R. 75 at 99 the High Court described committal proceedings as an essential safeguard against wanton or misconceived prosecutions. The 1987 legislation providing for largely "paper" committals was proclaimed during 1988. It has not yet been given a fair trial. The right and duty of a Magistrate to decline to commit in cases where he or she considers that a jury is not likely to convict has only recently been vindicated by the Court of Appeal in its decision in D.P.P. v. Saffron (7/6/89 not yet reported).

The Bar Council is currently faced with proposals in both the Coopers & Lybrand Report and the Attorney General's White Paper on criminal law reform for the abolition of committal proceedings. It is proposed that they be replaced by an internal review of the case conducted by the D.P.P.'s office with the defence receiving the prosecution "brief" in due course. There would also be a limited right to conduct a pre-trial cross-examination of some of the prosecution witnesses. The Bar has made strong representations to the Attorney General in favour of retaining committal proceedings in a recognisable form.

Unfortunately that is not all. On 10 May the Senate resolved to establish a Select Committee with wide terms of reference to enquire into "The Cost of Justice in Australia". Hearings before the Select Committee are due to commence in December this year and will no doubt occupy most of 1990. At this stage it looks as if the Senate will retrace much of the ground previously covered in this State by the N.S.W. Law Reform Commission and the Government between 1976 and 1987.

It is clear that the Bar will remain under close public scrutiny in the foreseeable future and will be constantly called upon to justify its existence. In such a climate it is therefore vital for the Bar that all its members work to safeguard and improve our ethical and professional standards.

Meanwhile on the other side of the world the English Bar has been called upon to defend its existence against proposals for radical change contained in Lord Mackay's Green Papers. The British Government's final decisions in the resulting controversy are now awaited. The effect of the projected legislation on the English Bar over the next few years will be watched with great interest in this part of the world and not only by the Bar. However, unlike the English Bar, the independent Bars in this country do not have any legal monopoly of the right of audience in the higher Courts. It was the absence of any such monopoly and the freedom which Solicitors enjoy to act as advocates and to compete with the Bar which enabled this Bar to defend itself successfully against proposals for fusion or common admission during the period between 1976 and 1987.

During recent years the Council has set its face against the self promotion that is now rampant among solicitors, particularly in the case of the larger firms. Recently a large newspaper wished to run an article on a "Q.C.'s Q.C." i.e. an article on the Queens Counsel that other Queens Counsel respect and admire. It was suggested to the Council that articles such as this represented a great opportunity for the Bar to secure good publicity and present a human face to the public. The Council however took the view that such articles should not be endorsed. Either the Q.C.'s Q.C. would be the President or one of the Silk on the Bar Council, or it would be some other Silk more or less nominated by the Council. The first would be nauseous and the second invidious.

The Bar Council now requires its President and Executive to speak to and through the media on the issues of the day or on other issues on which the Bar has taken a public position. This role cannot be avoided in the present climate. Personal publicity for the individuals concerned is inescapable. A similar

situation obtains with barristers who speak out on behalf of bodies such as the Council for Civil Liberties and the International Commission of Jurists etc. The Council takes the view that apart from these exceptions members of the Bar should only receive publicity for their professional activities as a direct result of their appearances before Courts or Tribunals or in presenting papers to law conferences, seminars etc. On the latter topic the Council has taken the view that members of the Bar should not speak at private or in-house seminars conducted by firms of solicitors or legal departments. On the other hand, members of the Bar are actively encouraged to present papers at seminars or conferences which are open to all interested members of the profession or the public. The latter activity is compatible with our existence as an independent Bar, the former is not.

In the last Federal Budget the Government moved to remedy the long-standing discrimination against the self-employed in the field of tax deductible superannuation. In February this year the Council of the Australian Bar Association, at my suggestion, engaged a firm of actuaries to report on the extent to which the current tax laws discriminated against the self-employed. I enlisted the help of Graham Ellis, who is also an actuary, and we worked on the final report with the consulting actuaries. It was ready for submission to the Commissioner of Taxation at the beginning of June. It is pleasing to note that our submissions on the basis of calculating reasonable benefit levels, the removal of the present fixed ceiling for annual deductions, and deductibility on a basis comparable with a corporate employer have been substantially accepted. The new regime will be in force when you write your cheque in favour of Barristers' Superannuation in June 1991.

We do live in interesting times. ❑ Ken Handley.

Christmas Charity

This year the Bar's selected Christmas Charity is the Richmond Fellowship of New South Wales (tax deductible). The Fellowship provides therapeutic housing in group homes and in unsupervised accommodation for the reintroduction of psychiatric patients to the community. Its work is invaluable, its need is desperate. This year your contribution to the Bar's charity will help to keep alive an urgently needed alternative to Government institutions.

Please support your Charity. Cheques made out to the "Richmond Fellowship of New South Wales" should be forwarded to the Registrar by 4 December 1989.

For further information contact Greg James Q.C. on 229.7333. ❑

Letter to the Editor

Dear Editor,

Re: Association of Barrister Civil Arbitrators

I am writing to inform you of the recent formation of an Association of Barrister Civil Arbitrators, membership of which is presently available to Barristers who have been appointed Arbitrators under the provisions of the Arbitration (Civil Actions) Act, 1983.

The objects of the Association are as follows:-

1. *To operate as an organisation of barrister civil arbitrators which will enable members to discuss, compare and formulate matters of common interest and, particularly, to consider the extent to which consistency in the conduct of arbitrations is desirable.*

2. *To discuss and consider particular problems relating to arbitration - whether procedural or otherwise.*

3. *To liaise with the Bar Council and the Law Society as a body in all matters concerning civil arbitration.*

4. *To promote and control the activities of barrister civil arbitrators with a view to maintaining the status and worth of civil arbitrations.*

5. *To provide links between members in both formal and social aspects.*

6. *Such other activities as shall be determined from time to time.*

At the time of writing, there are 30 financial members. The President of the Association is Evan Lewis.

The formation of the Association of Barrister Civil Arbitrators is not intended to duplicate the supervisory roles of the Arbitration Committee or the Bar Council of New South Wales in relation to the performance of the duties of barristers who are appointed Arbitrators under the provisions of the Arbitration (Civil Actions) Act, 1983, but is intended to satisfy a need which was felt to provide a forum for the exchange of information and views among barristers who are discharging those duties, particularly in relation to various problems which arise from time to time in the conduct of arbitrations under the Act.

If any barrister who has been appointed an Arbitrator under the Act has not yet heard of the formation of the Association, or wishes to join, he may contact me on 235 3033 or via DX 650, Sydney, for further information.

Yours truly,
Paul R. Glissan
Honorary Secretary.

The First 100 days ... or so..

(Chief Justice Gleeson addressed the Sydney University Law Graduates Association on 26 June)

Theo Simos invited me to address this luncheon on any subject of my choice. In issuing that invitation he was taking something of a risk. I was tempted to seek to demonstrate what a concerned and compassionate human being I am, or to display the vibrancy of my awareness of current issues, by addressing you on such subjects as: "Woodchipping and the Greenhouse Effect", "Stress Reduction in the Public Sector Workplace", or "Alternative Dispute Resolution in China". However, consistently with my view that a shoemaker should stick reasonably close to his last, I thought it better to say something about the judiciary.

Since my appointment I have found that people, sometimes out of politeness, and sometimes out of a genuine interest, often ask me how I find the job. This is not as dangerous as asking me about my health, but it does give me an opportunity to unburden myself.

The New South Wales Government did me one great favour. At about the same time as they announced my appointment, they also announced the appointment of a firm of management consultants to investigate the subject which was given the less-than-neutral description of "Delays and Inefficiencies in the Court System". This provides me with a form of public absolution of which I have been quick to take advantage.

It will be obvious to astute observers, even from that limited material which has already been made public, that, as one would have expected, the first question which the management consultants asked themselves and others was the obvious and important one: "Who is running this show?" One of the major pieces of information that I have gained in the last few months is that that is an astonishingly difficult question to answer. A conclusion which I have reached with certainty is that unless and until that question is faced up to and resolved in a manner which is consistent both with principle and political reality it will never be possible to make a permanently successful attack upon the inadequacies of the Court system, for the reason that it will never be possible to identify who is responsible for them or who has the capacity to remove them.

In Franz Kafka's work "The Trial" there is a despairing description of a Court system which, of course, I do not suggest accurately represents our system. The horror identified by the author, however, reflects in a grossly exaggerated form a difficulty which some people see in our own system. He wrote of people who entertained "a passion for suggesting reforms which often wasted time and energy that could have been better employed in other directions". He said:

"The only sensible thing was to adapt oneself to existing conditions. Even if it were possible to alter a detail for the better here or there - but it was simple madness to think of it - any benefit arising from that would provide for clients in the future only, while one's own interests would be immeasurably injured by attracting the attention of the..officials. Anything rather than that. One must lie low, no matter how much it went against the grain, and try to understand that this great organisation remained, so to speak, in a state of delicate balance, and that if someone took it upon himself to alter the disposition of things around him, he ran the risk of losing his footing and falling to destruction, while the organisation would simply right itself by some compensating reaction in another part of its machinery - since everything remained interlocked - and remain unchanged unless, indeed, as was very probable, it became still more rigid, more vigilant, severer, and more ruthless."

To the contrary of that, my own view is optimistic. I believe that provided the right questions are asked, and persisted in, answers will ultimately emerge.

I return to the question asked by the management consultants and, of course, asked also by me at the time I took up my appointment. It is one in which I in particular, lawyers and indeed the public in general have a keen interest. Who does run the system of the administration of justice in New South Wales? Who ought to run it?

The question is essentially one of constitutional law. The position which currently operates in New South Wales is in important respects substantially different from that which operates either in England or in the United States of America. In England where history and compromise are at least as important as theory in establishing constitutional arrangements, the Court system operates under an entrenched combination of legislative, executive and judicial controls. At the head of the system stands the Lord Chancellor, who is the presiding officer in the House of Lords, a member of the Cabinet, and the senior judge.

On the other hand, in the United States of America, where the doctrine of separation of powers is applied with considerable strictness, the judiciary stands apart from the legislative and executive branches of Government and the view is taken that its independence requires that it manage its own affairs and make its own decisions about and take responsibility for, the application of resources which the legislature determines would be available for the administration of justice. A somewhat similar view prevails in the Federal area in this country where the High Court of Australia has for years operated on a one line budget and makes its own decisions concerning the application of resources allocated to it by Parliament. The Federal Court of Australia also moves on to a one line budget as from the commencement of the next financial year.

The Court system of New South Wales is, of course, far more extensive and complicated than either of the two Federal Courts to which I have just referred. The New South Wales Courts deal with a volume of civil and criminal litigation far in excess of that dealt with by the Federal Courts. Indeed, to the considerable discomfiture of the New South Wales Attorney General the New South Wales Court system is burdened with the cost and expense of enforcing Federal laws, and a very substantial amount of New South Wales judicial resources are devoted to dealing with Federal prosecutions for such matters as drug offences and revenue frauds.

The New South Wales Government's commitment to reducing delays and eliminating inefficiencies in the Court system provides, so it seems to me, the ideal backdrop to a re-examination, which is long overdue, and possible redefinition, of the relationship between the judiciary on the one hand and the legislative and executive branches of Government on the other. I for my part entirely support the idea that Courts should strive for managerial efficiency provided always that that does not diminish the quality of the justice which they administer. Managerial efficiency, however, normally requires as its corollary managerial capacity.

Up until the present time the judiciary in New South Wales have been not only totally dependent upon the legislative and executive branches of Government in respect of the quantum of resources available for the administration of justice, but they have also been subject to executive control, extending down to matters of the utmost detail, in relation to the application of those resources. It is the legislature which decides how much money will be made available for the administration of justice. Within the ambit of that decision, it is the executive which decides, and decides in detail, how those resources will be allocated amongst and applied by the various Courts which make up the New South Wales Court System.

It is the executive Government which decides how many courtrooms there will be, how many judges there will be, what staff will be made available to judges, what forms of secretarial and other assistance they will be provided with, what registry and other support staff the Courts will have, what library facilities will be available to judges, whether and which Courts will have computer systems installed, which Courts will receive daily transcripts of proceedings, how many court reporters will accompany judges when they go on circuit, and a host of other matters which affect in the closest degree what a modern managerial expert would call the productivity of judges.

There is a large measure of inconsistency, of a kind which would be recognised by any management consultant, between, on the one hand, calling for judicial officers to involve themselves in a managerial fashion in the productivity of their Courts whilst at the same time leaving the judiciary without any measure of decision making capacity in relation to the application of resources which are made available for the administration of justice. This is the question which requires reconsideration. This is an aspect of the relationship between the judiciary and the executive that may call for redefinition It is not my present purpose to propose any particular solution to this question although some of you may have observed that a certain solution has been proposed by the management consultants recently engaged by the Government.

My immediate purpose is to awaken interest in the question amongst members of the legal profession. It is, I believe, not an adequate solution to the problem to rely as has been done in the past upon the personal influence of the Chief Justice in order to procure the result that the requirements of the administration of justice are given appropriate consideration at a decision making level. The Chief Justice may lack any or sufficient influence. The extent to which a Government may take account of his wishes will wax and wane. The judiciary is ill-equipped to engage in public controversy with politicians and it is normally inappropriate that it should attempt to do so.

The time is ripe for a reconsideration of the relationship between the judiciary and the executive branch of Government, and the Government's call for increased efficiency in the operation of the Court system, a call to which judges are willing and anxious to respond, provides the ideal opportunity for such a reconsideration.

The other issue which is thrown up by the report of the management consultants concerns the balance to be held between efficiency and justice.

This is a problem which has caused much concern in the United Sates of America where, by and large, there is a more longstanding interest in judicial administration than that which is recently arising in Australia.

In an article in the University of Columbia Law Review of 1978 (Vol. 13 p.52) Professor Shetreet said:

> "The Judge who conducts trials is confronted daily with the dilemma between the efficiency and the quality of the adjudicative process. The heavy case loads, backlog and delays present the judges with a difficult choice. On the one hand they seek the speedy disposition of the case, which will alleviate the pressure and expedite the proceedings in the court, on the other hand, they wish to conduct the trial with patience and deliberation, to give the parties full opportunity to present their case without cutting them short, and to allow them adjournments when they demand it. They are put under pressure to deliver written judgments as speedily as they can in order to make themselves available sooner to the long line of people who seek judicial services; justice requires deliberate judgment and considered opinion which cannot be rendered under pressure of speed and statistics. Generally, there should not be a conflict between justice and speedy judicial process; speedy trial is a component of justice, and unreasonable delayed justice is a denial of justice, but if in the conduct of the trial there appears to be a conflict between efficiency and justice, I submit that justice should prevail."

Professor Shetreet concluded his reply by quoting a phrase from the judgment of Mr. Justice White of the Supreme Court of the United States of America in the case of Stanley v. Illinois 405 US 645 1656:

"The constitution recognises higher values than speed and efficiency."

I do not wish what I am saying to be misunderstood as indicating the least resistance on my part to innovative measures which, consistently with the providing of due process of law, assist in overcoming the serious delays and inefficiencies in our justice system. My point is that there is a need to keep steadily in mind that the ultimate objective of the system is justice and not merely decision making, and that there are qualitative as well as quantitive values to be respected.

In an article in the Harvard Law Review (Vol 96 Pt. 1) in 1982 entitled "Managerial Judges" the learned author (Professor Resnik) pointed to the danger that the goals and values of judicial management systems appear to elevate speed over deliberation, impartiality, and fairness. She pointed to one interesting and frequently unrecognised aspect of this problem in the area of civil litigation.

Observing that due process is usually understood to require, in the area of civil justice, the making of a judicial decision in public following a full hearing, and with an opportunity for appellate review the author pointed out that emphasis on pre-trial procedures in aid of case flow management in the United States has produced the consequence that many of the important decisions affecting the ultimate resolution of a particular dispute are now made at a pre-trial stage without full argument, with no reasons being given for the judge's decision, and in circumstances where it is difficult, if not impossible, to obtain a review of the decision by the ordinary appellate process. This the author contends involves a great erosion of the standards of due process which are ordinarily regarded as applicable in the disposition of civil disputes. She says at p.430:

> "The literature of managerial judging refers only occasionally to the values of due process: the accuracy of decision making, the adequacy of reasoning, and the quality of adjudication. Instead, commentators and the training sessions for district judges emphasises speed, control and quantity. District Court chief judges pose and base statistics on the number of cases terminated, the number and type of discreet events (such as trial days and oral arguments) supervised, and the number of motions decided. The accumulation of such data may cause - or reflect - a shift in the values that shape the judiciary's comprehension of its own mission. Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become of importance; quality is occasionally mentioned and then ignored. Indeed, some commentators regard deliberation as an obstacle of efficiency."

This is simply one aspect of the age-old problem of maintaining an appropriate balance between competing requirements. We can all think of individual judicial officers who err on the side of despatch and others who err on the side of deliberation. It is, I believe, fair comment that the judicial system as a whole has in the past given insufficient attention to considerations of efficiency. There are various reasons for this, not the least of which is that, because the judicial branch of Government is totally dependent on Parliament and the executive in terms of resources, and because the executive have had the control, down to the most minute detail, of the application of the available resources, there has been very little incentive for judges to regard themselves as managers. They have had so little control or influence over decisions, which go to the root of the capacity of the system to deal with its workload that they have tended to keep well out of the field of judicial administration. But all that is changing.

The important thing is that the changes, welcome as they are, should not subvert the system's basic ideals.

In this State at the moment judicial officers are confronted with a challenge that is by no means peculiar to New South Wales. The problems which we currently face, which have resulted in a large part from substantial increases in the demands made on the court system both in respect of civil and criminal justice unmatched by appropriate increases of resources, is one that courts in other countries, especially in the United States of America, have had to grapple with. The measure of the success of our response to this challenge will be found in our ability to achieve an appropriate balancing of the more recently recognised values of managerial efficiency on the one hand with the traditional values of our system of justice on the other. This is a difficult and delicate task and its proper performance will require both the openness of mind and willingness to accept change and at the same time an appropriate degree of strength of mind and confidence in the underlying values which we have inherited from the past. ❑

Circuit Food

The recent attempt of Mr. Justice Wood to destroy the health, vigour and marriages of Common Law Circus practitioners by lumping seven weeks in a row upon us was relieved only by the significant improvement in the quality of out-of-Sydney restaurants.

The Power House Dining Room and the Cellar Bistro in Tamworth, Harts' and Joanna's in Lismore and Sea Food Mama's in Coffs all deserve mention, but the Ring Master's award for Star of the Circus goes to "The Rocks" restaurant in Byron Bay.

Forty easy minutes by car from Lismore, Byron is the place to camp for Lismore work. The Cape Byron Motel has big rooms for conferences and underneath lurks "The Rocks", unpretentious and friendly, very reasonably priced, this restaurant just slayed me. The chef cooks various styles, and all well.

Quickly came hot garlic and herb rolls, crisp and crunchy, on wholemeal, and a provencale salad with fresh baby tomatoes, cos and standard lettuce, carrot slivers, olives and cress with a herby oil and vinegar dressing, all fresh from the garden.

Next Thai style Moreton Bay Bugs, just cooked so very tender with fresh coriander, ginger garnish and a touch of chilli. Subtle and very Thai but of course more protein than in Thailand.

For main course I had a seafood canelloni, a creamy mixture of perch pieces, scallops, prawns and bugs in hollandaise, wrapped in home made pasta, very tender. This was topped with mozzarella and the whole thing was delicious and as Italian as Naples.

Cassegrain Semillon 1986, golden with a hint of green was just exactly the right complement. The Bar drank all they had in a week.

Go there, mention my name, but don't admit to knowing Roche or Crittle!

John Coombs ❑

Do Arts Graduates Contribute Anything to Society?

The teaching of Humanities and Social Sciences in universities has come under threat in the current "'utilitarian" economic climate. Sydney University is appealing to its Arts graduates to stand up and be counted by joining the newly formed Sydney University Arts Alumni Association.

According to the Dean of the Faculty of Arts, Associate Professor Sybil Jack, the justification for financial cut-backs to Arts faculties would seem to be the apparent absence of concrete evidence that Arts graduates have anything to contribute to the workforce.

Professor Jack said Arts graduates can and do in fact hold prominent positions in industry, in the media, in the professions, in education, in the arts, in government and even in the business world.

"Because Arts faculties provide a generalist education on a wide range of subjects, it is not always obvious to the community at large just what an Arts degree can do for an individual, and, in turn, what that individual can do for society," she said.

The job designations of Arts graduates are so diverse that they are not easy to identify as a group. By establishing a communication network for Arts graduates through the Alumni Association and by highlighting their achievements, Sydney University hopes to provide the evidence and the public profile needed to maintain the high reputation and usefulness of an Arts degree.

A reception to launch the Association was held at the University on Saturday, 16 September, 4 pm.

For information telephone Mr. George Maltby 327 4307 (AH) or Dr. Stephen Hollings 450 2217 (AH) or the University's Office of Graduate and Community Relations 692 4310.

Bar News Interviews Sir Garfield Barwick G.C.M.G.

Tom Molomby and Paul Donohoe interview Sir Garfield Barwick about his memories of his life at the Bar and advocacy.

SIR GARFIELD: Could I make some prefatory remarks. I have agreed to answer your questions, but I realise only too well that I am out of date. It is now twenty-nine years since I wore my gown as a barrister. That was in 1960 and I then appeared as Attorney-General of the Commonwealth.

Much change has since taken place. The nature of the disputes which are litigated, to some extent the rules of evidence, and the personnel of the tribunals have all changed. So what I answer you may need much adjustment to fit the times in which the advocate now works. But allowing for all this, it may be that some fundamentals remain and of these hopefully some now in practice may profit.

MOLOMBY: *Could we begin by talking about your view of the advocate and the skills and qualities required to be a good advocate? If one were able to take advantage of the benefits of genetic engineering and program a person to be an advocate what would be the qualities that one would be looking for?*

SIR GARFIELD: You'd make an awful mess if you tried to do that because you must have some native wit to work on. An advocate must have very quick cerebration. He must have acute appreciation of the relevance of what he hears or sees. And of course he has to have a very quick recall of whatever he has heard or read. They are qualities which may be improved if you've got the basis for them but you cannot, I think, grow them or engineer them.

How much then do you think those qualities can be improved by attention?

They can be. The would-be advocate can improve his powers of concentration. He can get himself into the situation where the world disappears and he has just something in the focus of his mind or sight. I'm sure you can improve your powers of concentration.

Is that simply an effort of will or is there some sort of system or technique that goes to assist that?

Yes, it is an exercise of will. I don't go along with any sort of gimmick arrangements under which you can contrive it. I think you can improve your concentration by concentrating and learning to concentrate in the midst of music or something that's making a noise or if it's somebody talking you can get yourself to the point of view I think by exercising what powers of concentration you have You can isolate yourself or insulate yourself and thus I think you can improve your capacity in that respect.

There are some humans I think that have little or no capacity to concentrate to any worthwhile extent. Things that happen around such people cause them to deflect their attention.

From the point of view of the beginner at the bar, what would you say are the most important things for a beginner to get a grasp of right from the start?

I think if I were beginning again I would want to go and sit to begin with in a courtroom and listen and observe. I assume that I have learned my law - I mean that I have learned my law. I have learned the principles of it and I've got it clear in my mind and I understand it. That is a prerequisite pre-eminently of the advocate, he has to feel himself quite secure in his own knowledge of the relevant law, whatever the nature of the case that he has to handle.

If he hasn't got it from recollection, he must acquire it by study, as it were, ad hoc for the purpose of the case. So I'd go and sit in the court and listen and watch, particularly during a jury trial.

What would you be attempting to gain from that watching?

I'd watch how my contemporaries or those who are older than myself handle witnesses and build up facts, how they deal with the judge, their approach to the judge, and I'd watch the judge's reaction to what they did and said.

Did you in fact have the opportunity to do that sort of thing yourself in your own career?

Yes, I did. I did, but not as much perhaps as I'm recommending to others because I began just as the depression overturned things and I had to use every spare moment to earn a few shillings which was not so easy in those particular times, but whenever I did have spare moments I didn't spend them playing dominos. I'd go over and watch and listen, choosing a case I'd know from rumour or the lists, a case from which I'd profit by observing.

Does that sort of experience in your view have a value to people who have progressed beyond the beginning stage?

Yes, I do. We used to have marked in the Banco Court in Sydney a group of seats that were "Waiting Barristers". When you go to the old Banco Court there is, or at any rate used to be, an elevated set of seats immediately opposite the judge.

This is the court in St. James Road?

Yes, the Banco Court, it's a lovely little court to work in. The jury box is a bit too high. The barristers would sit in those seats and listen; I've sat there listening both to trial courts and to appellate work.

The prime quality you pointed to when I asked you about the essential qualities of an advocate was really what I think I could summarise as quick wittedness.

Yes, not in the sense of the confidence man, he's got a quick wit of a different kind, but the wit which can recognise the relevance of what you've just heard, how it relates to the task you have in hand, its relevance to the issue to be determined in the trial or the appeal.

There are a lot of other factors that come into the task of course though, aren't there, a lot of things one has to work on and apply oneself to?

Yes, that's right. The advocate has got to be a hard worker. I dislike the word "workaholic". I know people who are workaholics and don't produce anything worthwhile. You've got to be prepared to devote yourself to the particular task you've got in hand, this case. If you want to put it on sort of a moral sense you've got an obligation to the person whose money you're taking and you've got to give him 100 percent service.

That means you've got nothing else to do with your mind but to do the client's case and to work at it in the sense that it doesn't matter whether it takes you until midnight or later to master its facts and the relevant law.

When you received a brief in your early days at the bar did you have any sort of system of approach that you would adopt to preparing the case? Were there certain things, for example, that you did in a particular order?

No, I don't think I ever had a systematic program of that kind. I tried to get to the bottom of the facts of the case. The first thing to know is what facts you've got available, what facts you expect to prove. Then you next go through how you are going to prove them. But you must see the relevance of those facts to the legal cause of action that you are asked to present and succeed.

That's why I emphasised a while ago the idea of relevance, you've got to pick up the relevant facts and material relevant to a cause of action, the proposition which is the backbone of the case.

Because very often your opponent is going to be taking a rather different view of relevance or a different view of the correct way of looking at those same facts. What sort of attention did you give to the way the other side might be going to approach it? Was that something you would speculate about?

Oh, yes, I am conscious of saying to a solicitor who is telling, or his witnesses tell me, what his clients are going to say, and I almost invariably say: "What is the other chap going to say about this, what is the other point of view?"

That is the other point of view on the facts?

Of the facts.

In terms of running the case in court and what the other counsel might do with it?

Yes, you look to see how the case could be put differently from a legal aspect, a legal point of view, using some other legal principle than the one that you are favouring in your approach.

Would your assessment of that vary according to who it was on the other side?

No, I have known men who say - I have had a solicitor say to me: "Don't worry about that, so and so would never think of that." I have never done that. I assume that my opponent is as bright as myself or brighter. That's the only way to approach it, not to assume that he is a fool or that he will miss anything.

When we had a previous discussion you mentioned advices on evidence and that's clearly something you placed some importance on.

I mentioned a moment or two ago that I would consider how I was going to prove the facts that were necessary to make good the cause of action. I would, even if I wasn't briefed to write an advice on evidence. I would myself go through and see how each material fact would be proved, whether I wanted one witness to do it or two witnesses to do it, whether I needed to have corroborative evidence. I'd work out exactly how the case would be handled in matching the facts and the cause of action.

Very often if I did that on a brief to advise on evidence I could subsequently conduct the case looking at my own advice on evidence because in preparing the advice on evidence I would have gone through the whole question of presentation.

There's a certain amount of judgment that comes into that sort of issue, isn't there?

It does into everything, yes, quite right. That's something that you can't exactly genetically engineer either. You can improve your judgment by learning by your mistakes and not make the same mistake twice but you must have some native capacity for judgment.

An obvious issue that comes to mind relevant to what you've just said is, for example, how many witnesses one might choose to lead to prove a particular point.

Yes, it depends what the point is. By and large you would act on the footing that the fewer witnesses you called to prove a fact the better.

What view would you take of it if you knew it was a fact strenuously in issue, and you had, say, five potential witnesses to prove it and you suspected the other side might have as many who would be saying the opposite? Would you run all your witnesses?

Not necessarily.

Does that depend on - -

There is a Latin phrase that says you go by their weight, not their number.

But how do you determine the weight?

That's your judgment, that's right, that's your judgment.

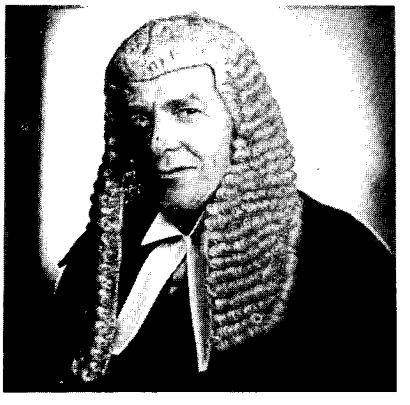
What's the process that one goes through or that you used to go through?

I remember a case where I had a very knowledgeable solicitor brief me and we talked over the identity of the witnesses he would call and the order in which we'd call them because we had one witness whom we thought would be a weak witness. We said we'd call him towards the end of the list and if need be dispense with him. After the case had been going some time I remember feeling that it would be right to call this fellow now and I called him. My instructing solicitor got up behind me and said: "I say, Skipper, why change the batting order?" I said: "I think it will be alright, you leave it alone."

We finished the case at 4.00 o'clock and that witness turned up absolute trumps. The solicitor got up and said: "Blow me down, you send in Arthur Mailey to play out the light and he makes a century." That's right, that's personal judgment and you've got to feel sufficiently sure in your own judgment to do such things.

I imagine you'd had a conference with that witness on that occasion?

Yes, I'd seen the witnesses. I'd seen the witnesses but you misjudge witnesses very often, you know, when you see them in chambers . This chap I misjudged at first but he came good, he was marvellous. That's part of the preparation of the case, to decide which witnesses and when. There is significance in the temporal relationship of the calling of the evidence, not in every case but in some cases.



1941: Garfield Barwick K.C. after receiving silk.

Going back to the start of your own experience, do any particular things come to you as crucial learning experiences that you went through? You mentioned going and sitting in court, for example, which you had a limited opportunity to do, but thinking more of the actual practice of conducting cases were there moments when you thought: "That's something good I've learned there and I'll be sure to do that again" or when you saw somebody else do something and you thought: "That's one I'll do tomorrow"?

I'll give you an illustration about learning. I had a case in which the occurrence that mattered occured to the left of the witness who I was cross-examining and he was giving evidence as to what happened. I perceived that he had very poor sight, he had bevelled glasses on, those heavy glasses. As I watched him - because that's another cardinal rule, never to take your eyes off the witness, watch him all the time - and he, everytime - Bill Owen tried the case in Number Three Court - every time the judge spoke to him, the judge being on his left, he turned right around to look at the judge.

So I brightly thought: "Well, I'll make this point" and I said to the witness: "You've got very weak sight, sir" and he said: "I won't have you making fun of me, young man." I said "I'm not making fun of you", I said "It's a fact, isn't it, that you are weak sighted?" "Yes", he said, "You're right." I said: "Your left eye is so much weaker than your right." "I don't think so", he said.

If I had been a wise man I would have stopped there but I said to him: "As a matter of fact don't you need to bring your other eye to bear over the bridge of your nose to see to the left?" "No, I don't, young man." And then if I'd had any sense I'd have stopped. But I said: "But when the judge speaks to you I notice that you bring your right eye to bear on him." "Nothing of the kind, young man, I'm stone deaf in my left ear." I lost the whole of the effect. Well, I never did the like of that again.

There is an art of knowing when to stop, when you've got enough, enough to make your submission or get your proof. I know people who try to prove too much and ask too many questions to try to get too perfect an answer for their purposes because you all the time have got to be thinking: "How am I ultimately going to put this to the judge or jury as the case may be? Am I fitting what I am getting into that sort of ultimate operation?"

Perhaps we could look at another area and that's the running of appeals. Is there any major difference between preparing a case for trial and preparing a case for an appeal?

Yes, there is, though in one sense all men are jurymen whether they are judges or not. I remember sitting in the Privy Council as a member of the Board and a well known counsel of New South Wales was for the appellant - and he made what was a real jury speech and I thought to myself: "That's not much use up here." I went down to lunch with my companions, we used to have lunch in the House of Lords, and one of them said to me: "My word, that was a very good speech," and obviously he had been influenced by it.

I realised that Privy Councillors are jurymen too. In that sense there is no difference, in that sense. All humans have prejudices, sentiments and attitudes, some of which are common to mankind or they are fairly common and they are present in judges. There are occasions when you can take the judgment of some appellate judges and work backwards as he has done you can see that the reason that the case has resulted in the way it did has less to do with the expressed reasons than with some desire he had to reach its result.

And that desire was founded on human considerations, attitudinal considerations or ideological considerations. So that in one sense there is little difference. On the other hand if you are dealing with a point of law where there is less room for

sentiment in issues of fact there is always some room it seems to me - but if you are dealing with a question of law then there's all the world in difference.

You now have got in one sense to educate your man because as a rule you mustn't too readily assume that your judge knows the law , particularly the point that's material to you. Sometimes you can make that assumption if you know the judge very well, know his background, but otherwise you've got to educate him. But the price of doing so is a delicate one.

Lawyers don't like being educated so that you've got to be careful that you're not teaching your grandmother to suck eggs. The way in which you begin to educate has got to be done with a degree of subtlety and very often indirection.

What is the diplomatic way of embarking on that then?

Well, it differs very much with the man. There was one judge on the Supreme Court, who prided himself in being able to read quickly. I learned this from George Flannery, a very great advocate. George Flannery, if he wanted to educate that judge and read him a certain passage in a case he would not read him that passage. He would read a page or two beforehand and he'd read slowly and the judge would suddenly find the passage and the judge would say: "Oh, Mr. Flannery, you need this passage" and of course he had found it for himself. Vanity is not unknown amongst judges.

If Flannery had read the relevant passage directly to him there would possibly have been a certain ntipathy whereas if the judge found it for himself it became acceptable - I saw George do that, I've done that, read the wrong page sometimes. That is only illustrative of the infinite variety of reactions that you are likely to arouse or induce in the appellate judge.

If, for example, you knew that you were going to be confronted with a judge who was more likely to yield to the sentimental aspects of the case as you have described them, would that make a difference in the way you chose to present the case?

Yes, I'd have to leave room for him, yes.

When you say leave room for him, what does that mean?

I would say something about those elements which may attract his sentimental interest but which wouldn't offend his next door neighbour who was unsentimental. Remember when you've got two or three or five it's much more difficult to tailor your remarks to the individual judges' perpensities as you have conceived them.

Rather like your experience on the Privy Council where you reacted adversely to the speech and somebody else was impressed by it.

Oh yes, impressed by it.

So that's a rather delicate path to walk, isn't it?

Oh, it is. We used to have great difficulty when Starke was on the High Court because Starke was in my experiencewhat you might describe as all wool and a yard wide. He was a tough human being, very direct and hadn't much room for subtlety. He liked things to be very black and white.

To get him on your side too soon you might easily start losing one of the others so you had to - handling him was most difficult, most difficult because he'd barge in and want to have his say and to an extent monopolise your time. Yet you knew very well that there was somebody two doors away that was thinking quite differently. It was a very difficult court to work with at that time.

How did you handle that problem?

I don't know that I can give you the prescription. I had a bit of luck with him. Starke, I got on with ultimately to the point where I could tell him: "If you wait a while I will come to what you want to talk about." I wouldn't say it like that of course but in effect in more delicate language I'd tell him to pipe down while I talked to somebody else. He ultimately - we got on well enough for him to wait for me until I came and dealt with what was troubling him.

Presumably from experience he came to recognise that you were indeed going to come to his point.

Oh, yes, I wouldn't welch on him but he was very difficult to handle; but if you were able to make a point to him he'd understand it. He was a very good lawyer, but of the unsubtle kind. He didn't like undue refinements and subtleties.

How much difference could the composition of a bench make to the way you chose to present a case?

A great deal, a great deal, yes.

What sort of difference are we talking about really?

Differences where you'd lay your emphasis, differences into exactly your process of persuasion or education. You would try to say things that would appeal to the mind of a judge whom you thought would receive it in a particular form and not receive it otherwise. That is very difficult.

From what you are saying there would be some point in studying the form of a judge if you like.

Oh, yes. For a young man the High Court is a terrifying experience. I remember going up to get special leave to appeal - you sent me a copy of Larke Hoskins v. Icher . The Court was siting in Taylor Square. I went up to get special leave. Do you remember Flannery led me and we lost in the Full Court. I went up to get special leave, for a very small fee I may tell you, and

I got up in Court and put the point. I wasn't doing any good at all and I thought to myself: "There is something wrong." I went back to taws and started to work the thing up again.

Suddenly Isaacs said to me: "You didn't say that before." And of course I had to bow and said I had overlooked that. I had said it before but I bowed out. Shortly afterwards I got my leave. The old reporter - there used to be a reporter around the Equity Court and the High Court who had a limp, he had a short leg or something. He walked over to me as I walked out of the court and he said: "Weren't you lucky, young fellow, that you started again?" He had spotted what had happened, that I would not take "no" for an answer in one sense and to go back and start again. Isaacs had apparently missed it the way I'd said it the first time but we got special leave - Larke Hoskins v. Icher - but the thing never went on. I think it was settled or disappeared.

I presume you were involved in a lot of cases where you'd work something up and you were very much looking forward to a certain result and the case disappeared because it was settled.

That's a very bad thing for counsel to get wedded to a case that he really wants to get on for his own sake; if it's settled, that's the client's business and that's all about it. You can naturally feel disappointment that you hadn't a chance to try to resolve some rusty part of the law, but you should never allow that to influence you.

Did you ever find yourself influenced by your sympathy for the client or perhaps on occasions lack of sympathy for the client and sympathy for the other side?

No, I don't think so. I think that's another mistake that counsel wants to avoid, to get emotionally involved at all in a case. That's not always easy. I did have an occasion when I was angry about what I thought was an injustice. What happened was that I appeared before the Privy Council for no fee to put it right. I did that much as I thought the High Court had been most unjust.

Barwick - The Young Advocate

Was it put right?

Yes, it was put right.

What was the case?

It was Leeder v Ellis where there was no sum of money involved really. It was in my view a wicked decision.

Even if there was never a case you lost that you felt you should have won.

Oh, yes, plenty. It's the same way when you sit as a judge in a multiple court when you think that your dissenting view was the right one.

I was referring to your role as counsel, not judge, in that.

It's the same thing in some ways. You are disappointed that you've been convinced of your point of view but it's not been acceptable to others.

I was rather thinking of the other scenario which is winning the case, where you recognise yourself in the end that it wasn't a terribly meritorious case but for one reason or another you'd come out on top.

I was just the same as every other human. You very much like to succeed and the fact that you have succeeded unmeritoriously, if anything, would tend to enhance the feeling of success rather than the other way. I think so. If you get a good verdict, or a good acquittal in a case where you had some doubt as to guilt I think you feel you have succeeded in some way.

You certainly succeeded, but does it ever create a problem for counsel wondering about their own role in the light of objectives of truth and justice, if you like?

There is only one truth and that's the verdict. You see, it's a great error to try to sit in judgment on the verdict. There has been a fair trial and there's a verdict - and that's it. I think that's fundamental to the law. It's all right for the journalist to say: "It's not justice" but it must be. It's the verdict after a fair trial. But if you are asked about the merits of an appeal you can express your judgment on the propriety of the verdict.

I take it then you didn't ever feel inhibited by things like the rules of evidence and procedure in terms of what you could achieve in a case.

I never found them in the road, no. They were part of the tools one had to use.

I would imagine rather the opposite, they were mechanisms there to be taken advantage of if you were skilful enough to.

That's right, if you can that's so but by and large they work out fairly well. I think that the modern tendency to try to widen the material that comes before a tribunal, particularly a tribunal of

fact, is not good. The danger of admitting hearsay evidence is tremendous; you are attributing to the layman the capacity to handle hearsay evidence and I take leave to doubt the capacity of humans to be able to resist the influence of material placed before them.

There is a very recent judgment of the High Court on that.

I know. It should be remembered that these rules are the product of a great deal of wisdom over a long period of time and I don't readily accept the view that all my predecessors were fools. They had good reason for making the rule as a rule. Sometimes you might find the rule was determined by historical reasons which no longer obtain but then that may be different. But when they are dependent upon logical and moral considerations I think they ought to be respected.

We were speaking earlier of the difference it could make to the way you chose to present an appeal as to whether the bench was composed of one group of people or another. If you were embarking on an appeal and all precedent was very heavily against you, which must have occurred to you on some occasions, would that make a difference to the approach you would take?

Do you mean I am then going to try to upset the precedent, say it was wrong?

Yes. Is there an approach for making a court more kindly disposed to considering throwing over the existing view if that is the position you are trying to approach?

Yes, you would attempt a little bit of conditioning. For example, you would try to show either some absurdity to which the existing rule arrives in practice or in fact or in supposed fact or you may take it more directly on and say: "This, while it's here, it has evolved through a series of misunderstandings" - and I'd have to go through them and point them out. And you prepare them to be patient with you.

This is the technique of going back through the historical development of a principle.

That's right.

And showing that if what had originally been said had been viewed a rather different way at different times it could have evolved in another direction.

I suppose an instance that comes to my mind is that the Privy Council, seven of them, decided that a drunk man could have a criminal intent. The High Court decided that he couldn't and the matter turned very largely on the way in which one of the expressions was read in one of the cases. That had to be opened up. I don't remember who argued the case before us but that's a case where if you had that to argue you'd have to go and have a close look at the root of the whole thing and see that it had been misunderstood, that the emphasis had been misplaced, you see.

Are there other techniques for making the bench more prepared to consider departing from established precedent or what they might choose to regard as established precedent?

The first thing you must have is complete frankness. You tell them what you are going to do, and be frank that you're going to ask them to overrule it, depart from it, and you're going to give them reasons why they should, not that they're going to remake the law but they are going to expose the fault that's already been made. Do you follow what I mean?

Yes, I do, yes. Do you recall any cases where you went in knowing that you were going to have to ask them to overthrow the existing wisdom and establish something new and how you tried to chart the way through?

The last case I appeared in was in the Privy Council in the liquor licence case. I appeared as Attorney General of the Commonwealth as an intervenor. I was to argue that Section 74, the inter se section in the Constitution was available in the case of a challenge based on an exclusive power. Sir Owen Dixon had written an elaborate judgment to say it wasn't and he'd said it earlier in the ANA case number two. I thought it was in the nature of a howler to say that. I had to not say it was a schoolboy howler because Dixon's name was something to conjure with. I had to lead the regiment from behind because I was only an intervenor. And I had in front of me Gavin Simmons who was not only a great admirer of Dixon but he had decided the existence of an inter se point both in the Nelungaloo and in the Bank case. I have always been doubtful that there was such a point. The case was - it was extremely difficult to argue in some ways but we succeeded. The Privy Council said that Section 74 was available in the case of an exclusive power. That is the last case I argued.

Do you recall though what the techniques were in more detail which you used to confront that difficulty?

I don't know that I can reconstruct them. I had a very interesting board that included Cyril Radcliffe, a very fine mind, and he ultimately wrote the judgment. So in some sense without letting him think he was the target, I in some ways made him the target because I thought he was the strongest mind there amongst them. I started that case behind the eight ball because it was Dixon's judgment which was against me.

I suppose one factor that must come into the thinking there is that some of the people up there will know what you are doing and will know the techniques you are using, if you like, or recognise them and say: "Ha, ha, I know why he's saying that. He's saying that because so and so down there on my left said that in his judgment three months ago."

In that case I've just spoken of, while I was arguing Cyril Radcliffe said to me: "What about such and such a case?" That case wasn't against me really but to deal with it would have complicated very much the way I was putting the case. So I said to him: "Do we have to bother about that? We've got a good

deal on our plates, you know." That's one thing a barrister has got to do, he's got to be on terms with his court where it's almost man to man. You've got to be able to talk like that to your bench. Do you follow that? I had managed to get myself into such a situation.

I follow that but I'd have thought that's a function of considerable seniority and experience. It's something very difficult for a junior person to ever attain.

No, I doubt that. A youngster's got to watch he doesn't become bumptious, there is no doubt about that, but he musn't get a sort of nervous fear of the judge. After all, he's got to get on speaking terms with the judge. I said that to Cyril Radcliffe - it wasn't hard for me to do it because I knew him personally, I had been his junior and I'd had to do with him and it passed off, you see. Anyhow he wrote the judgment and after he'd written the judgment and it was published he rang me up one day and asked me to come and have dinner with himself and his wife Antonia, so I did.

Over dinner I said to him: "Cyril, why did you try me with so and so during the case". He smiled at me and he said: "I thought I'd let you know I knew what you were at. There were others on that bench that didn't know" which was very revealing. He understood what I was doing because he was a top mind and a splendid advocate. I don't think I ever met a better, a really top mind.

> ***"I had to lead the regiment from behind because I was only an intervenor."***

That relationship with the bench has to be developed by counsel; nothing cheeky, not like that, no presumption about it, but where, after all, you're talking to a lawyer who is not other than your friend. You've got to cultivate that and I did that. A youngster doesn't need to lose the opportunity of meeting the judge socially if he can. That's one reason I favoured the common room at Wentworth Chambers.

I'd hoped very much that the bench would blow in there from time to time. They haven't done it, it's a great pity, because, you see, in the Inns of Court you will sit down and you will hear one say to a Lord of Appeal, anybody: "How did you come to decide so and so" and those present will talk about it. There is no false dignity about it. We've never been able to cultive that. That common room didn't live up to what I wanted it to do.

Another thing I was very sad about, when they let solicitors come in. I would never have done that. I'd have made that very much the exclusive area for barristers, particularly if you're going to get the judges in.

Because the presence of other people would affect the freedom of discussion?

Oh, yes, it would.

One of the aspects of your own practice that's been remarked upon is your use of the reply, especially in appellate work. That involves very special judgment I would have thought.

Yes, very self reliant sort of attitude to take it on because it's got great risks. It has great risks because your court may have formed its view before you reply on the thing you want to reply on.

And it may be too late to budge them?

Too late, it may be too late. So that it's a technique that's got to be very selectively used. I did use it selectively. But where the case clearly - I could put my point of view without trenching on the defence, the opposition to my point of view, then I could leave the reply to the opposing point of view to a reply which is its proper function and that gives the impression very often that you divided the case up and kept the best back, but it can be very effective because you then deal with a thing that your opponent has said and which, as a rule, he can't touch any more.

Whereas if you had put your propositions first your opponent might have dealt with his case more effectively.

That's right, or indeed the bench might have got to it too soon. That's another thing to be taught; when is the right time to make the running. That's a matter of very - I don't recommend that to a youngster. That's something that will come with time if he's a capable man. It's too risky a procedure for a youngster to try, I think.

When you say the bench getting to it too soon, how is it possible for the bench to get to whatever the point is too soon?

Well, if you've got on the bench a very acute mind that can start and deal with your proposition before you've put it which he could do and he could predispose his companions long before you got there. That depends on the line up. I wouldn't give, in some cases, Dixon a chance to get ahead of me like that, because he was a powerful man with his colleagues.

So how would you control that?

I'd watch very carefully in chief that I gave him no chance to cut in on it, if I could, and suggest some line that I wasn't putting, as he sometimes did. That's not easy because you can't be rude and the task of diverting attention away is not easy.

How is it done?

All this, you asked me - it's very difficult to explain almost the subtleties of the exchange between bench and bar, they are very subtle, very subtle, sometimes very coarse I think, with Starke, he could be very outspoken but the others not.

Could we come back to an example of the issue I mentioned just previously, that is the use of reply? Do you recall the case of the Bank of New South Wales v. Laing which you took in the Privy Council? I think that is an example of the particular use of reply.

Yes, that was a case where you could safely reserve what you wanted to say about the opposition's point, save it for reply because the case had been won below on a pleading point. I thought I had the answer to the pleading point. I thought there had been a misconception on the part of both Taylor and Ferguson and I'm sure each of them would roll over in his grave if he heard me say that, they had misconceived it because they were very rapt in it and each has a very good pleader.

I then put the case in chief as a matter of substance, of contract, what was the contractual obligation between bank and customer. The respondent's case depended upon the view that the bank promised to pay back all the money which was deposited with it at any time by the customer. My point of view was that they only had a contract to pay the balance in the account at any given moment when asked.

I had to establish that as the substance of the contract. It was a misconception to think they were promising to pay all the sums that they have already repaid. So in chief I didn't touch the pleading point. The opposition in answer to me said it was a pleading point that they had put my client, the Bank, in the situation where it only had one answer which was payment, payment of all the money that had ever been banked.

Then I dealt with that in reply and showed that there was a fallacy in the pleading point as it was put by the other side. That is an example where - some would say it's a coarse example - where you could really divide up the case into quite distinct plaintiff's cause of action and defendant's defence and deal with the defence only in reply.

It was on that reply point, the pleading point, that the Privy Council decided the case.

They decided it from the point of substance but they did also deal with it with the pleading point. They virtually - now you catch me there because I doubt if I've ever read the judgment they wrote.

I've read it more recently but I confess you probably know the case better.

Yes, but I doubt if I've ever read it because I usually found little time reading what was of no further interest to me. I remember Edward McTiernan one day, as I walked with him from Town Hall Station into the city when I was at the bar, he was on the bench. He said: "Did you read my judgment for such and such a case?" and I said humorously: "I was only paid to conduct the case, not to read what the court happens to say about it."

But seriously, I don't recall I ever read the Privy Council's reasons in Laing v. the Bank of New South Wales.

MR. DONOHOE: On the subject of pleadings, Sir Garfield, you said at the commencement of our discussions how important it was to grasp the material facts in a case and I think you said that at times you were so busy you could only master a case once. In that mastery the drafting of pleadings at common law and the drafting of orders in equity seemed to assume considerable importance as well as the advice on evidence. That seems to still have current importance.

Well, you've lost common law pleading. The advantage of common law pleading was that right at the beginning you had to make up your mind what was the cause of action, what was the relief you were to get. The same is true really still in whatever case it is you must know what is the legal rule that you are hoping to bring you to success and what is the success to be, what sort of an order are you to get.

My view and I did this in practice, I always made up my mind as early as possible once I had mastered the facts what was the cause of action, what was the relief I was to get. I did the same thing for equity as I do for common law, though it was much more easily done in common law because the common law pleading system was stylised, as it were, into particular causes of action.

Although common law pleading has gone and what passes for pleading in equity is only a recital of facts, no attempt to extrapolate a cause of action is necessary, it's still true I think that the first and fundamental task is to know what is your cause of action, what is the legal principle to which you've got to refer your evidence and your proofs, and the orders that you want to get.

You mentioned, and I mentioned a little earlier that an advice on evidence was a very useful mechanism. You then took the case, you examined the facts, you worked out how you were going to prove the facts, what witnesses you would need and how many if it was a matter of number. You would work out the cause of action and indeed in my case I would, if the cause of action had to be made good by reference to authority. I would write down the authorities on the back of my copy of that advice on evidence. That was as good as a brief when the time came. I could pick that up again and I would be right back in the picture again without very much more assistance.

I think that's a good exercise for any barrister to do with every case. Very often if he does it thoroughly he does it once. I know a lot of chaps think: "I mightn't ultimately be briefed in this case, I might be jammed" but I don't think that's any reason for not doing what I've said. When it's all said and done I wouldn't have been above giving my advice on evidence to the chap who ultimately got the brief if that was asked of me.

I don't think your competitiveness has got to go to the point of refusing that sort of comradeship.

Do you recall which cases you regarded as the most challenging at the time?

I think the hardest case to put together was the bank case in the Privy Council. The High Court had made a great number of attempts to find a way of enforcing section 92. Dixon had been the dissenter over a period of time. They had been assisted by three decisions of the Privy Council and I had to have a new and different interpretation of the section or testing of it, whether legislation infringed, that involved persuading minds to adopt that for which I could cite no conclusive authority.

I couldn't say: "The High Court decided this." I could say: "You, the Privy Council, deciding so much but you don't go the whole distance in deciding what I'm putting." Of course I was talking to a group who couldn't believe that the parliament was unable to pass a law to do something as simple as regulating interstate trade. You've got to remember that Dicey's notion of the sovereignty of parliament is a very deeply entrenched notion in the English lawyer's mind. He is unfamiliar really in practice with the idea of an entrenched provision which denies the parliament power. In the case of 92, it denied all parliament's power. The question was as to the extent of such denial.

I think that was a very difficult task to have to put together the necessary argument. I think that was more difficult in my case as I had never worked off a transcript of an argument, I had rarely put an argument down in writing and I very rarely had many notes. I might have a heading or two but not much else so I had to venture myself on a very long argument in a new atmosphere, a very new atmosphere, before people whom I didn't know and who didn't know me.

I remember the first half hour I spent on the opposition to the grant of special leave. I followed Cyril Radcliffe who had been arguing in front of me. He really was tops. The general attitude of those (seven of them) on the other side of the table was: "Why have we got to listen to you?" They had heard England's best. You know, it was very patent. The next morning I got going and Valentine Holmes, who was a good advocate, a very good advocate, always said to me, " You know, I've only seen a few magical moments but", he said" "the moment you cracked a joke with Andrew Uthwatt that morning was magic." He said: "It completely changed their attitude to you."

Do you remember what it was?

No, I can't remember that but I know it happened. Val always said that was a magical moment, it loosened everything. The Bank case was fairly difficult. I don't think I've ever had as difficult an argument. Now of course it's all undone, the High Court, no longer bound by the Council's decisions, have ignored them.

Quite, have you read it?

Yes, I have read it. They've got a magnificent remark in it that the Constitution might provide the text but not the test, so then they proceed to say that what they were worried about at Federation was protection for free trade and what they were intending is that interstate trade should be relatively free, it should be just as free as other trade, but they said absolutely free so you don't take any notice of the text. You find the test is whether the law is passed from a protectionist point of view. It's really laughable. I'd have great fun appealing from that with the Privy Council. Dear me, it's terrible tosh, you know.

That is a remarkable sentence when you analyse it; the Constitution might provide the text but not the test. Very sad. ❑

The Special Term

"The plaintiff acknowledges and agrees that this settlement is also a settlement of all other claims and/or potential claims he or she may have against the Government Insurance Office of New South Wales, its agents, its insured persons and/or their agents for any other injuries suffered by the plaintiff arising out of the use of a motor vehicle for personal injury up to the date of settlement."

There is a misunderstanding in some quarters of the Government Insurance Office that a new term has been imported into "the usual" terms of settlement in third party matters (refer Bar Association circular, 17 March 1989).

The practice of various agencies of the Government Insurance Office using different versions of the "standard" terms of settlement, some incorporating the new term, some not, now places Counsel appearing for the Government Insurance Office in a difficult position.

Counsel appearing for the GIO should ascertain in advance of settlement the terms which will be sought. Obviously a requirement "that the plaintiff give a release of all other claims" is an additional term which must be brought to the attention of the opposing Counsel when stipulating the basis upon which an offer of settlement is made.

Failure to advise the basis on which settlement is being negotiated may result in the other party enforcing the oral agreement to settle - without any additional term - thus leaving the defendant's Counsel at risk vis-à-vis the Government Insurance Office.

On the other hand Counsel appearing for the plaintiff should be vigilant when dealing with the Government Insurance Office, as with any other litigant, to ascertain the precise basis on which an offer of settlement has been made. It is clearly of no assistance in the present climate to use sgeneral phrases such as "on the usual terms" in these negotiations. ❑

You Knew All the Time!

"Law, as a linguistic register or as a literary genre, can be described linguistically or, more importantly, discursively, in terms of its systematic appropriation and privileging of legally recognised meanings, accents and connotations (modes of inclusion), and its simultaneous rejection of alternative and competing meanings and accents, forms of utterance and discourse generally, as extrinsic, unauthorised or threatening (modes of exclusion). To understand the coherence of this process of linguistic and semantic inclusion and exclusion is to introduce the problem of the relationship of law to power, and to some extent to explain the characteristic modes of legal utterance as social discourse - as a hierarchical (stratified), authoritarian (distanced), monologic (uniaccentual) and alien (reified) use of language."

(Legal Discourse, P. Goodrich, St. Martin's Press 1987; p.3).

The Great Appeaser

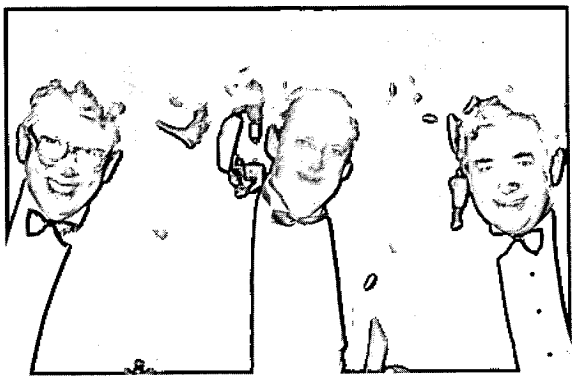
The Bar Association's dinner in honour of Chief Justice Gleeson produced the usual grovelling homilies.

Mr. Senior R.V. Gyles Q.C.

A speech of this type tends to lurch between sycophancy and impertinence. It is one thing to be impertinent about a retiring dignitary. It is quite another to be impertinent about a new Chief Justice who will occupy his position for the next twenty years. I therefore decided that I would handle the sycophancy, and Wheelahan, who follows me, can handle the impertinence. Put another way, I will be the straight man.

Incidentally, it is a pleasure to be sharing the bill with Wheelahan on a grand occasion like this. The last grand occasion upon which I heard him speak was the lavish dinner tendered to him by a large group of friends upon his appointment to the Bench. My invitation to the returning home party must be still in the mail.

When at the Bar the Chief Justice liked to tell the story of the senior silk with aspirations to the Bench who announced one morning in a crowded lift lobby: "I see they have appointed young Bloggs to the Supreme Court!" Malcolm Hardwick was in the vicinity and replied "Yes Bill, he picked himself, there was really nobody else." I had always regarded that story as apocryphal until, in the week after the impending appointment of the new Chief Justice had been announced, I shared a lift with Hardwick and a number of other silk. Somebody said "What do you think of Gleeson's appointment?" Hardwick replied "Picked himself - there was really nobody else." It did cross my mind that there were some Supreme Court judges who might have taken a different view.



Coombs Q.C., Justice Beaumont and Gyles Q.C.

But it is true that our guest of honour's appointment was greeted with universal acclaim. I have not heard one critical comment about it. In our profession that is remarkable. It was seen as an appointment based on merit alone.

By the time of his appointment Murray Gleeson was one of the few members of the New South Wales Bar with a truly Australia-wide reputation. He had an enormous practice of great quality. He has been described by one high judicial source as the Barwick of his generation. I would still take that as a high compliment, notwithstanding the post-1975 vendetta waged against that great man.

All of this is well known. What is not so well known is the man behind the professional mask, and rather an intimidating mask it can be. The Chief Justice values his privacy. During his days as President of the Bar, if any controversial matter likely to arouse media interest arose he would leave Chambers, leaving no contact number, and would remain in hiding until it blew over, leaving Registrars, Secretaries and Vice Presidents lamenting. It became so bad that on one occasion the Bar Council passed a resolution requiring the President to make himself available to the media on some issue or other. As there was no sanction, he disregarded it.

His Honour is a product of the Catholic education system in the days when secular influence was small. He went from the parish school in Wingham on the mid-north coast to St. Joseph's College for his secondary education. I am told the first secular teachers that His Honour encountered were in first year arts at Sydney University. From the sublime to the ridiculous indeed.

My first glimpse of His Honour was in the 1954 Laurence Campbell Oratory Competition. He amazed the pundits who regarded the intellectual interests of St. Joseph's college students as limited to rugby and horse racing by walking off with the prize.

His academic results at school were outstanding, and he played in the competition-winning first eleven as a cautious but technically correct batsman, and a hopeless fieldsman. However, typically, he rose to the occasion and, in the last game for the championship, took the only catch that he had held in the entire competition.

At University his results were again outstanding - both in Arts and Law - and he graduated with first class honours in Law. He had many distinguished contemporaries including Justices Kirby, Hill, Hodgson, Matthews, Young, Professors Baxt and Peden, Tamberlin QC and many other distinguished members of the profession, and last, but certainly not least, one J.R.A. Dowd.

In view of the debacle which ensued when Mary Gaudron (as she then was) at a dinner like this tried to extract humour from the relationship between an Attorney General and a new appointee to the Bench, I will pass to my next point.

During his last years at the Law School, His Honour was an articled clerk at Murphy and Moloney, and was employed by that firm as a solicitor for a time after graduation.

His Honour is remembered by fellow employees for one, his appalling conveyancing; two, his behaviour at office Christmas parties; and three, his occupation of the "Blue Room".

All particulars of one and two have been refused in order to protect the reputation both of His Honour and Murphy and Moloney, and I thus cannot elaborate.

I was able to find out a little more about the mysterious "Blue Room". It was a traditional articled clerks' bearpit, found in most firms in those days, and would have no chance of passing today's Labour and Industry requirements. It was detached from the remainder of the office. The thing that was remarkable about it (particularly in the early 1960s) was that His Honour shared it with three female articled clerks. I am reliably informed that this caused the lad from Wingham and St. Joseph's a degree of culture shock.

From Murphy and Moloney His Honour obtained at least three things: one, a solid grounding in the practical aspects of the law; two, a good supply of briefs; and three, most importantly for present purposes, a close relationship with Gerry Wells who, after retirement from active practice, was appointed to head the New South Wales Remuneration Tribunal, and who is shortly to make recommendations to the Government on the level of judicial salaries.

So, in 1963 His Honour came to the bar. He took Chambers on the 7th floor of Wentworth, presided over by either the legendary J.W. Smythe QC, or the legendary Fred de Saxe, depending upon one's point of view. At the suggestion of his friend Bill Deane he read with the dashing junior L.W. Street. Apart from a solid grounding from his master in persuasive advocacy with both Judges and (more importantly) solicitors, His Honour then acquired many junior briefs when L.W. Street took silk shortly thereafter. Murray continued his close association with Bill Deane who had a great influence upon him. Bill was also a St. Joseph's boy, and they were introduced by Peter Capelin who had been at school with Murray Gleeson.

However, many take the view that the greatest influence upon the style of Gleeson as an advocate was J.W. Smyth. The cool and unflappable demeanour, the careful preparation and mastery of the facts, the economy of language, the use of silence as a weapon and, above all, a delight in the tactical interplay of a case were the hallmarks of that influence.

His Honour took silk in 1974 after eleven years at the Bar. He quickly developed a superb practice as a leader. He had avoided being typecast as a junior, and his width of experience stood him in good stead as a silk. He was at home at first instance or on appeal, before Judges, juries or lay tribunals, dealing with matters of fact or matters of law, performing in Court or giving advice in Chambers. He had the most meteoric rise at our Bar since his mentor Bill Deane.

What was special about His Honour as an advocate? His legal knowledge and ingenuity, and careful preparation of the facts, can be taken for granted. In my view his special quality was the ability to treat every tribunal before whom he appeared as a jury open to persuasion, and to analyse the case in such a fashion as to make available to the tribunal a simple, appealing and apparently logical path, which would present as the best solution on the merits. He always put what Sir Garfield Barwick called "points of prejudice" - or as Gleeson would call them "points of merit" - to the forefront of his argument, with a disarming and appealing simplicity.

I have already mentioned his appetite for the tactics of a situation. This made him a feared opponent and even more feared as counsel for a co-defendant or co-accused. It also made his advice eagerly sought after by solicitors and their clients. Let me give you some insight to Gleeson in Chambers from a client's viewpoint. I am reading from the House of Representatives Hansard in the debate upon the Report of the Cross Inquiry. The speaker is the Honourable Ian Sinclair.

"The undisputed evidence was that the lunch concluded by 2 p.m. I left the club and went immediately to see my solicitor, Mr A.T. Scotford, at his office. Within fifteen minutes of the lunch concluding, I repeated to my solicitor the terms of the conversation that had just taken place, namely, that a proposal had been put to me whereby with the passing of money, arrangements could be made with respect to my forthcoming criminal charges. Mr. Scotford made a note about this in his own office diary. On my instructions, he then sought and obtained advice from Mr. Gleeson as to what should be done about the matter. That advice was that nothing should be done about it, and I should "put the matter out of my mind". As the Special Minister of State [Mr. Young] who has some acquaintance with Mr. Gleeson, should be able to confirm, that is typical Gleeson advice."

I had the privilege of serving with His Honour on the Bar Council for several years, including his term as President. He was a most effective President. He was an efficient, no-nonsense administrator, and dealt with matters as they arose. He was an excellent chairman of a meeting - rarely intruding his own view until the critical vote was taken. He had few personal hobbyhorses. The only topic which I can recall always aroused his keen interest was baiting McColl about the notorious painting which Meagher so kindly donated to the Association. He was a skilled negotiator with politicians, Judges, and officials of all types. The cool stare, the quiet logic, and the skilful use of silence were formidable.

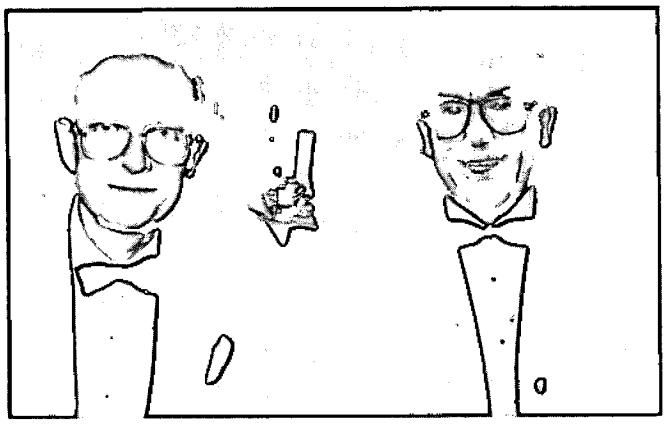
His greatest contribution to the Bar during this period was to reach agreement in principle with the then Attorney General Terry Sheahan as to the final disposal of the Law Reform Commission recommendations upon the structure of the profession. The result was not perfect, and we knew it, but it did resolve a situation which required resolution, and did so in a fashion which ensured the continued integrity of the Bar as we know it. It is not so well known that this in no small measure was due to the good personal relationship which His Honour struck up with the Attorney General after his appointment.

There is much more that could be said about His Honour - wild horses wouldn't drag out of me any details of his visit to Raymonds Revue Bar in London. I could speak of his devotion to various sports, many of which have ended in physical injury to himself; his preoccupation with ailments of all types, fuelled by his long period as a director of the Sickness and Accident Fund; his numerous and continuing incidents in aircraft; the contrast between his financial prudence at home and his sybaritic lifestyle abroad when attending to the requirements of corporate giants; and, on a more serious note, his family and his religion. But enough is enough in a speech like this.

I had thought that I had done a reasonably thorough job of research into His Honour's antecedents. Much of it I knew myself, the rest I obtained from one source and another. Imagine my consternation when, just two days ago, I was glancing at an article on the front page of the Sydney Morning Herald as I ate my rice bubbles. The article was entitled "How Friedrich kept the N.S.C watchdogs at Bay" by David Wilson and Bob Bottom. Roughly halfway through the article I came upon this astonishing revelation.

"As recently as Saturday, March 18 - just three days before he went missing - Mr. Friedrich spent some of the day driving around Inverloch in Gippsland. Was Inverloch an old stamping ground? Or was John Friedrich using the alias of Mr. Murray Gleeson in claiming to own a home in the area? One local resident has matched a picture of Mr. Friedrich to a person he thought was a Mr. Gleeson."

It was immediately apparent to me that my research had not been as thorough or as effective as I had thought. In responding to the toast which Wheelahan and I are to move to His Honour, I trust the Chief Justice will explain to us his amazing double life. ❑



Handley Q.C. and Justice McHugh

Chief Judge Staunton Q.C. and Justice Matthews

Judges Moore and Maguire

Mr. Junior D.A. Wheelahan Q.C.

Until tonight the reports about the new Chief Justice have been largely anecdotal. Brace yourselves for revelations empirical.

Tonight you will hear about Gleeson the Great Appeaser - the Neville Chamberlain of negotiators with the then Great Satan of the Law Reform Commission, Prof. Ron ("we'll rub you out") Sackville.

You will hear how the Chief Justice, in order to curry favour with socialist and Tory premiers alike, has masqueraded as a truly great servant of this community.

I speak of none other than Gerry Gleeson.

The socialists recommended Gerry for an Order of Australia but, like the appointment of David Godfrey Smith to the District Court through a typographical error, that most sought after of colonial honours went to our Chief Justice.

Much can be understood about the Chief Justice when it is realised that the full-bottomed wig he wears once belonged to Robert Lindsay Taylor. When worn by the former Chief Judge at Common Law, never once was a merciful or generous notion or idea harboured under it. Indeed under that wig machiavellian plots for the discomfiture of counsel were hatched. How proud His Honour would be to know that the tradition so skilfully created by himself is being continued with such enthusiasm and vigour.

Since the elevation of the Chief Justice many changes have occurred in the Court. He sits in Divisions. He sits in Equity and the Equity poofters, as Mr. Justice McInerney describes all who practise there, are clamouring for the return of Myers J.

He sits in Crime and the hardy, robust practitioners in that jurisdiction are pleading for the return of Mr. Justice O'Brien.

He sits in Common Law. Paraplegics, quadriplegics and brain-damaged infants petition the Government for the appointment of men with the attitude to damages of Mr. Justice Begg.

Seasoned campaigners in the Court of Criminal Appeal recall, with affection, the days when that Court was frequently presided over by Sir Bernard Sugarman.

Judges have told me that especially in the Court of Criminal Appeal members of inner bar, the outer bar and of the criminal community have been reduced to tears following an exchange with the Chief Justice.

This tendency to the lachrymose seems to have developed in this community, historically at least, from the activities of a former and otherwise undistinguished captain of Australian cricket and I refer of course to Kim Hughes. He blubbered and carried on on national television when deprived of the captaincy.

His response to his loss was probably influenced by the fact that he had a girl's name.

A ground swell of sympathy developed for the man. Observing this result the great pragmatist, the Prime Minister, decided to see if it would work for him.

He slobbered and snivelled his way through an interview concerning his family and then, most recently, in a thoroughly unedifying spectacle broke down for the most trivial and

inappropriate of reasons.

Cynics would say that the Prime Minister hoped to gain some sympathy, advantage or support from this display. Rest assured that shedding tears in a Court of Criminal Appeal is unlikely to produce any of those results.

Even though the Chief Justice has passed from amongst us he rated a mention in last Saturday's Spectrum article entitled "Silks City".

That article produced universal erubescent faces amongst the Inner Bar. The twenty who were named in the article blushed from embarrassment. The 150 who weren't mentioned reddened with rage.

The article was certainly instructive. For example, Ken Handley, to employ the language of Broadcaster Mossop, was flabbergasted to learn that he was rumoured to charge up to five times what was then his going rate.

Tom Hughes learnt to his great surprise that his services could be secured for about 50% of his then going rate. If Bond Media could have secured Tom's services at $5000 per day there would have been no settlement of the $100,000,000 Fairfax case.

Spectrum identified three former presidents including the Chief Justice as being Catholics.

Later in that article it was inferred that the same "unholy trinity", as Mr. Justice Hunt might describe them, were reputed not to charge in the highest bracket.

What does this mean? Does it mean that Catholics are no good or just don't know how to charge?

The Inner Bar was divided into "the magnificent seven", "other top silk" and those who failed to rate a mention. Of the last group there are three members of Inner Bar who, principally through the initiative of the Chief Justice, now sit with him as Associate Judges. I refer of course to Morton ("What's my power to remit this matter to the District Court for the assessment of damages") Rolfe, Calvin Rocester ("Verdict for the Defendant") Calloway and Peter ("Derby") Capelin.

Associate Justice Calloway has established by his judicial performance conclusively that one cannot judge a book by its cover and that leopards do indeed change their spots. It is confidently hoped, indeed expected, that His Honour's practice will be in tatters when he returns to the Bar and attempts to yet again entice floods of Plaintiffs into his poor and uninteresting Chambers on the 10th of Selborne.

Associate Justice Capelin maintained the close connection with the turf which was first made popular, fashionable and respectable at this Bar by Mr. Justice McHugh. Some of His Honour's practices tend to confuse those appearing before him. He sits in a Committee room. At the commencement of the day's business His Honour calls the card. He then announces starters and riders for the day's list. He describes the matters that come before him as protests which are either upheld or dismissed and the results of his deliberations are semaphored to puzzled litigants.

I mentioned that Morton Rolfe is an acting Justice and he and the Chief Justice have something in common. It is not, as is widely thought, their penchant to boogaloo in Rogues, Williams or The Metropolis nightclubs, but rather the curious habit of being called by name other than that which they were given.

Why some people would seek to be known by a name different from the one they are given or acquired is obvious. For example it would be no fun to be known as "Spaghetti" Eustace, "Putty Nose" Nicholls, "Shagger" Meares or "Shanks" Morris.

But people who have in fact changed their name have done so for reasons that don't appear to be immediately obvious. For example Simon Sheller is really Charles Sheller, Morton Rolfe is really Jimmy, Rodney Parker is really Roger (why would one bother to make such a change?).

Henrich Nicholas is really William, John Holt is really Walter, Bob Lord is really Lionel.

Lancelot John ("Call me Bill") Priestley is in a special category.

This Chief Justice has always been reluctant to use or have used his first given name. It appears that in this regard the Gleesons are an odd lot. His father was christened John and is called Leo. His brother was christened John and is called Paul. The Chief Justice was christened Anthony and is called Murray. But there lies behind the Chief Justice's preference sound reasoning based upon extensive research done by him and it related to the meaning of Anthony.

Anthony has several irreconcilable origins including the Persian "Anxtony" meaning "irritable through bowel problems"; the Roman surname "Antonioni" meaning "one of the Anthony boys" and the English "And Tony" meaning "one who is nearly forgotten and introduced last".

Anthonys tend to be spare, arrogant children, good at language who all seem to need spectacles and look ridiculous in swimming costumes.

Anthony is generally thought to be a useful name for an aimless second son or a large intelligent dog. Most branches of the Christian faith enjoy a St. Anthony including the Catholic St. Anthony patron saint of the uninformed but optimistic and the Coptic St. Anthony patron saint of the continental breakfast.

Is it any wonder that this man changed his name?

The circumstances leading to His Honour's appointment are now appropriate to be revealed.

The bucolic Attorney General informed me that late last year he rang Gleeson Q.C. and the following conversation ensued.

The Attorney: "Would you accept an appointment?"

Gleeson: "As what?"

The Attorney: "A Judge?"

Gleeson: "Certainly."

Then, Gleeson, thoughtfully, "To which Court?"

Since being appointed it was necessary for His Honour to acquire some staff.

Abiding by that most useful of injunctions *delegatus non*

potest delegare he conducted the interview for the position of tipstaff himself. Some perfectly decent member of the community presented himself and was asked but one question namely "Have you got any convictions?" The applicant replied "No". The Great cross examiner continued: "I can't think of anything else to ask you." An embarrassed silence followed. The applicant volunteered the following. He said: "I think you will find that I am a very amiable person."

The Chief Justice replied: "Well, I am not."

His application was successful and we can anticipate a long and fruitful relationship between the Chief Justice and his tipstaff.

Chief Justices throughout the ages have had judges who have presented them with intractable problems of discipline and decorousness.

When Julian Salomons Q.C. was invited to be Chief Justice he accepted and received his commission. He never heard a case nor sat on the bench for he resigned before being sworn into office.

Salomons recorded the occasion which made him change his mind - a turbulent encounter with Mr. Justice Windeyer who suggested that he was always "breaking down mentally". The charge was exaggerated but Salomons had in earlier years suffered "brain fever" through unremitting work. He reconsidered his position and decided he could not bear the burdens of the Chief Justiceship together with any difficulties with one of the other Judges.

This Chief Justice has a similar problem, but happily not of those dimensions.

A member of the Court of Appeal was recently touring New Zealand. He was doing his Somerset Maugham impersonation. By that I mean wearing a broad-brimmed straw hat and calico jacket and drinking colossal quantities of poor wine.

An intrepid member of the New Zealand press approached His Honour for his views on a National Companies and Securities Commission. His Honour urged the New Zealanders to resist the temptation to establish such an entity.

He said we had one here.

He said that it was staffed by unemployable cretins. He said the competence of their prosecuting staff was such that he didn't think they had ever won a case. He said they didn't choose flagrant breaches. Typically they picked those involving less than $100.

Having said that, Mr. Justice Meagher boarded a fast-moving jet heading west. Staffs of Corporate Affairs Commissions nationally now join the complete fraternity of attorneys, the staffs of all law schools, labour lawyers and women in their concern about Meagher.

The Chief Justice is a stranger to neither New Zealand nor women. Once when leaving New Zealand he was asked by a reporter to comment upon New Zealand beer and New Zealand women. His response was, simply, "Your beer is flat".

In a debate he once opened for the Government and pointed at and addressed the leader of the opposition - a Winsome girl from O.L.M.C. Parramatta named Lynette Brooker and quoting Macbeth said: "Oh horror, horror, horror! Tongue nor heart cannot conceive nor name thee." The debate was won, but the girl was lost.

The Chief Justice was for a number of years the President of the Bar Association. He was its President during some of its turbulent years when the gang of four in the Law Reform Commission was feverishly attempting to amalgamate us with the Attorneys. The then President's spirited defence of the Bar should be known by all for it was recognised by those who observed it to be enormously effective.

His view that an independent Bar was critical to the maintenance of the system of justice as it operates in this State prevailed and it is believed by many to be one of the most important decisions of the last decade.

The Chief Justice was once described by the Chief Justice of Australia as the finest appellate advocate in the country. He left the Bar at a time when his career was at its apogee.

He had the confidence, capacity and cupidity of the consumate advocate.

He was invited to leave the Bar to accept the staggering burden of the State's highest judicial office at a time when his earning capacity was significant and the demand made upon him and his financial resources were not insubstantial.

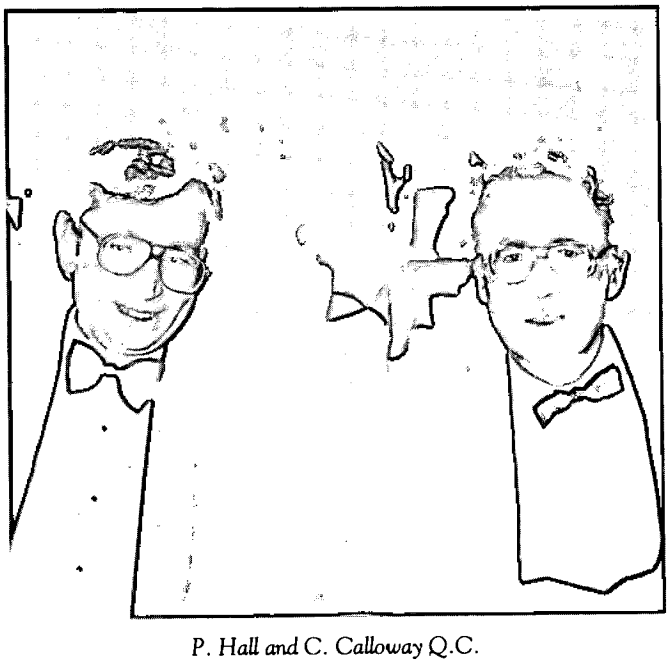
He left the Bar at a time when the gap between judicial and private professional earnings was increasing exponentially.

Notwithstanding these matters, the enormous honour, the challenge and the burden of the Chief Justiceship attracted him. In the short time that he has been there he has performed in a way that surprises none of those who knew him well.

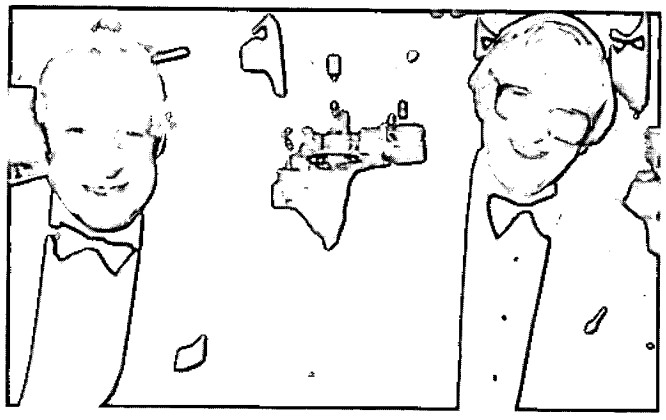
His hand is seen in many unexpected areas.

Judicial output has increased. Litigious backlogs are disappearing and there can be no doubt that the Supreme Court has a vital and effective leader. The highest office has fallen to the man best equipped to shoulder its burden and if the Attorney General of the State of New South Wales is remembered for nothing else he will be remembered as the man who was successful in attracting this most eminent and worthy gentleman to this most prestigious and important position.

Ladies and gentlemen I invite you to toast our guest of honour, Chief Justice Gleeson. ❑

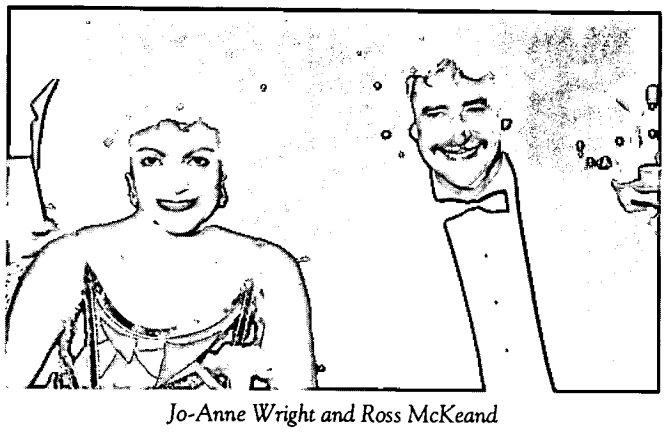


P. Hall and C. Calloway Q.C.

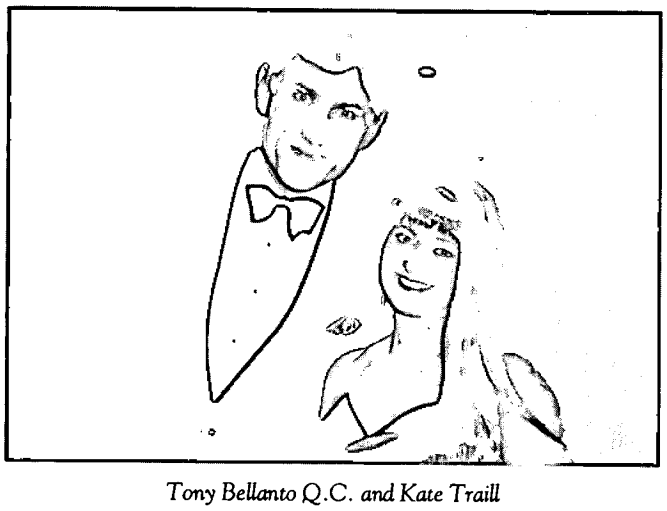


Sir Laurence Steet K.C.M.G. and Justice Morling

Tim Duchesne and Anne Quirk



Jo-Anne Wright and Ross McKeand



Tony Bellanto Q.C. and Kate Traill

Chief Justice Gleeson's response:

I am grateful to you for all for this splendid occasion and for the generous sentiments which you have expressed by your toast.

I am especially grateful to Gyles and Wheelahan for dealing with me so kindly. May I remark upon how much nicer their speeches were than at least one of those delivered at the last Bench and Bar Dinner which I attended, which was an occasion to honour my predecessor upon his retirement.

I have no criticism to offer concerning the speech made by Waddy on that occasion. Indeed, his natural sense of fairness and good manners was such that he was evidently constrained to abandon the prepared speech that he had written for the occasion and to deliver, as a reaction to the offensive speech made by Meagher, what could only be described as a hagiography concerning Sir Laurence. It is rather, the self-indulgent effusions of Meagher that I intend to contrast with this evening's dignified and generous speeches.

In this regard, I find myself the subject of some constraint because of events which have intervened between that occasion and the present time.

As I sat here listening to Meagher's torrent of abuse directed carelessly towards my predecessor and myself it never occurred to me as a possibility that the Government would pursue its shameless patronage of old boys of Riverview College to the length of appointing him to the Court of Appeal.

The result is that I am now inhibited in what I can say by way of response to that speech. You all know that when I was at the Bar wild horses would not drag from me a remark critical of a Supreme Court Judge. Now I am obliged to take every opportunity to shower Judges with praise. Furthermore, I have to respect Mr. Justice Meagher's sensitive personal feelings. You may remember that the public announcement of his appointment was preceded by a spate of rumours as to difficulties in relation to his health. His Honour, on the occasion of his swearing-in, referred to the acute personal embarrassment which he had been caused by these rumours and expressed the sincere wish that no future references would be made to the subject of his personal health. In those circumstances I desire to make some references to the subject of his personal health.

Most of the rumours that you heard were in fact true. Indeed, over the Christmas vacation Meagher travelled the world in search of accommodating medical opinion, and finally received it in a suburb on the outskirts of Morocco. The whole sorry affair has resulted in the addition of a new category to any formulation of degrees of impossibility. Henceforth, in ascending order, they can be stated as follows. First, there is a camel seeking to pass through the eye of a needle. Second, there is a rich man trying to enter the Kingdom of Heaven. Third, there is an Attorney General endeavouring to persuade a medical practitioner of ordinary standards of competence and probity to certify to Meagher's fitness. It should be added that the fitness to which I refer is not fitness to run in the City to Surf race, or even to act as the anchorman for the Court of Appeal's tug-of-war team at the Supreme Court Judges' picnic. I am referring to fitness to sit still for a few hours a day and listen.

But I must not dwell on this new, and somewhat rococo, ornament to the Bench. This gathering of Bench and Bar is a very happy occasion for me and acrimony is foreign to my nature.

You may be interested, Mr. President, to know that the tradition of mutual support and encouragement between the Bar and the Supreme Court of New South Wales, and in particular the Chief Justice of the Supreme Court, goes back to the earliest days of the Colony.

A well-publicised conflict between Sir Francis Forbes and Governor Darling, in the days when the Chief Justice exercised something like a power of veto over legislation enacted by the Legislative Council of New South Wales, gave rise to a mighty conflict in which the Chief Justice's principal, and perhaps, only supporters were the Bar. The Governor sought to exact a form of social revenge upon the Chief Justice which is described by Lady Forbes in a letter that she wrote at the time in the following terms:

"If we gave a dinner party, General Darling would issue invitations, at the last moment, to our guests, for the same evening, his invitations being headed 'The Governor Commands Your Attendance at Dinner' etc. and our promised guests would arrive at our house to make their excuses so that they might obey His Excellency's mandate. In order to save ourselves, and our friends, from this humiliation we ceased to entertain except at the usual Bar diners, when we felt sure of our guests as the members of the Bar were not subject to Government control."

Attorney General John Dowd and Chief Justice Gleeson

There are two particular aspects of that extract from Lady Forbes's letter which are noteworthy. The less important relates to her apparent indication that the Chief Justice paid for Bar dinners.

That is a practice which has long since fallen into well-deserved obsolescence, and I can assure you that there is little prospect that it will be revived. The second aspect concerns the concluding words of the letter which I will repeat: "The members of the Bar were not subject to Government control."

I doubt that Lady Forbes was expressing a legal opinion. Nevertheless, I would like to think that her comments reflected, and continued to reflect, a profound truth. If it be the case that, going back to the earliest days of this colony, Governments have found, as two elements of the community "not subject to Government control" the Chief Justice of the Supreme Court and the Bar, then that is the way it should be. I trust that is how it will remain.

The Bar is a wonderful institution. I saw from reading a newspaper over the Easter weekend that some of its members make enormous incomes, and that they are fond of sexual gossip. In relation to the latter subject I regret that I have nothing to contribute. As to the former, my own ideas as to what is a proper sum for a barrister to charge have now crystallised. I regard the last fee which I charged as the maximum which is appropriate, in both real and nominal terms, and this view can be expected to be reflected in disciplinary proceedings over the next twenty years.

That period will be one of great change both for the Bar and for the Judiciary. The tendency of change is often difficult to recognise for those who are living in the midst of it. However, I believe it is possible to make some fairly confident predictions.

One prediction that I believe can be made with a considerable degree of confidence is that relations between the Bench and the Bar will become even closer than they have been in the past because we will share an increasing number of common members. There used to be a famous, if apocryphal, story told about the Australian Golf Club, where Wheelahan is such a notable figure. It concerned a letter that was written by the Secretary of the Club at the request of the Committee to the Committee of St. Andrews in Scotland seeking a ruling upon an intricate problem which arose out of circumstances involving a golf ball coming to rest in the branches of a tree. The Committee of St. Andrews was invited to express an opinion upon what was the appropriate action to be taken in such circumstances. The response came back: "There are no trees on golf courses". Only a few years ago I received a similar response from some senior English Judges and barristers when, as President of the Bar Council, I made inquiries as to the approach which the Bar should take towards the right of former Judges to return to the Bar and practice. I was told that former Judges do not return to the Bar. As a proposition of fact that is manifestly untrue of Australia at the present time.

I have no doubt that, as an inevitable consequence of Government policies, a consequence that has been clearly drawn to the attention of the relevant Governments, what has in recent years begun as a trickle of Judges returning to private practice, either at the Bar or in firms of solicitors, will become a steady stream. The Bench and Bar will have to learn to accommodate this new circumstance. I have yet to make up my own mind whether I for my part will lift a finger to stop it even if I were able to do so. When I speak of Judges returning to private practice I mention particularly private practice as barristers or solicitors. There is, however, another form of private practice developing at a rapid rate in the United States of America. I refer to retired Judges returning to private practice as Judges. Depending on the extent to which these events occur they may have profound consequences, of a structural nature, for the Court system and the administration of justice in this country.

I have confidence in the survival and vigorous growth of the independent Bar. Nevertheless, I am sure that the next few years will see important structural changes in the organisation of the legal profession. I am constantly surprised at the ingenuous belief on the part of some who promote change in that regard that, once it has commenced, lawyers will have control of the direction which it takes.

For example, I hear solicitors speak of the advent of multi-

disciplinary practices or business, making what seems to me to be the entirely unwarranted assumption that if and when such practices or business operations flourish they will have legal practice at their centre and other forms of professional or commercial activity will be peripheral. The possibility that some other form of professional or commercial activity, such as accounting, or merchant banking, or even retail banking, will lie at the centre of such operations, and that legal activities will be peripheral never seems to have occurred to anybody. Why lawyers should believe that once that form of competition is opened up the competitive activity will be controlled and regulated by lawyers is beyond my comprehension.

We are all going to have to learn to live with these changes, more or less comfortably.

The Judiciary, also, can expect to be under constant pressure, and sometimes fairly regular attack. Lawyers and Judges are not popular people. Least of all are they popular with those whose desires and objectives they from time to time frustrate. There is, however, a curious aspect of all this. If imitation is the most sincere form of flattery, and if actions speak louder than words, then one would have to conclude that amongst the ranks of politicians and bureaucrats, the Judiciary must have many admirers.

It is an extraordinary feature of the way in which public business in this country has been conducted for generations that politicians of all political colours have been extremely anxious to establish decision-making tribunals and bodies which have some superficial resemblance to the Judiciary and which are represented to the public as "independent tribunals". Very few people seem to have noticed that the only independence which some of these tribunals enjoy is the freedom to do whatever the Government of the day wants them to do, and that they operate in practice as a method of distancing potentially unpopular decision-making from those who should take the responsibility for it. In a spirit of disarming frankness, a new phrase has been coined. It has now been declared that some people who are, by their style and title, represented to the public as Judges are in truth only quasi-judges. We are not told whether the corollary of that is that such people enjoy and exercise quasi-independence. The independence of the Judiciary is regarded by all public figures in our community as of such fundamental constitutional importance and such self-evident value that it is the subject of almost universal lip-service. What is, however, of interest and deserving of a great deal more attention and public investigation is what might be called the quasi-independence of the quasi-judiciary. I hope that recent and current events might arouse, amongst members of the legal profession, a lively interest in that subject, which is worthy of close consideration.

We have in this country a proliferation of decision-making tribunals which are represented to the public as being "independent". I cannot believe that much more time will be allowed to elapse before the correctness of that representation is made the subject of close public examination.

I thank you all for your hospitality and your good wishes. To echo the words of an ancient curse, we are all living in interesting times. I doubt, however, that many of us would wish it were otherwise. ❑

Famous Last Words

During the hearing of an appeal, with Barry Toomey QC in full flight, a worried-looking Sheriff's Officer burst into the President's Court where the Court of Appeal was sitting. On the Bench were Kirby P., Samuels J.A., and Meagher J.A. The Sheriff's Officer approached the Bench and whispered to the Associate who spoke to the President. The following conversation ensued:

Kirby P.	What is the matter you wish to report, officer?
Sheriff's Officer.	There has been a bomb threat in the building. We want to know how long your Honours will be sitting?
Kirby P.	When was it threatened that the bomb would go off?
Sheriff's Officer.	At 3.30 this afternoon.
Kirby P.	But it is now quarter to four. Aren't you a bit late to be telling us?
Samuels JA.	Perhaps we should consult the Chief Justice to see what he wishes the Court to do.
Kirby P.	In Northern Ireland, the judges operate daily under these threats. I think we should continue to sit.
Sheriff's Officer.	We know who made the threat. We have not seen the person in the building.
Meagher JA.	Was he Romanian?
Kirby P.	I think we know the case. The Court will continue to sit until the normal hour, 4.15 p.m.
Meagher JA.	On earlier expiry.
Toomey.	Whichever shall first occur.

This is the best version of what happened that could be pieced together after the event. ❑

Vote-Catching

Mr. Griffith:	If the Court pleases, the previous New South Wales Government went into its last election with a slogan "back to basics" and, to some extent, the same description might be applied to our contentions, of which the Court has a copy, although I suppose we hope for a unanimous vote as a result of that.
Deane J:	That certainly could not be applied to the Act you are defending, Mr. Solicitor.
Mr. Griffith:	No. Yes, Your Honour.
McHugh J:	And that government got defeated too, did it not?
Mr. Griffith:	Well, Your Honour, that is why I made the analogy with a smile, but we are not looking for votes, although seven judgments would be a satisfactory response, Your Honour.

(State of New South Wales & Ors. v. Commonwealth of Australia, High Court, 4 October 1989).

The Great Appeaser

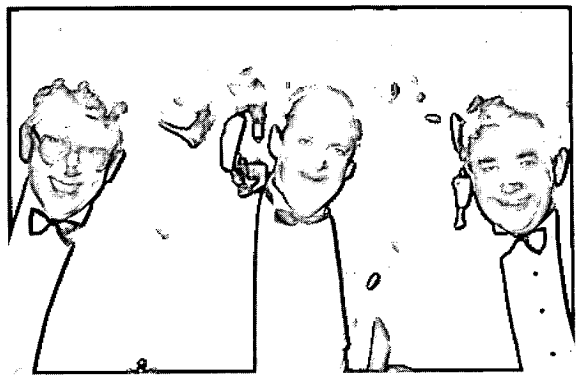
The Bar Association's dinner in honour of Chief Justice Gleeson produced the usual grovelling homilies.

Mr. Senior R.V. Gyles Q.C.

A speech of this type tends to lurch between sycophancy and impertinence. It is one thing to be impertinent about a retiring dignitary. It is quite another to be impertinent about a new Chief Justice who will occupy his position for the next twenty years. I therefore decided that I would handle the sycophancy, and Wheelahan, who follows me, can handle the impertinence. Put another way, I will be the straight man.

Incidentally, it is a pleasure to be sharing the bill with Wheelahan on a grand occasion like this. The last grand occasion upon which I heard him speak was the lavish dinner tendered to him by a large group of friends upon his appointment to the Bench. My invitation to the returning home party must be still in the mail.

When at the Bar the Chief Justice liked to tell the story of the senior silk with aspirations to the Bench who announced one morning in a crowded lift lobby: "I see they have appointed young Bloggs to the Supreme Court!" Malcolm Hardwick was in the vicinity and replied "Yes Bill, he picked himself, there was really nobody else." I had always regarded that story as apocryphal until, in the week after the impending appointment of the new Chief Justice had been announced, I shared a lift with Hardwick and a number of other silk. Somebody said "What do you think of Gleeson's appointment?" Hardwick replied "Picked himself - there was really nobody else." It did cross my mind that there were some Supreme Court judges who might have taken a different view.



Coombs Q.C., Justice Beaumont and Gyles Q.C.

But it is true that our guest of honour's appointment was greeted with universal acclaim. I have not heard one critical comment about it. In our profession that is remarkable. It was seen as an appointment based on merit alone.

By the time of his appointment Murray Gleeson was one of the few members of the New South Wales Bar with a truly Australia-wide reputation. He had an enormous practice of great quality. He has been described by one high judicial source as the Barwick of his generation. I would still take that as a high compliment, notwithstanding the post-1975 vendetta waged against that great man.

All of this is well known. What is not so well known is the man behind the professional mask, and rather an intimidating mask it can be. The Chief Justice values his privacy. During his days as President of the Bar, if any controversial matter likely to arouse media interest arose he would leave Chambers, leaving no contact number, and would remain in hiding until it blew over, leaving Registrars, Secretaries and Vice Presidents lamenting. It became so bad that on one occasion the Bar Council passed a resolution requiring the President to make himself available to the media on some issue or other. As there was no sanction, he disregarded it.

His Honour is a product of the Catholic education system in the days when secular influence was small. He went from the parish school in Wingham on the mid-north coast to St. Joseph's College for his secondary education. I am told the first secular teachers that His Honour encountered were in first year arts at Sydney University. From the sublime to the ridiculous indeed.

My first glimpse of His Honour was in the 1954 Laurence Campbell Oratory Competition. He amazed the pundits who regarded the intellectual interests of St. Joseph's college students as limited to rugby and horse racing by walking off with the prize.

His academic results at school were outstanding, and he played in the competition-winning first eleven as a cautious but technically correct batsman, and a hopeless fieldsman. However, typically, he rose to the occasion and, in the last game for the championship, took the only catch that he had held in the entire competition.

At University his results were again outstanding - both in Arts and Law - and he graduated with first class honours in Law. He had many distinguished contemporaries including Justices Kirby, Hill, Hodgson, Matthews, Young, Professors Baxt and Peden, Tamberlin QC and many other distinguished members of the profession, and last, but certainly not least, one J.R.A. Dowd.

In view of the debacle which ensued when Mary Gaudron (as she then was) at a dinner like this tried to extract humour from the relationship between an Attorney General and a new appointee to the Bench, I will pass to my next point.

During his last years at the Law School, His Honour was an articled clerk at Murphy and Moloney, and was employed by that firm as a solicitor for a time after graduation.

His Honour is remembered by fellow employees for one, his appalling conveyancing; two, his behaviour at office Christmas parties; and three, his occupation of the "Blue Room".

All particulars of one and two have been refused in order to protect the reputation both of His Honour and Murphy and Moloney, and I thus cannot elaborate.

I was able to find out a little more about the mysterious "Blue Room". It was a traditional articled clerks' bearpit, found in most firms in those days, and would have no chance of passing today's Labour and Industry requirements. It was detached from the remainder of the office. The thing that was remarkable about it (particularly in the early 1960s) was that His Honour shared it with three female articled clerks. I am reliably informed that this caused the lad from Wingham and St. Joseph's a degree of culture shock.

From Murphy and Moloney His Honour obtained at least three things: one, a solid grounding in the practical aspects of the law; two, a good supply of briefs; and three, most importantly for present purposes, a close relationship with Gerry Wells who, after retirement from active practice, was appointed to head the New South Wales Remuneration Tribunal, and who is shortly to make recommendations to the Government on the level of judicial salaries.

So, in 1963 His Honour came to the bar. He took Chambers on the 7th floor of Wentworth, presided over by either the legendary J.W. Smythe QC, or the legendary Fred de Saxe, depending upon one's point of view. At the suggestion of his friend Bill Deane he read with the dashing junior L.W. Street. Apart from a solid grounding from his master in persuasive advocacy with both Judges and (more importantly) solicitors, His Honour then acquired many junior briefs when L.W. Street took silk shortly thereafter. Murray continued his close association with Bill Deane who had a great influence upon him. Bill was also a St. Joseph's boy, and they were introduced by Peter Capelin who had been at school with Murray Gleeson.

However, many take the view that the greatest influence upon the style of Gleeson as an advocate was J.W. Smyth. The cool and unflappable demeanour, the careful preparation and mastery of the facts, the economy of language, the use of silence as a weapon and, above all, a delight in the tactical interplay of a case were the hallmarks of that influence.

His Honour took silk in 1974 after eleven years at the Bar. He quickly developed a superb practice as a leader. He had avoided being typecast as a junior, and his width of experience stood him in good stead as a silk. He was at home at first instance or on appeal, before Judges, juries or lay tribunals, dealing with matters of fact or matters of law, performing in Court or giving advice in Chambers. He had the most meteoric rise at our Bar since his mentor Bill Deane.

What was special about His Honour as an advocate? His legal knowledge and ingenuity, and careful preparation of the facts, can be taken for granted. In my view his special quality was the ability to treat every tribunal before whom he appeared as a jury open to persuasion, and to analyse the case in such a fashion as to make available to the tribunal a simple, appealing and apparently logical path, which would present as the best solution on the merits. He always put what Sir Garfield Barwick called "points of prejudice" - or as Gleeson would call them "points of merit" - to the forefront of his argument, with a disarming and appealing simplicity.

I have already mentioned his appetite for the tactics of a situation. This made him a feared opponent and even more feared as counsel for a co-defendant or co-accused. It also made his advice eagerly sought after by solicitors and their clients. Let me give you some insight to Gleeson in Chambers from a client's viewpoint. I am reading from the House of Representatives Hansard in the debate upon the Report of the Cross Inquiry. The speaker is the Honourable Ian Sinclair.

"The undisputed evidence was that the lunch concluded by 2 p.m. I left the club and went immediately to see my solicitor, Mr A.T. Scotford, at his office. Within fifteen minutes of the lunch concluding, I repeated to my solicitor the terms of the conversation that had just taken place, namely, that a proposal had been put to me whereby with the passing of money, arrangements could be made with respect to my forthcoming criminal charges. Mr. Scotford made a note about this in his own office diary. On my instructions, he then sought and obtained advice from Mr. Gleeson as to what should be done about the matter. That advice was that nothing should be done about it, and I should "put the matter out of my mind". As the Special Minister of State [Mr. Young] who has some acquaintance with Mr. Gleeson, should be able to confirm, that is typical Gleeson advice."

I had the privilege of serving with His Honour on the Bar Council for several years, including his term as President. He was a most effective President. He was an efficient, no-nonsense administrator, and dealt with matters as they arose. He was an excellent chairman of a meeting - rarely intruding his own view until the critical vote was taken. He had few personal hobbyhorses. The only topic which I can recall always aroused his keen interest was baiting McColl about the notorious painting which Meagher so kindly donated to the Association. He was a skilled negotiator with politicians, Judges, and officials of all types. The cool stare, the quiet logic, and the skilful use of silence were formidable.

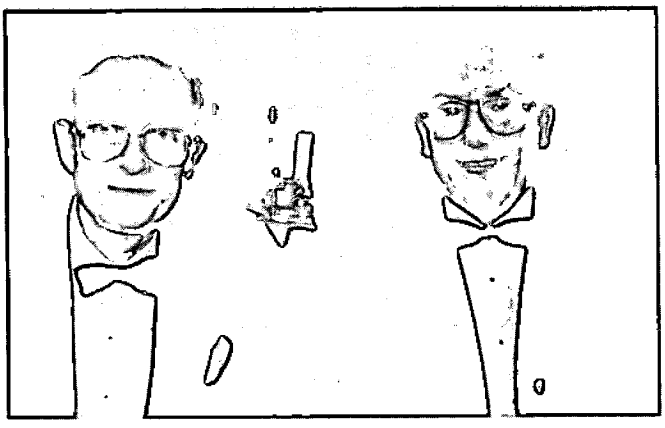
His greatest contribution to the Bar during this period was to reach agreement in principle with the then Attorney General Terry Sheahan as to the final disposal of the Law Reform Commission recommendations upon the structure of the profession. The result was not perfect, and we knew it, but it did resolve a situation which required resolution, and did so in a fashion which ensured the continued integrity of the Bar as we know it. It is not so well known that this in no small measure was due to the good personal relationship which His Honour struck up with the Attorney General after his appointment.

There is much more that could be said about His Honour - wild horses wouldn't drag out of me any details of his visit to Raymonds Revue Bar in London. I could speak of his devotion to various sports, many of which have ended in physical injury to himself; his preoccupation with ailments of all types, fuelled by his long period as a director of the Sickness and Accident Fund; his numerous and continuing incidents in aircraft; the contrast between his financial prudence at home and his sybaritic lifestyle abroad when attending to the requirements of corporate giants; and, on a more serious note, his family and his religion. But enough is enough in a speech like this.

I had thought that I had done a reasonably thorough job of research into His Honour's antecedents. Much of it I knew myself, the rest I obtained from one source and another. Imagine my consternation when, just two days ago, I was glancing at an article on the front page of the Sydney Morning Herald as I ate my rice bubbles. The article was entitled "How Friedrich kept the N.S.C watchdogs at Bay" by David Wilson and Bob Bottom. Roughly halfway through the article I came upon this astonishing revelation.

"As recently as Saturday, March 18 - just three days before he went missing - Mr. Friedrich spent some of the day driving around Inverloch in Gippsland. Was Inverloch an old stamping ground? Or was John Friedrich using the alias of Mr. Murray Gleeson in claiming to own a home in the area? One local resident has matched a picture of Mr. Friedrich to a person he thought was a Mr. Gleeson."

It was immediately apparent to me that my research had not been as thorough or as effective as I had thought. In responding to the toast which Wheelahan and I are to move to His Honour, I trust the Chief Justice will explain to us his amazing double life. •❑



Handley Q.C. and Justice McHugh

Chief Judge Staunton Q.C. and Justice Matthews

Judges Moore and Maguire

Mr. Junior D.A. Wheelahan Q.C.

Until tonight the reports about the new Chief Justice have been largely anecdotal. Brace yourselves for revelations empirical.

Tonight you will hear about Gleeson the Great Appeaser - the Neville Chamberlain of negotiators with the then Great Satan of the Law Reform Commission, Prof. Ron ("we'll rub you out") Sackville.

You will hear how the Chief Justice, in order to curry favour with socialist and Tory premiers alike, has masqueraded as a truly great servant of this community.

I speak of none other than Gerry Gleeson.

The socialists recommended Gerry for an Order of Australia but, like the appointment of David Godfrey Smith to the District Court through a typographical error, that most sought after of colonial honours went to our Chief Justice.

Much can be understood about the Chief Justice when it is realised that the full-bottomed wig he wears once belonged to Robert Lindsay Taylor. When worn by the former Chief Judge at Common Law, never once was a merciful or generous notion or idea harboured under it. Indeed under that wig machiavellian plots for the discomfiture of counsel were hatched. How proud His Honour would be to know that the tradition so skilfully created by himself is being continued with such enthusiasm and vigour.

Since the elevation of the Chief Justice many changes have occurred in the Court. He sits in Divisions. He sits in Equity and the Equity poofters, as Mr. Justice McInerney describes all who practise there, are clamouring for the return of Myers J.

He sits in Crime and the hardy, robust practitioners in that jurisdiction are pleading for the return of Mr. Justice O'Brien.

He sits in Common Law. Paraplegics, quadriplegics and brain-damaged infants petition the Government for the appointment of men with the attitude to damages of Mr. Justice Begg.

Seasoned campaigners in the Court of Criminal Appeal recall, with affection, the days when that Court was frequently presided over by Sir Bernard Sugarman.

Judges have told me that especially in the Court of Criminal Appeal members of inner bar, the outer bar and of the criminal community have been reduced to tears following an exchange with the Chief Justice.

This tendency to the lachrymose seems to have developed in this community, historically at least, from the activities of a former and otherwise undistinguished captain of Australian cricket and I refer of course to Kim Hughes. He blubbered and carried on on national television when deprived of the captaincy.

His response to his loss was probably influenced by the fact that he had a girl's name.

A ground swell of sympathy developed for the man. Observing this result the great pragmatist, the Prime Minister, decided to see if it would work for him.

He slobbered and snivelled his way through an interview concerning his family and then, most recently, in a thoroughly unedifying spectacle broke down for the most trivial and

inappropriate of reasons.

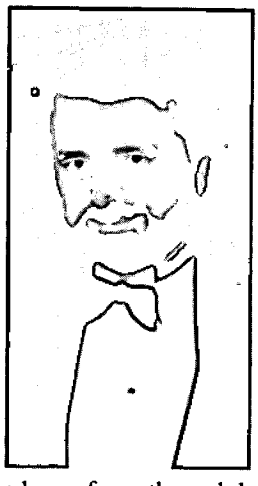
Cynics would say that the Prime Minister hoped to gain some sympathy, advantage or support from this display. Rest assured that shedding tears in a Court of Criminal Appeal is unlikely to produce any of those results.

Even though the Chief Justice has passed from amongst us he rated a mention in last Saturday's Spectrum article entitled "Silks City".

That article produced universal erubescent faces amongst the Inner Bar. The twenty who were named in the article blushed from embarrassment. The 150 who weren't mentioned reddened with rage.

The article was certainly instructive. For example, Ken Handley, to employ the language of Broadcaster Mossop, was flabbergasted to learn that he was rumoured to charge up to five times what was then his going rate.

Tom Hughes learnt to his great surprise that his services could be secured for about 50% of his then going rate. If Bond Media could have secured Tom's services at $5000 per day there would have been no settlement of the $100,000,000 Fairfax case.



Spectrum identified three former presidents including the Chief Justice as being Catholics.

Later in that article it was inferred that the same "unholy trinity", as Mr. Justice Hunt might describe them, were reputed not to charge in the highest bracket.

What does this mean? Does it mean that Catholics are no good or just don't know how to charge?

The Inner Bar was divided into "the magnificent seven", "other top silk" and those who failed to rate a mention. Of the last group there are three members of Inner Bar who, principally through the initiative of the Chief Justice, now sit with him as Associate Judges. I refer of course to Morton ("What's my power to remit this matter to the District Court for the assessment of damages") Rolfe, Calvin Rocester ("Verdict for the Defendant") Calloway and Peter ("Derby") Capelin.

Associate Justice Calloway has established by his judicial performance conclusively that one cannot judge a book by its cover and that leopards do indeed change their spots. It is confidently hoped, indeed expected, that His Honour's practice will be in tatters when he returns to the Bar and attempts to yet again entice floods of Plaintiffs into his poor and uninteresting Chambers on the 10th of Selborne.

Associate Justice Capelin maintained the close connection with the turf which was first made popular, fashionable and respectable at this Bar by Mr. Justice McHugh. Some of His Honour's practices tend to confuse those appearing before him. He sits in a Committee room. At the commencement of the day's business His Honour calls the card. He then announces starters and riders for the day's list. He describes the matters that come before him as protests which are either upheld or dismissed and the results of his deliberations are semaphored to puzzled litigants.

I mentioned that Morton Rolfe is an acting Justice and he and the Chief Justice have something in common. It is not, as is widely thought, their penchant to boogaloo in Rogues, Williams or The Metropolis nightclubs, but rather the curious habit of being called by name other than that which they were given.

Why some people would seek to be known by a name different from the one they are given or acquired is obvious. For example it would be no fun to be known as "Spaghetti" Eustace, "Putty Nose" Nicholls, "Shagger" Meares or "Shanks" Morris.

But people who have in fact changed their name have done so for reasons that don't appear to be immediately obvious. For example Simon Sheller is really Charles Sheller, Morton Rolfe is really Jimmy, Rodney Parker is really Roger (why would one bother to make such a change?).

Henrich Nicholas is really William, John Holt is really Walter, Bob Lord is really Lionel.

Lancelot John ("Call me Bill") Priestley is in a special category.

This Chief Justice has always been reluctant to use or have used his first given name. It appears that in this regard the Gleesons are an odd lot. His father was christened John and is called Leo. His brother was christened John and is called Paul. The Chief Justice was christened Anthony and is called Murray. But there lies behind the Chief Justice's preference sound reasoning based upon extensive research done by him and it related to the meaning of Anthony.

Anthony has several irreconcilable origins including the Persian "Anxtony" meaning "irritable through bowel problems"; the Roman surname "Antonioni" meaning "one of the Anthony boys" and the English "And Tony" meaning "one who is nearly forgotten and introduced last".

Anthonys tend to be spare, arrogant children, good at language who all seem to need spectacles and look ridiculous in swimming costumes.

Anthony is generally thought to be a useful name for an aimless second son or a large intelligent dog. Most branches of the Christian faith enjoy a St. Anthony including the Catholic St. Anthony patron saint of the uninformed but optimistic and the Coptic St. Anthony patron saint of the continental breakfast.

Is it any wonder that this man changed his name?

The circumstances leading to His Honour's appointment are now appropriate to be revealed.

The bucolic Attorney General informed me that late last year he rang Gleeson Q.C. and the following conversation ensued.

The Attorney: "Would you accept an appointment?"

Gleeson: "As what?"

The Attorney: "A Judge?"

Gleeson: "Certainly."

Then, Gleeson, thoughtfully, "To which Court?"

Since being appointed it was necessary for His Honour to acquire some staff.

Abiding by that most useful of injunctions *delegatus non*

potest delegare he conducted the interview for the position of tipstaff himself. Some perfectly decent member of the community presented himself and was asked but one question namely "Have you got any convictions?" The applicant replied "No". The Great cross examiner continued: "I can't think of anything else to ask you." An embarrassed silence followed. The applicant volunteered the following. He said: "I think you will find that I am a very amiable person."

The Chief Justice replied: "Well, I am not."

His application was successful and we can anticipate a long and fruitful relationship between the Chief Justice and his tipstaff.

Chief Justices throughout the ages have had judges who have presented them with intractable problems of discipline and decorousness.

When Julian Salomons Q.C. was invited to be Chief Justice he accepted and received his commission. He never heard a case nor sat on the bench for he resigned before being sworn into office.

Salomons recorded the occasion which made him change his mind - a turbulent encounter with Mr. Justice Windeyer who suggested that he was always "breaking down mentally". The charge was exaggerated but Salomons had in earlier years suffered "brain fever" through unremitting work. He reconsidered his position and decided he could not bear the burdens of the Chief Justiceship together with any difficulties with one of the other Judges.

This Chief Justice has a similar problem, but happily not of those dimensions.

A member of the Court of Appeal was recently touring New Zealand. He was doing his Somerset Maugham impersonation. By that I mean wearing a broad-brimmed straw hat and calico jacket and drinking colossal quantities of poor wine.

An intrepid member of the New Zealand press approached His Honour for his views on a National Companies and Securities Commission. His Honour urged the New Zealanders to resist the temptation to establish such an entity.

He said we had one here.

He said that it was staffed by unemployable cretins. He said the competence of their prosecuting staff was such that he didn't think they had ever won a case. He said they didn't choose flagrant breaches. Typically they picked those involving less than $100.

Having said that, Mr. Justice Meagher boarded a fast-moving jet heading west. Staffs of Corporate Affairs Commissions nationally now join the complete fraternity of attorneys, the staffs of all law schools, labour lawyers and women in their concern about Meagher.

The Chief Justice is a stranger to neither New Zealand nor women. Once when leaving New Zealand he was asked by a reporter to comment upon New Zealand beer and New Zealand women. His response was, simply, "Your beer is flat".

In a debate he once opened for the Government and pointed at and addressed the leader of the opposition - a Winsome girl from O.L.M.C. Parramatta named Lynette Brooker and quoting Macbeth said: "Oh horror, horror, horror! Tongue nor heart cannot conceive nor name thee." The debate was won, but the girl was lost.

The Chief Justice was for a number of years the President of the Bar Association. He was its President during some of its turbulent years when the gang of four in the Law Reform Commission was feverishly attempting to amalgamate us with the Attorneys. The then President's spirited defence of the Bar should be known by all for it was recognised by those who observed it to be enormously effective.

His view that an independent Bar was critical to the maintenance of the system of justice as it operates in this State prevailed and it is believed by many to be one of the most important decisions of the last decade.

The Chief Justice was once described by the Chief Justice of Australia as the finest appellate advocate in the country. He left the Bar at a time when his career was at its apogee.

He had the confidence, capacity and cupidity of the consumate advocate.

He was invited to leave the Bar to accept the staggering burden of the State's highest judicial office at a time when his earning capacity was significant and the demand made upon him and his financial resources were not insubstantial.

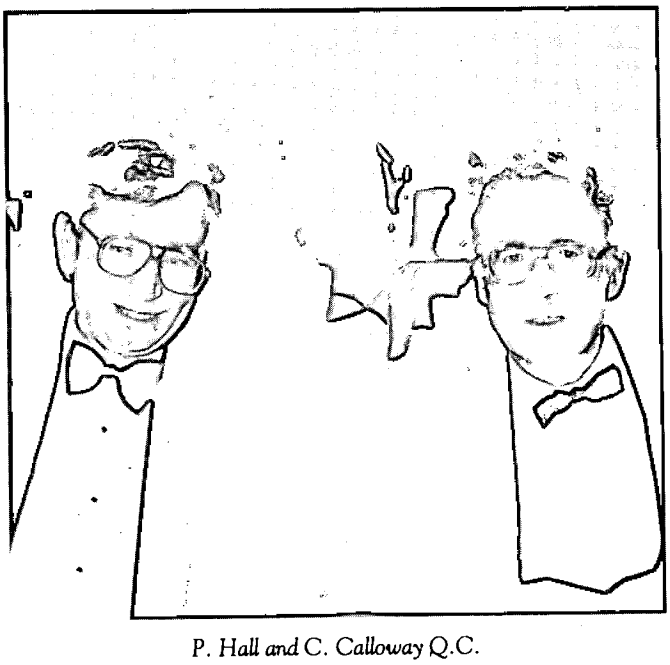
He left the Bar at a time when the gap between judicial and private professional earnings was increasing exponentially.

Notwithstanding these matters, the enormous honour, the challenge and the burden of the Chief Justiceship attracted him. In the short time that he has been there he has performed in a way that surprises none of those who knew him well.

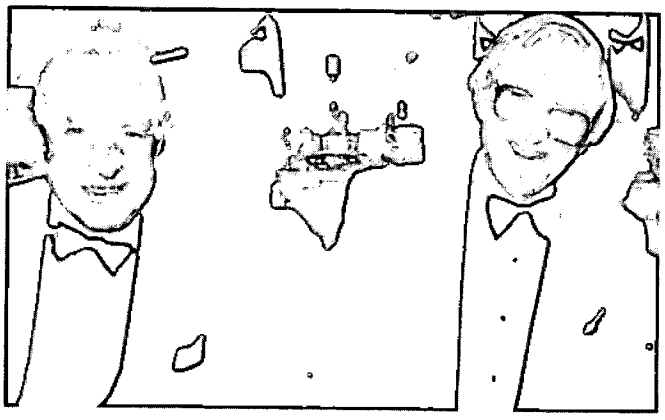
His hand is seen in many unexpected areas.

Judicial output has increased. Litigious backlogs are disappearing and there can be no doubt that the Supreme Court has a vital and effective leader. The highest office has fallen to the man best equipped to shoulder its burden and if the Attorney General of the State of New South Wales is remembered for nothing else he will be remembered as the man who was successful in attracting this most eminent and worthy gentleman to this most prestigious and important position.

Ladies and gentlemen I invite you to toast our guest of honour, Chief Justice Gleeson. ❑



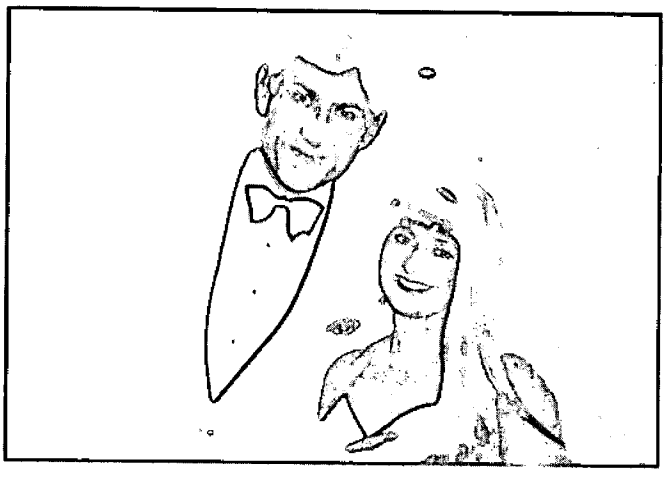
P. Hall and C. Calloway Q.C.



Sir Laurence Steet K.C.M.G. and Justice Morling

Tim Duchesne and Anne Quirk

Jo-Anne Wright and Ross McKeand



Tony Bellanto Q.C. and Kate Traill

Chief Justice Gleeson's response:

I am grateful to you for all for this splendid occasion and for the generous sentiments which you have expressed by your toast.

I am especially grateful to Gyles and Wheelahan for dealing with me so kindly. May I remark upon how much nicer their speeches were than at least one of those delivered at the last Bench and Bar Dinner which I attended, which was an occasion to honour my predecessor upon his retirement.

I have no criticism to offer concerning the speech made by Waddy on that occasion. Indeed, his natural sense of fairness and good manners was such that he was evidently constrained to abandon the prepared speech that he had written for the occasion and to deliver, as a reaction to the offensive speech made by Meagher, what could only be described as a hagiography concerning Sir Laurence. It is rather, the self-indulgent effusions of Meagher that I intend to contrast with this evening's dignified and generous speeches.

In this regard, I find myself the subject of some constraint because of events which have intervened between that occasion and the present time.

As I sat here listening to Meagher's torrent of abuse directed carelessly towards my predecessor and myself it never occurred to me as a possibility that the Government would pursue its shameless patronage of old boys of Riverview College to the length of appointing him to the Court of Appeal.

The result is that I am now inhibited in what I can say by way of response to that speech. You all know that when I was at the Bar wild horses would not drag from me a remark critical of a Supreme Court Judge. Now I am obliged to take every opportunity to shower Judges with praise. Furthermore, I have to respect Mr. Justice Meagher's sensitive personal feelings. You may remember that the public announcement of his appointment was preceded by a spate of rumours as to difficulties in relation to his health. His Honour, on the occasion of his swearing-in, referred to the acute personal embarrassment which he had been caused by these rumours and expressed the sincere wish that no future references would be made to the subject of his personal health. In those circumstances I desire to make some references to the subject of his personal health.

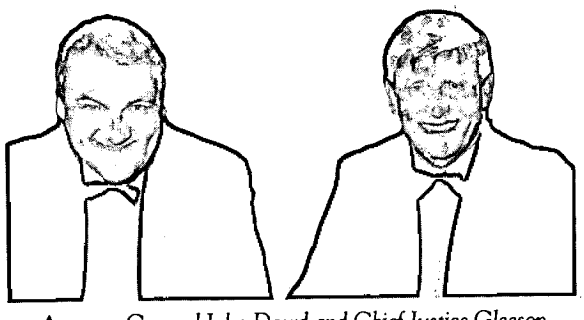
Most of the rumours that you heard were in fact true. Indeed, over the Christmas vacation Meagher travelled the world in search of accommodating medical opinion, and finally received it in a suburb on the outskirts of Morocco. The whole sorry affair has resulted in the addition of a new category to any formulation of degrees of impossibility. Henceforth, in ascending order, they can be stated as follows. First, there is a camel seeking to pass through the eye of a needle. Second, there is a rich man trying to enter the Kingdom of Heaven. Third, there is an Attorney General endeavouring to persuade a medical practitioner of ordinary standards of competence and probity to certify to Meagher's fitness. It should be added that the fitness to which I refer is not fitness to run in the City to Surf race, or even to act as the anchorman for the Court of Appeal's tug-of-war team at the Supreme Court Judges' picnic. I am referring to fitness to sit still for a few hours a day and listen.

But I must not dwell on this new, and somewhat rococo, ornament to the Bench. This gathering of Bench and Bar is a very happy occasion for me and acrimony is foreign to my nature.

You may be interested, Mr. President, to know that the tradition of mutual support and encouragement between the Bar and the Supreme Court of New South Wales, and in particular the Chief Justice of the Supreme Court, goes back to the earliest days of the Colony.

A well-publicised conflict between Sir Francis Forbes and Governor Darling, in the days when the Chief Justice exercised something like a power of veto over legislation enacted by the Legislative Council of New South Wales, gave rise to a mighty conflict in which the Chief Justice's principal, and perhaps, only supporters were the Bar. The Governor sought to exact a form of social revenge upon the Chief Justice which is described by Lady Forbes in a letter that she wrote at the time in the following terms:

"If we gave a dinner party, General Darling would issue invitations, at the last moment, to our guests, for the same evening, his invitations being headed 'The Governor Commands Your Attendance at Dinner' etc. and our promised guests would arrive at our house to make their excuses so that they might obey His Excellency's mandate. In order to save ourselves, and our friends, from this humiliation we ceased to entertain except at the usual Bar diners, when we felt sure of our guests as the members of the Bar were not subject to Government control."



Attorney General John Dowd and Chief Justice Gleeson

There are two particular aspects of that extract from Lady Forbes's letter which are noteworthy. The less important relates to her apparent indication that the Chief Justice paid for Bar dinners.

That is a practice which has long since fallen into well-deserved obsolescence, and I can assure you that there is little prospect that it will be revived. The second aspect concerns the concluding words of the letter which I will repeat: "The members of the Bar were not subject to Government control."

I doubt that Lady Forbes was expressing a legal opinion. Nevertheless, I would like to think that her comments reflected, and continued to reflect, a profound truth. If it be the case that, going back to the earliest days of this colony, Governments have found, as two elements of the community "not subject to Government control" the Chief Justice of the Supreme Court and the Bar, then that is the way it should be. I trust that is how it will remain.

The Bar is a wonderful institution. I saw from reading a newspaper over the Easter weekend that some of its members make enormous incomes, and that they are fond of sexual gossip. In relation to the latter subject I regret that I have nothing to contribute. As to the former, my own ideas as to what is a proper sum for a barrister to charge have now crystallised. I regard the last fee which I charged as the maximum which is appropriate, in both real and nominal terms, and this view can be expected to be reflected in disciplinary proceedings over the next twenty years.

That period will be one of great change both for the Bar and for the Judiciary. The tendency of change is often difficult to recognise for those who are living in the midst of it. However, I believe it is possible to make some fairly confident predictions.

One prediction that I believe can be made with a considerable degree of confidence is that relations between the Bench and the Bar will become even closer than they have been in the past because we will share an increasing number of common members. There used to be a famous, if apocryphal, story told about the Australian Golf Club, where Wheelahan is such a notable figure. It concerned a letter that was written by the Secretary of the Club at the request of the Committee to the Committee of St. Andrews in Scotland seeking a ruling upon an intricate problem which arose out of circumstances involving a golf ball coming to rest in the branches of a tree. The Committee of St. Andrews was invited to express an opinion upon what was the appropriate action to be taken in such circumstances. The response came back: "There are no trees on golf courses". Only a few years ago I received a similar response from some senior English Judges and barristers when, as President of the Bar Council, I made inquiries as to the approach which the Bar should take towards the right of former Judges to return to the Bar and practice. I was told that former Judges do not return to the Bar. As a proposition of fact that is manifestly untrue of Australia at the present time.

I have no doubt that, as an inevitable consequence of Government policies, a consequence that has been clearly drawn to the attention of the relevant Governments, what has in recent years begun as a trickle of Judges returning to private practice, either at the Bar or in firms of solicitors, will become a steady stream. The Bench and Bar will have to learn to accommodate this new circumstance. I have yet to make up my own mind whether I for my part will lift a finger to stop it even if I were able to do so. When I speak of Judges returning to private practice I mention particularly private practice as barristers or solicitors. There is, however, another form of private practice developing at a rapid rate in the United States of America. I refer to retired Judges returning to private practice as Judges. Depending on the extent to which these events occur they may have profound consequences, of a structural nature, for the Court system and the administration of justice in this country.

I have confidence in the survival and vigorous growth of the independent Bar. Nevertheless, I am sure that the next few years will see important structural changes in the organisation of the legal profession. I am constantly surprised at the ingenuous belief on the part of some who promote change in that regard that, once it has commenced, lawyers will have control of the direction which it takes.

For example, I hear solicitors speak of the advent of multi-

11th (Biennial) Lawasia Conference - Hong Kong 18-21 September 1989

Another conference. Who needs them (especially at Darling Harbour when you are trying to scratch out a meagre existence up the road in Phillip Street)?

But Hong Kong...? Pearl of the Orient - residence of 6 million very edgy Chinese, 60,000 Vietnamese emigres and (very) assorted others - and shoppers' paradise (but only up to $400 per Australian adult if you want to bring it home).

The Law Association for Asia and the Pacific met again. Countries represented - 20 (including United Kingdom, Switzerland and Italy??). Delegates - 375 odd (some more than others). Australians - 127. Sydney bench - 5. Sydney bar - 6.

The event was held in the Convention and Exhibition Centre in Wanchai which, judging by the hammering and drilling which accompanied most sessions, was still under construction. It was overshadowed by a convention of jewellers and watchmakers secured by guards armed with shotguns. And there is something disconcerting about signs saying: "When there is a fire, do not use lifts". (What happened to "if"?)

Anyway, after the usual frenzy of exchange of cards we got down to business.

To save you a lengthy and boring rapportage (that will be produced in due course by the organisers), here is an incomplete selection of messages exchanged at the various sessions:

Insolvency- often follows the subject of the next session.

Taxation - inevitable. Less painful if you live in Hong Kong (at least until 1997).

Communication and Media Law - a fund of information about leasing and insuring satellites, the Cape York Spaceport, contempt of court and defamation.

Administrative Law - whither Crown immunity? (Perhaps to China); judicial review (is it out of hand? Give the bureaucracy back to the shiny-buns.) Where did they get this doctrine of a stay of proceedings anyway? Who makes the decisions around here?

Human Rights - the practical problems of demonstrating to Nepalese villagers and Bombay stevedores that:
(a) they have them; and
(b) they should exercise them.
Followed by a whip-around at dinner to fund the human rights program for the next two years (not tax-deductible, yet).

Constitutions in a Modern Setting - think of a topic, it's there. Hong Kong's future and the basic law; independence of the judiciary and its violation in Asia, the Pacific and Australia (yes, I know Mr. Staples was not a member of a court established under s.71 of the Constitution, but he was given the rights, title and immunities of a judge). Anyway, what do you do with a miscreant judge? Obtain on appointment (as did Marcos) a signed, undated letter of resignation?

Complex Commercial Crime - we need computers to detect, combat and prosecute international wrongdoing: but somebody has to drive them. More power to the state - 1984 has been and gone. Excesses of official zeal can be compensated by damages. Search warrants? Bah, humbug! And as for "dishonesty" - well, it's a bit like the elephant's bottom: difficult to define but you know it when you smell it (according to Perth barrister, Andrew Hodge).

Intellectual Property - eh?

Environmental Law - is anyone listening? Perhaps ICAC has a role. Nobody else seems to be doing much. Oh well, if we keep going as we are, there soon won't be anything left to protect.

Regulation of Capital and Money Markets - less is better. Where do you get it? How to move it.

Women and the Law - lunch by invitation only.

The Legal Profession - computers (again); insurance; confidentiality and its overlap with that of bankers.

Judicial Section - ?

Commercial Arbitration - yes, Sir Laurence attended.

Court Delays - we all know how to end them - all we need is a government with the will and the money. (Looks like we'll be battling for some time to come.) Hong Kong does not seem to have a problem : plenty of judges there (at least until 1997).

(I have most papers available for copying.)

If you are still with me, let me tell you about the gala dinner, a confusing order of execrable dishes finishing with "petits fours chinois", replete with jugglers who dropped their balls and a songstress who cleared the restaurant in the space of 2.5 songs. Amazing. Even the tables left.

The Hong Kong Law Society President took every opportunity to interrupt proceedings - some sort of microphone fetish. The President of the Bar did a Wheelahan - overlooked at the opening ceremony he entertained (?) us at lunch with the speech he would have delivered if asked.

Seriously, though, there were lessons to be learned. Lawyers in the region do look to Australia for guidance and support. Our tradition and its maintenance are admired and sought to be emulated. We have an influence largely unrecognised at home. We can learn from them, too - not only what to avoid, but how to broaden constructively our sometimes blinkered and often inwardly directed vision.

The next conference is in Perth in two years' time. It is expected 700-800 will attend (Australia attracts larger numbers from the region). See if you can make it.

And ponder this: if a feng shui man (a geomancer) had been consulted in time, Frederick Jordan Chambers might have been passed over by Counsel's Chambers Ltd. See? We can learn from the north. But perhaps it's not too late for a bit of bai sun. Let's face it, the spirits which dwell at 233 Macquarie Street need to be placated.

N.R. Cowdery Q.C.
Convenor, Lawasia Committee

Review of U.K. Green Papers

Brett Walter analyses the Green Papers which are to provide the basis for reform of the English legal system.

The proposals by Lord Mackay, the Scotch Lord Chancellor, to restructure the legal profession and introduce contingency fees have apparently stirred up the English and Welsh Bar. In January 1989, the Lord Chancellor's Department released two Green Papers on "The Work and Organisation of the Legal Profession" (Cm.570) and "Contingency Fees" (Cm.571). The proposals contained in these blandly written documents have caused consternation in some quarters, principally amongst barristers, and some perplexity in political and commercial circles acquainted with the workings of the legal profession. It has been said that the main Green Paper on the legal profession is the latest example of Thatcherism meddling rather than muddling through. It is easy to agree that these Green Papers represent the triumph of abstract ideology over pragmatic common sense.

The favoured ideology is announced in vague terms: "The Government believes that free competition between the providers of legal services will, through the discipline of the market, ensure that the public is provided with the most efficient and effective network of legal services at the most economical price, although the Government believes that the public must also be assured of the competence of the providers of those services". The Green Papers implicitly state that the present system in England and Wales fails to live up to these supposedly Conservative articles of faith. Mention is made of relaxation of control of advertising by solicitors in recent years and the advent of licensed conveyancers competing with solicitors in recent years and the advent of licensed as examples of progress in the right direction, but it is difficult to identify specific criticisms of supposedly anti-competitive practices allegedly working to the detriment of consumers.

> *" The unspoken and almost insulting premise of this part of the Green Paper is that the English and Welsh Bar does not provide an adequate service. "*

Many of the observations in the main Green Paper are banal or naive both as to the present state of affairs and the desired end of the mooted reforms. For example, the Government is said to consider that the best way to ensure that the expertise of practitioners is matched to the demands of particular work so as to give the public the best choice of competent practitioners "is for areas of specialist expertise to be developed". One practical implication of "specialisms", as they are called in the main Green Paper, is to permit advertising by so-called accredited specialists. Ironically, the free-market argument involves the imposition of further regulation, by means of "The Lord Chancellor's Advisory Committee on Legal Education and Conduct" being reconstituted "as a vigorous and active standing committee" to advise on matters including the accreditation of specialists.

Advocacy is proposed as an exception to a general rule that no so-called specialism should be restricted to specialist practitioners alone. It is simply said that the Government believes "that the needs of the administration of justice requires special arrangements to be made" in the case of advocacy. What is not explained is why anything needs to be done to alter the present position in that regard.

A veiled criticism is that the Bar regulates itself, by and large, under the supervision of the Court. Not one specific criticism is made of any supposed shortcoming in this system. However, the proposal is for this to be overridden by a new system administered by bureaucrats in the Lord Chancellor's Department, and including the innovation of a Legal Services Ombudsman, with power to investigate particular cases and to control and recommend changes to general procedures. As well, it is proposed "that there should in future be written codes which specifically set professional standards". It is nowhere demonstrated in the Green Paper that the absence of "standards of this kind" in relation to barristers has led to any misunderstanding by barristers of their duties to clients and the Court, and in particular no example is given of the kind of written code which could be drawn so as to provide specific rules (as opposed to "guidelines", which are criticised for being such) for professional conduct, without narrowing the properly comprehensive nature of the profession's duties.

The proposal most resented by the English and Welsh Bar is for the expansion of rights of audience beyond barristers and the establishment of a certification process to identify persons entitled to practise as an advocate. Some of the concerns which have been expressed by the English and Welsh Bar lose their force in New South Wales, where we have competed with solicitor-advocates and a much smaller number of lay advocates in specified tribunals for a very long time. During that time, it would be fair to say, the New South Wales Bar has thrived, and so it is difficult for us to sympathise entirely with English and Welsh fears of their Bar's annihilation if it is exposed to competition from solicitors and laymen as advocates. In a sense, these concerns probably reflect less confidence than barristers are entitled to feel in their ability still to attract most of the quality advocacy work even after losing their monopoly.

The unspoken and almost insulting premise of this part of the main Green Paper is that the English and Welsh Bar does not provide an adequate advocacy service. Even accepting that no profession or institution is perfect, the reader is left to wonder whether a chapter is missing from the main Green Paper which catalogues the shortcomings of the present system. In fact, it is clear that change is proposed for its own sake and because so-called competition is said to be good in itself. The Green Paper announces that the Government considers that "rights of audience in the courts should be restricted to those who are properly trained, suitably experienced and subject to codes of conduct which maintains standards" except in the case of persons representing themselves. The Government's aim is "to ensure the widest possible choice of advocate for the client while at the same time ensuring that adequate standards of competence and probity are maintained".

The practical proposals to give effect to these sentiments include the Lord Chancellor's bureaucrats overseeing the education, qualifications and training of advocates "appropriate for each of the various courts", controlled by subordinate legislation. After the transitional period (during which all practising barristers out of pupillage are to receive "a full general certificate"), a progression is proposed from an academic course, through a vocational course, practical training in advocacy to the holding of a limited certificate for a certain period. Progression from stage to stage is to depend on satisfactory completion of the previous one. A "variety of professional bodies" apparently extending beyond the present Bar Council and Law Society is proposed as the monitoring authorities for the progress and certification of advocates. This covers the eventuality of lay advocates (if the word "lay" would continue to have any meaning after these reforms) such as accountants, surveyors, medical practitioners, architects and the like being certified to practice alongside barristers and solicitors. The Green Paper says that the "whole area of lay representation should be considered by the Advisory Committee"; presumably, more details of this alarming proposal are yet to emerge from the Lord Chancellor's Department.

As the Green Paper also proposes that judges be drawn from the class of "all advocates", in effect it proposes the eligibility of non-lawyers for elevation to the bench, and promotion from lower courts to the highest.

Fortunately, at least from the view of those who respectfully admire the wisdom of the majority judgments in Giannarelli, the Green Paper notes that the Government accepts the cogency of arguments in favour advocates' immunity from actions for negligence.

The main Green Paper deals with a number of other matters affecting barristers directly or indirectly. For example, the requirement for counsel to be instructed, usually, by solicitors, is to be scrapped in favour of a free market in which advocates including barristers can enter into direct relations, contractual in nature, with clients. The rules of any voluntary association which sought to prohibit its members from accepting instructions directly would have to be shown to the proposed competition authority not to operate "in an anti-competitive way". The Inns of Court are said to be the "prime examples of such bodies". The argument that the widest possible choice of advocate for the clients of many solicitors including small firms is provided by the independent Bar in its present form, and would be threatened by advocates setting up in large firms to accept instructions directly from clients, is rejected by the Green Paper by its simple expression of the Government's hope and expectation "that a free market for the provision of independent advocacy services will flourish", and a reliance on unspecified empirical evidence to suggest that traditional barristers will survive such competition.

The system of appointment of Queen's Counsel escapes relatively unscathed, although, ominously, it is said to be "a matter for the proposed new competition authority" to look into any rules about "the relative size of payments to Silks and other lawyers", which "appear to be difficult to justify".

Some of the practices of the English and Welsh Bar which are much more restrictive than apply in New South Wales are criticised in the main Green Paper, such as the requirement for the barristers to practise from approved chambers ultimately controlled by the Inns of Court and with the services of a clerk. According to the Green Paper, pupillages are much more haphazard there than in New South Wales, where the Bar Association provides centralised control.

More radically from the New South Wales view, the Green Paper suggests that barristers should be able to practise in partnership, incorporate and employ other barristers. In answer to the obvious argument that these developments would in fact restrict the number of advocates available to take a particular case, chiefly by reason of conflict of interest, the Green Paper simply recites the Government's belief that this risk "is outweighed by the advantages of greater efficiency and of easing the entry of new barristers into the profession", and would "be met by the fact that the forces of competition can be expected to fill naturally any gaps in the provision of advocacy services". No explanation is ventured as to any of these matters, particularly the appeal to supposed "efficiency".

The Green Paper effectively issues a challenge to English and Welsh Bar to prepare its defense to a more detailed attack, described in the Green Paper as "closer scrutiny" of areas such as rules dictating the location of conferences and other rules which may "impose unnecessary or unhelpful restrictions".

Another radical suggestion for the whole of the legal profession, and the Bar in particular, is that so-called multi-disciplinary practices including legal and other professions should be permitted. Combined with the proposed new regime as to advocates, the proposals are clearly intended to permit one-stop shopping to the detriment of, for example, an independent Bar. The Green Paper suggests that barristers should be able to join such practices. The problem of enforcing proper professional standards when there is a mixture of professions is scarcely addressed, except for the proposal that other professions may need to improve their standards up to the standard of "the highest common factor" such as that of the legal profession.

Otherwise, the Green Paper merely suggests that "each member of a multi-disciplinary practice should remain individually subject to the rules of his or her professional body", while at the same time remaining "personally responsible for the activities of the practice within their own professional field" and personally controlling the work involved. Conflicts of interest, the Green Paper blithely asserts, must be resolved by professional personal responsibility overriding responsibility to the whole practice and other members of it.

Advertising is proposed to be uniformly regulated for solicitors and barristers, so that a general liberty to advertise should be controlled only by a prohibition on misleading statements and on forms of advertising thought by some authority to bring the profession into disrepute. According to the Green Paper's reasoning, matters such as fees and desired areas of practice (as opposed to accredited specialisms) will therefore be proper to be advertised by barristers.

The Green Paper on contingency fees deserves full treatment on its own, and the subject matter is under consideration by the our Council's Rules Committee. However, it is notewor-

thy that the Government's conclusion is that "speculative actions on the Scottish model" should be legal in England and Wales. This would bring England and Wales into line with New South Wales, where counsel may appear on the basis that a proper fee (not affected in size by the amount of the verdict) will be charged only in the event of success. The Green Paper also suggests that some variants, under presently unspecified tight control, of the USA contingency system should be considered. Generally, this question appears to be at a much more rudimentary stage than those tackled in the main Green Paper, and much more work is likely to be done in England before any real proposals emerge for a contingent fee basis other than that to which we are used in New South Wales.

Two general impressions are striking for a New South Wales reader of these Green Papers. Firstly, there are differences between our Bar and the English and Welsh Bar which are more profound than has usually been thought - the monopoly on advocacy in the higher courts is the most important of these. These differences reduce somewhat the fellow-feeling we may otherwise have for our beleaguered counterparts in England and Wales. Secondly, the ways of professional reformers are apparently universal in several important respects, most notably in their fondness for a priori reasoning and the publication of bland generalisations simultaneously with the development of detailed plans for radical change. ❑

So, Mr. Norman, Do I understand you to say that for you to earn as much as Mr. Hughes you would have to come at least second in the Tasmanian Open?

The Barrister's Armoury

It would be impossible in the late 1980's to find a legal practice which was independent of computers. Their presence may be felt in the office - in the word processor - to the chambers, where an identical machine may be being used as an adjunct to the writing and research involved in case preparation. The ubiquity of the computer, particularly that of the mid-range personal (also known as micro) computer, is also evident in glossy advertisements in journals such as this, and in the fact that university students may now expect to be exposed to computers as a resource in litigation support, etc. The historical commonplace of the computer as a standard bearer in the stakes of numbers and number crunching must now be refined to conceive of the computer as having an equivalent ability in the province of the barrister - words, and word crunching.

It is, then, becoming commonplace that the deployment of contemporary search-and-retrieval software can dramatically increase the productivity of barristers. Barristers can now enjoy the privileges which until recently were restricted to those involved in expensive litigations with budgets which could accommodate sums well in excess of one hundred thousand dollars. Today, theoretically, a legal profession with clerical support staff is able to be as productive as a team of five computer professionals with a million dollar mainframe in the 1970's. However, against theory is the caveat that, while the user is promised and effortless, comprehensive on-screen access to case documentation, in practice that promise can only be fulfilled by appropriate design and maintenance of the computer application.

The advisory services available to a law firm running or intent upon running computers include hardware and software distributors, educationalists and pragmatists. These last are the computer-based companies who consult and provide services relating to transportable information technology (microcomputer data-base application) specifically as it impinges upon the legal profession. Two examples are LMCS (Legal Management Consultancy Services) and Scantext. LMCS is a consultancy service which specialises in the Apple/Macintosh Computer. Apple/Macintosh, one of the two major players in microcomputer systems is a company which believes in the utility of computers as educational aids - this conduces to their ease of use - although their technical impetus has been most pronounced in graphics based fields such as desktop publishing. However, sands run quickly in the glass of computer technology and Apple have imported many of the specialised text-based applications which have been the forte of the other major player IBM (International Business Machines). Raproachment, compatibility and translation between these two hitherto antagonistic companies are becoming the vogue. In the meantime however, an efficient system will avoid compatibility problems. LMCS assess the various combinations of user requirements with regard to Apple Macintosh proprietary capabilities to design productive and friendly computer environments.

Scantext is a Computer Services Bureau which specialises in litigation support using IBM PC (personal computer) compatibles and off-the-shelf software. Litigation support includes services such as putting large amounts of text (transcripts, exhibits, etc.) onto computer disk and indexing it for instantaneous and selective retrieval by solicitors or barristers themselves. The type of consultancy evinced by Christoph Schnelle (Managing Director of Scantext) is cautious - "People who make a living at the cerebral cut and thrust of law can be suspicious of computers. They tend to relax when they realise that the computer is just a tool. A highly effective tool." His experience also leads him to be cautionary; "The great benefit of a computer in chambers is in large-scale text manipulation and immediate access to on-line data bases like INFO ONE. The cost benefits of computers outside of word processing and litigation support are minimal. Even in litigation support it is easy to go astray. There are many text retrieval programs, Gofer, Lotus Magellan, Isys, Corporate Retriever, Zyindex, WordCruncher, MemoryMate, Status, Stairs, Evidence and database programs like Dbase IV and Paradox. Database programs are very structured and demanding to run on a day-to-day basis, though with the right support they are definitely a viable alternative. The other programs have drawbacks too. Some are too difficult and unwieldy like Status, Stairs, Evidence, and Corporate Retriever which is showing its age. Some of the others like Gofer or MemoryMate are unpredictable with large amounts of data while others lack specificity. Isys and Zyindex slow down drastically when searching large files, it can take them ten seconds or more to register the next occurrence in a search. To use WordCruncher the text needs to be prepared. That is reasonably difficult and is a service Scantext provide. Once the text is prepared, though, WordCruncher is extremely fast and extremely useful to the barristers and solicitors who take the hour or two necessary to find their way around in it.

Beyond the macro context of office automation and computer advisory/support services some interesting conclusions may be drawn from the micro context of text production - the court. In line with the convenience electronic data offers in terms of storage and retrieval necessity prompts the creation of electronic copy in the court itself. Computer Transcripts, who are Australia's only freelance computer-aided transcription service provide a disk copy of transcripts as part of their service. Using a transcriptor which produces code on disk as well as on paper the production of the transcript is accelerated by using a computer translator. The reporter's task is no longer to produce the hard copy, but merely to check and edit it on screen before printing it out. The computer automatically provides for the style of the document and local spelling vagaries. The hard copy which is available daily is supplemented by a disk copy putting the barrister in a position to deploy a favoured computing strategy or not. It is the availability of this resource, as part of the service, which separates computer aided transcription from sound or manual recording of proceedings, although speed and accuracy are other persuasive arguments for this type of reporting.

The longer term indicators are that electronic storage will become the accepted recording mode of legal proceedings. This trend, along with the general mopping up operation in the computer industry itself vis-a-vis standards (qualitative and constituent), cost, etc., will contribute to the barrister's faculties. The far from trivial task of making computer operation trivial has reached a plateau where all the parties concerned, hardware and software interests, academics, students, practitioners of law and field experts can begin to analyse the situation in terms of defining the future directions, standards, and requirements desirable for legal data handling. ❑

Reports from Bar Council Committees

Accident Compensation Committee

On 2nd October, 1989 there came into force the new provisions relating to the amendments to the Workcover legislation including its retrospective provisions. This legislation, as members are probably aware, is the result of a long period of inquiry by a Government seeking to implement an election promise to re-introduce in New South Wales, common law rights for people injured at the workplace whilst keeping premiums under strict control The Bar, through its Workcover Committee, comprising Coombs Q.C., McCarthy Q.C., Poulos, Ferrari, Johns and Cavanagh, ably overseen and at times directed by the President, have been engaged in intense negotiations both with the Committee and with respective members of the Government regarding the provisions of the new bill.

These negotiations were intensely frustrating at times as the goal posts of costs were moved on several occasions. All members of the Committee in particular ways were engaged in the process and in lobbying all political parties and a great debt of thanks is owed to them, particularly to Ferrari who was the 'Quartermaster' of the group and to the efforts of Handley Q.C. for his able dealings with the Minister. The Bar played a significant part in the re-introduction of common law provisions acting in a conciliatory role during the course of negotiations.

Although the system finally put in place is obviously restricted and not the system that the Bar would have preferred, nonetheless a slice of cake for the severely injured is better than no cake at all. In addition, the trust engendered by the Bar will lead to it being involved in efforts to improve the present system. The Government has indicated that as it is affordable, amendments will be made to bring about a more socially just system. The Committee is disappointed at the present outcome but the support in Cabinet for a Motor Accidents Act replica could not be achieved, despite our intense efforts over an 18 month period. ❑ John Coombs Q.C., Chairman

Commercial Liaison Committee

The main achievement of the Committee during 1989 was the launching of the bar's new commercial legal aid scheme. The first matter undertaken by this scheme (a mortgagee's sale case) is still pending. The second, another mortgagee's sale case involving a guarantor, has just been referred to the Committee for its consideration.

It is important to realise that the small number of cases handled by the Committee is not in any way a criticism of the scheme. The need for legal aid in the commercial list is hardly the most pressing social problem facing the Australian community. The scheme is designed to deal with the occasional case where a litigant without substantial resources finds himself in the position of defendant in a commercial cause which requires the services of experienced counsel. The function of the scheme is to fill the lacuna which otherwise exists in this area.

The Committee expresses its appreciation to Malcolm Oakes and Philip Taylor who have given generously of their time in relation to the first pending matter. ❑

Computers Committee

The major event of the year concerning computers was the collapse of ESTOPL. This was a scheme which had been run by Counsel's Chambers Limited rather than the Bar Association. That company finally found that it was unable to continue with the scheme for economic reasons.

A committee of barristers comprising Einstein Q.C., Slattery, Street and Bannon called a meeting in September as a result of which efforts are being made to revive ESTOPL under the auspices of the Bar Association. This scheme is enthusiastically welcomed by the Computers Committee and it is hoped that ESTOPL will continue as a service provided by the Bar Association. ❑

Criminal Law Committee

The Criminal Law Committee this year had negotiations with the Legal Aid Commission with a view to setting up as part of the reading program practical experience of one month sessions at the Local Courts briefed for defendants by the Legal Aid Commission. The Commission did not welcome the idea and sought to retain the work for in-house solicitors. Recent changes in the Commission's personnel have produced changes in attitude.

There has been a vigorous campaign to retain committals. There were extensive negotiations, public statements and public meetings to continue committals and there was close liaison with the Law Society. It is believed that the substance of committals has prospects of being retained.

The revival of the Law Council's Criminal Law Section and co-operation with the Criminal Lawyers Association has meant that these with the Bar and the Law Society presented a united front on committals.

Numerous reports to the Attorney General were made about various pieces of legislation and the white paper which dealt with the composition of the Court of Criminal Appeal, appeal rights and changes in trial procedure.

There was liaison with the State DPP to effect a change in his briefing out system to provide more briefs for the very junior Bar in simple trials and pleas. ❑

Equity Liaison & Listing Committee

In the early part of the year the mounting congestion in the lists and consequent delays were of increasing concern among the judges of the Equity Division and the profession generally. These were exacerbated when Master Gressier took a period of extended leave. However as a result of certain representations to the Attorney-General, an additional master has been appointed and the business within the division is now progressing satisfactorily. ❑

64th Conference of the International Law Association

The 64th Conference of the International Law Association will be held at the Conrad International Hotel and Jupiters Casino at Broadbeach, Gold Coast, Queensland, Australia from August 19-26, 1990.

At the Conference, the ILA's international committees will present and discuss reports on a wide spectrum of topics including the environment, securities, international monetary law, international commercial arbitration and state immunity. Delegates will receive in advance copies of the reports of the international committees in which they have expressed an interest and are invited to participate in the forum discussion of such reports.

Confirmed and invited speakers to the Conference include:

- His Excellency the Right Honourable W.G. Hayden, Governor-General of Australia
- His Excellency Sr. Perez de Cuellar, Secretary General of the United Nations
- The Honourable Mr. Justice Mason, Chief Justice of Australia
- The Honourable Sir Ninian Stephen, First Ambassador for the Environment and former Governor-General of Australia
- His Excellency Sr. J.M. Ruda, President of the International Court of Justice.

For further details in relation to the Conference please contact:

ILA - 1990
Moller Consulting
PO Box 226
Aspley Queensland 4034
telephone (07) 263 6118 facsimile (07) 229 1498
or the

Australian branch of the International Law Association
C/- Law School, University of Sydney,
173 Phillip Street, Sydney.

Totally Aggravating

Plaintiff in a defamation case was asked in re-examination:

Q. "Did you enjoy being cross-examined by Mr. X for two days?"
A. "No, it was the second worst experience of my life."
Q. "What was the worst?"
A. "Being interrogated by the Czech Secret Police." ❑

11th (Biennial) Lawasia Conference - Hong Kong 18-21 September 1989

Another conference. Who needs them (especially at Darling Harbour when you are trying to scratch out a meagre existence up the road in Phillip Street)?

But Hong Kong...? Pearl of the Orient - residence of 6 million very edgy Chinese, 60,000 Vietnamese emigres and (very) assorted others - and shoppers' paradise (but only up to $400 per Australian adult if you want to bring it home).

The Law Association for Asia and the Pacific met again. Countries represented - 20 (including United Kingdom, Switzerland and Italy??). Delegates - 375 odd (some more than others). Australians - 127. Sydney bench - 5. Sydney bar - 6.

The event was held in the Convention and Exhibition Centre in Wanchai which, judging by the hammering and drilling which accompanied most sessions, was still under construction. It was overshadowed by a convention of jewellers and watchmakers secured by guards armed with shotguns. And there is something disconcerting about signs saying: "When there is a fire, do not use lifts". (What happened to "if"?)

Anyway, after the usual frenzy of exchange of cards we got down to business.

To save you a lengthy and boring rapportage (that will be produced in due course by the organisers), here is an incomplete selection of messages exchanged at the various sessions:

Insolvency- often follows the subject of the next session.

Taxation - inevitable. Less painful if you live in Hong Kong (at least until 1997).

Communication and Media Law - a fund of information about leasing and insuring satellites, the Cape York Spaceport, contempt of court and defamation.

Administrative Law - whither Crown immunity? (Perhaps to China); judicial review (is it out of hand? Give the bureaucracy back to the shiny-buns.) Where did they get this doctrine of a stay of proceedings anyway? Who makes the decisions around here?

Human Rights - the practical problems of demonstrating to Nepalese villagers and Bombay stevedores that:
(a) they have them; and
(b) they should exercise them.
Followed by a whip-around at dinner to fund the human rights program for the next two years (not tax-deductible, yet).

Constitutions in a Modern Setting - think of a topic, it's there. Hong Kong's future and the basic law; independence of the judiciary and its violation in Asia, the Pacific and Australia (yes, I know Mr. Staples was not a member of a court established under s.71 of the Constitution, but he was given the rights, title and immunities of a judge). Anyway, what do you do with a miscreant judge? Obtain on appointment (as did Marcos) a signed, undated letter of resignation?

Complex Commercial Crime - we need computers to detect, combat and prosecute international wrongdoing: but somebody has to drive them. More power to the state - 1984 has been and gone. Excesses of official zeal can be compensated by damages. Search warrants? Bah, humbug! And as for "dishonesty" - well, it's a bit like the elephant's bottom: difficult to define but you know it when you smell it (according to Perth barrister, Andrew Hodge).

Intellectual Property - eh?

Environmental Law - is anyone listening? Perhaps ICAC has a role. Nobody else seems to be doing much. Oh well, if we keep going as we are, there soon won't be anything left to protect.

Regulation of Capital and Money Markets - less is better. Where do you get it? How to move it.

Women and the Law - lunch by invitation only.

The Legal Profession - computers (again); insurance; confidentiality and its overlap with that of bankers.

Judicial Section - ?

Commercial Arbitration - yes, Sir Laurence attended.

Court Delays - we all know how to end them - all we need is a government with the will and the money. (Looks like we'll be battling for some time to come.) Hong Kong does not seem to have a problem : plenty of judges there (at least until 1997).

(I have most papers available for copying.)

If you are still with me, let me tell you about the gala dinner, a confusing order of execrable dishes finishing with "petits fours chinois", replete with jugglers who dropped their balls and a songstress who cleared the restaurant in the space of 2.5 songs. Amazing. Even the tables left.

The Hong Kong Law Society President took every opportunity to interrupt proceedings - some sort of microphone fetish. The President of the Bar did a Wheelahan - overlooked at the opening ceremony he entertained (?) us at lunch with the speech he would have delivered if asked.

Seriously, though, there were lessons to be learned. Lawyers in the region do look to Australia for guidance and support. Our tradition and its maintenance are admired and sought to be emulated. We have an influence largely unrecognised at home. We can learn from them, too - not only what to avoid, but how to broaden constructively our sometimes blinkered and often inwardly directed vision.

The next conference is in Perth in two years' time. It is expected 700-800 will attend (Australia attracts larger numbers from the region). See if you can make it.

And ponder this: if a feng shui man (a geomancer) had been consulted in time, Frederick Jordan Chambers might have been passed over by Counsel's Chambers Ltd. See? We can learn from the north. But perhaps it's not too late for a bit of bai sun. Let's face it, the spirits which dwell at 233 Macquarie Street need to be placated.

N.R. Cowdery Q.C.
Convenor, Lawasia Committee

Review of U.K. Green Papers

Brett Walter analyses the Green Papers which are to provide the basis for reform of the English legal system.

The proposals by Lord Mackay, the Scotch Lord Chancellor, to restructure the legal profession and introduce contingency fees have apparently stirred up the English and Welsh Bar. In January 1989, the Lord Chancellor's Department released two Green Papers on "The Work and Organisation of the Legal Profession" (Cm.570) and "Contingency Fees" (Cm.571). The proposals contained in these blandly written documents have caused consternation in some quarters, principally amongst barristers, and some perplexity in political and commercial circles acquainted with the workings of the legal profession. It has been said that the main Green Paper on the legal profession is the latest example of Thatcherism meddling rather than muddling through. It is easy to agree that these Green Papers represent the triumph of abstract ideology over pragmatic common sense.

The favoured ideology is announced in vague terms: "The Government believes that free competition between the providers of legal services will, through the discipline of the market, ensure that the public is provided with the most efficient and effective network of legal services at the most economical price, although the Government believes that the public must also be assured of the competence of the providers of those services". The Green Papers implicitly state that the present system in England and Wales fails to live up to these supposedly Conservative articles of faith. Mention is made of relaxation of control of advertising by solicitors in recent years and the advent of licensed conveyancers competing with solicitors in recent years and the advent of licensed as examples of progress in the right direction, but it is difficult to identify specific criticisms of supposedly anti-competitive practices allegedly working to the detriment of consumers.

Many of the observations in the main Green Paper are banal or naive both as to the present state of affairs and the desired end of the mooted reforms. For example, the Government is said to consider that the best way to ensure that the expertise of practitioners is matched to the demands of particular work so as to give the public the best choice of competent practitioners "is for areas of specialist expertise to be developed". One practical implication of "specialisms", as they are called in the main Green Paper, is to permit advertising by so-called accredited specialists. Ironically, the free-market argument involves the imposition of further regulation, by means of "The Lord Chancellor's Advisory Committee on Legal Education and Conduct" being reconstituted "as a vigorous and active standing committee" to advise on matters including the accreditation of specialists.

Advocacy is proposed as an exception to a general rule that no so-called specialism should be restricted to specialist practitioners alone. It is simply said that the Government believes "that the needs of the administration of justice requires special arrangements to be made" in the case of advocacy. What is not explained is why anything needs to be done to alter the present position in that regard.

A veiled criticism is that the Bar regulates itself, by and large, under the supervision of the Court. Not one specific criticism is made of any supposed shortcoming in this system. However, the proposal is for this to be overridden by a new system administered by bureaucrats in the Lord Chancellor's Department, and including the innovation of a Legal Services Ombudsman, with power to investigate particular cases and to control and recommend changes to general procedures. As well, it is proposed "that there should in future be written codes which specifically set professional standards". It is nowhere demonstrated in the Green Paper that the absence of "standards of this kind" in relation to barristers has led to any misunderstanding by barristers of their duties to clients and the Court, and in particular no example is given of the kind of written code which could be drawn so as to provide specific rules (as opposed to "guidelines", which are criticised for being such) for professional conduct, without narrowing the properly comprehensive nature of the profession's duties.

> *" The unspoken and almost insulting premise of this part of the Green Paper is that the English and Welsh Bar does not provide an adequate service. "*

The proposal most resented by the English and Welsh Bar is for the expansion of rights of audience beyond barristers and the establishment of a certification process to identify persons entitled to practise as an advocate. Some of the concerns which have been expressed by the English and Welsh Bar lose their force in New South Wales, where we have competed with solicitor-advocates and a much smaller number of lay advocates in specified tribunals for a very long time. During that time, it would be fair to say, the New South Wales Bar has thrived, and so it is difficult for us to sympathise entirely with English and Welsh fears of their Bar's annihilation if it is exposed to competition from solicitors and laymen as advocates. In a sense, these concerns probably reflect less confidence than barristers are entitled to feel in their ability still to attract most of the quality advocacy work even after losing their monopoly.

The unspoken and almost insulting premise of this part of the main Green Paper is that the English and Welsh Bar does not provide an adequate advocacy service. Even accepting that no profession or institution is perfect, the reader is left to wonder whether a chapter is missing from the main Green Paper which catalogues the shortcomings of the present system. In fact, it is clear that change is proposed for its own sake and because so-called competition is said to be good in itself. The Green Paper announces that the Government considers that "rights of audience in the courts should be restricted to those who are properly trained, suitably experienced and subject to codes of conduct which maintains standards" except in the case of persons representing themselves. The Government's aim is "to ensure the widest possible choice of advocate for the client while at the same time ensuring that adequate standards of competence and probity are maintained".

The practical proposals to give effect to these sentiments include the Lord Chancellor's bureaucrats overseeing the education, qualifications and training of advocates "appropriate for each of the various courts", controlled by subordinate legislation. After the transitional period (during which all practising barristers out of pupillage are to receive "a full general certificate"), a progression is proposed from an academic course, through a vocational course, practical training in advocacy to the holding of a limited certificate for a certain period. Progression from stage to stage is to depend on satisfactory completion of the previous one. A "variety of professional bodies" apparently extending beyond the present Bar Council and Law Society is proposed as the monitoring authorities for the progress and certification of advocates. This covers the eventuality of lay advocates (if the word "lay" would continue to have any meaning after these reforms) such as accountants, surveyors, medical practitioners, architects and the like being certified to practice alongside barristers and solicitors. The Green Paper says that the "whole area of lay representation should be considered by the Advisory Committee"; presumably, more details of this alarming proposal are yet to emerge from the Lord Chancellor's Department.

As the Green Paper also proposes that judges be drawn from the class of "all advocates", in effect it proposes the eligibility of non-lawyers for elevation to the bench, and promotion from lower courts to the highest.

Fortunately, at least from the view of those who respectfully admire the wisdom of the majority judgments in Giannarelli, the Green Paper notes that the Government accepts the cogency of arguments in favour advocates' immunity from actions for negligence.

The main Green Paper deals with a number of other matters affecting barristers directly or indirectly. For example, the requirement for counsel to be instructed, usually, by solicitors, is to be scrapped in favour of a free market in which advocates including barristers can enter into direct relations, contractual in nature, with clients. The rules of any voluntary association which sought to prohibit its members from accepting instructions directly would have to be shown to the proposed competition authority not to operate "in an anti-competitive way". The Inns of Court are said to be the "prime examples of such bodies". The argument that the widest possible choice of advocate for the clients of many solicitors including small firms is provided by the independent Bar in its present form, and would be threatened by advocates setting up in large firms to accept instructions directly from clients, is rejected by the Green Paper by its simple expression of the Government's hope and expectation "that a free market for the provision of independent advocacy services will flourish", and a reliance on unspecified empirical evidence to suggest that traditional barristers will survive such competition.

The system of appointment of Queen's Counsel escapes relatively unscathed, although, ominously, it is said to be "a matter for the proposed new competition authority" to look into any rules about "the relative size of payments to Silks and other lawyers", which "appear to be difficult to justify".

Some of the practices of the English and Welsh Bar which are much more restrictive than apply in New South Wales are criticised in the main Green Paper, such as the requirement for the barristers to practise from approved chambers ultimately controlled by the Inns of Court and with the services of a clerk. According to the Green Paper, pupillages are much more haphazard there than in New South Wales, where the Bar Association provides centralised control.

More radically from the New South Wales view, the Green Paper suggests that barristers should be able to practise in partnership, incorporate and employ other barristers. In answer to the obvious argument that these developments would in fact restrict the number of advocates available to take a particular case, chiefly by reason of conflict of interest, the Green Paper simply recites the Government's belief that this risk "is outweighed by the advantages of greater efficiency and of easing the entry of new barristers into the profession", and would "be met by the fact that the forces of competition can be expected to fill naturally any gaps in the provision of advocacy services". No explanation is ventured as to any of these matters, particularly the appeal to supposed "efficiency".

The Green Paper effectively issues a challenge to English and Welsh Bar to prepare its defense to a more detailed attack, described in the Green Paper as "closer scrutiny" of areas such as rules dictating the location of conferences and other rules which may "impose unnecessary or unhelpful restrictions".

Another radical suggestion for the whole of the legal profession, and the Bar in particular, is that so-called multi-disciplinary practices including legal and other professions should be permitted. Combined with the proposed new regime as to advocates, the proposals are clearly intended to permit one-stop shopping to the detriment of, for example, an independent Bar. The Green Paper suggests that barristers should be able to join such practices. The problem of enforcing proper professional standards when there is a mixture of professions is scarcely addressed, except for the proposal that other professions may need to improve their standards up to the standard of "the highest common factor" such as that of the legal profession.

Otherwise, the Green Paper merely suggests that "each member of a multi-disciplinary practice should remain individually subject to the rules of his or her professional body", while at the same time remaining "personally responsible for the activities of the practice within their own professional field" and personally controlling the work involved. Conflicts of interest, the Green Paper blithely asserts, must be resolved by professional personal responsibility overriding responsibility to the whole practice and other members of it.

Advertising is proposed to be uniformly regulated for solicitors and barristers, so that a general liberty to advertise should be controlled only by a prohibition on misleading statements and on forms of advertising thought by some authority to bring the profession into disrepute. According to the Green Paper's reasoning, matters such as fees and desired areas of practice (as opposed to accredited specialisms) will therefore be proper to be advertised by barristers.

The Green Paper on contingency fees deserves full treatment on its own, and the subject matter is under consideration by the our Council's Rules Committee. However, it is notewor-

thy that the Government's conclusion is that "speculative actions on the Scottish model" should be legal in England and Wales. This would bring England and Wales into line with New South Wales, where counsel may appear on the basis that a proper fee (not affected in size by the amount of the verdict) will be charged only in the event of success. The Green Paper also suggests that some variants, under presently unspecified tight control, of the USA contingency system should be considered. Generally, this question appears to be at a much more rudimentary stage than those tackled in the main Green Paper, and much more work is likely to be done in England before any real proposals emerge for a contingent fee basis other than that to which we are used in New South Wales.

Two general impressions are striking for a New South Wales reader of these Green Papers. Firstly, there are differences between our Bar and the English and Welsh Bar which are more profound than has usually been thought - the monopoly on advocacy in the higher courts is the most important of these. These differences reduce somewhat the fellow-feeling we may otherwise have for our beleaguered counterparts in England and Wales. Secondly, the ways of professional reformers are apparently universal in several important respects, most notably in their fondness for a priori reasoning and the publication of bland generalisations simultaneously with the development of detailed plans for radical change. ❑

So, Mr. Norman, Do I understand you to say that for you to earn as much as Mr. Hughes you would have to come at least second in the Tasmanian Open?

The Barrister's Armoury

It would be impossible in the late 1980's to find a legal practice which was independent of computers. Their presence may be felt in the office - in the word processor - to the chambers, where an identical machine may be being used as an adjunct to the writing and research involved in case preparation. The ubiquity of the computer, particularly that of the mid-range personal (also known as micro) computer, is also evident in glossy advertisements in journals such as this, and in the fact that university students may now expect to be exposed to computers as a resource in litigation support, etc. The historical commonplace of the computer as a standard bearer in the stakes of numbers and number crunching must now be refined to conceive of the computer as having an equivalent ability in the province of the barrister - words, and word crunching.

It is, then, becoming commonplace that the deployment of contemporary search-and-retrieval software can dramatically increase the productivity of barristers. Barristers can now enjoy the privileges which until recently were restricted to those involved in expensive litigations with budgets which could accommodate sums well in excess of one hundred thousand dollars. Today, theoretically, a legal profession with clerical support staff is able to be as productive as a team of five computer professionals with a million dollar mainframe in the 1970's. However, against theory is the caveat that, while the user is promised and effortless, comprehensive on-screen access to case documentation, in practice that promise can only be fulfilled by appropriate design and maintenance of the computer application.

The advisory services available to a law firm running or intent upon running computers include hardware and software distributors, educationalists and pragmatists. These last are the computer-based companies who consult and provide services relating to transportable information technology (microcomputer data-base application) specifically as it impinges upon the legal profession. Two examples are LMCS (Legal Management Consultancy Services) and Scantext. LMCS is a consultancy service which specialises in the Apple/Macintosh Computer. Apple/Macintosh, one of the two major players in microcomputer systems is a company which believes in the utility of computers as educational aids - this conduces to their ease of use - although their technical impetus has been most pronounced in graphics based fields such as desktop publishing. However, sands run quickly in the glass of computer technology and Apple have imported many of the specialised text-based applications which have been the forte of the other major player IBM (International Business Machines). Raproachment, compatibility and translation between these two hitherto antagonistic companies are becoming the vogue. In the meantime however, an efficient system will avoid compatibility problems. LMCS assess the various combinations of user requirements with regard to Apple Macintosh proprietary capabilities to design productive and friendly computer environments.

Scantext is a Computer Services Bureau which specialises in litigation support using IBM PC (personal computer) compatibles and off-the-shelf software. Litigation support includes services such as putting large amounts of text (transcripts, exhibits, etc.) onto computer disk and indexing it for instantaneous and selective retrieval by solicitors or barristers themselves. The type of consultancy evinced by Christoph Schnelle (Managing Director of Scantext) is cautious - "People who make a living at the cerebral cut and thrust of law can be suspicious of computers. They tend to relax when they realise that the computer is just a tool. A highly effective tool." His experience also leads him to be cautionary; "The great benefit of a computer in chambers is in large-scale text manipulation and immediate access to on-line data bases like INFO ONE. The cost benefits of computers outside of word processing and litigation support are minimal. Even in litigation support it is easy to go astray. There are many text retrieval programs, Gofer, Lotus Magellan, Isys, Corporate Retriever, Zyindex, WordCruncher, MemoryMate, Status, Stairs, Evidence and database programs like Dbase IV and Paradox. Database programs are very structured and demanding to run on a day-to-day basis, though with the right support they are definitely a viable alternative. The other programs have drawbacks too. Some are too difficult and unwieldy like Status, Stairs, Evidence, and Corporate Retriever which is showing its age. Some of the others like Gofer or MemoryMate are unpredictable with large amounts of data while others lack specificity. Isys and Zyindex slow down drastically when searching large files, it can take them ten seconds or more to register the next occurrence in a search. To use WordCruncher the text needs to be prepared. That is reasonably difficult and is a service Scantext provide. Once the text is prepared, though, WordCruncher is extremely fast and extremely useful to the barristers and solicitors who take the hour or two necessary to find their way around in it.

Beyond the macro context of office automation and computer advisory/support services some interesting conclusions may be drawn from the micro context of text production - the court. In line with the convenience electronic data offers in terms of storage and retrieval necessity prompts the creation of electronic copy in the court itself. Computer Transcripts, who are Australia's only freelance computer-aided transcription service provide a disk copy of transcripts as part of their service. Using a transcriptor which produces code on disk as well as on paper the production of the transcript is accelerated by using a computer translator. The reporter's task is no longer to produce the hard copy, but merely to check and edit it on screen before printing it out. The computer automatically provides for the style of the document and local spelling vagaries. The hard copy which is available daily is supplemented by a disk copy putting the barrister in a position to deploy a favoured computing strategy or not. It is the availability of this resource, as part of the service, which separates computer aided transcription from sound or manual recording of proceedings, although speed and accuracy are other persuasive arguments for this type of reporting.

The longer term indicators are that electronic storage will become the accepted recording mode of legal proceedings. This trend, along with the general mopping up operation in the computer industry itself vis-a-vis standards (qualitative and constituent), cost, etc., will contribute to the barrister's faculties. The far from trivial task of making computer operation trivial has reached a plateau where all the parties concerned, hardware and software interests, academics, students, practitioners of law and field experts can begin to analyse the situation in terms of defining the future directions, standards, and requirements desirable for legal data handling. ❑

Reports from Bar Council Committees

Accident Compensation Committee

On 2nd October, 1989 there came into force the new provisions relating to the amendments to the Workcover legislation including its retrospective provisions. This legislation, as members are probably aware, is the result of a long period of inquiry by a Government seeking to implement an election promise to re-introduce in New South Wales, common law rights for people injured at the workplace whilst keeping premiums under strict control The Bar, through its Workcover Committee, comprising Coombs Q.C., McCarthy Q.C., Poulos, Ferrari, Johns and Cavanagh, ably overseen and at times directed by the President, have been engaged in intense negotiations both with the Committee and with respective members of the Government regarding the provisions of the new bill.

These negotiations were intensely frustrating at times as the goal posts of costs were moved on several occasions. All members of the Committee in particular ways were engaged in the process and in lobbying all political parties and a great debt of thanks is owed to them, particularly to Ferrari who was the 'Quartermaster' of the group and to the efforts of Handley Q.C. for his able dealings with the Minister. The Bar played a significant part in the re-introduction of common law provisions acting in a conciliatory role during the course of negotiations.

Although the system finally put in place is obviously restricted and not the system that the Bar would have preferred, nonetheless a slice of cake for the severely injured is better than no cake at all. In addition, the trust engendered by the Bar will lead to it being involved in efforts to improve the present system. The Government has indicated that as it is affordable, amendments will be made to bring about a more socially just system. The Committee is disappointed at the present outcome but the support in Cabinet for a Motor Accidents Act replica could not be achieved, despite our intense efforts over an 18 month period. ❑ John Coombs Q.C., Chairman

Commercial Liaison Committee

The main achievement of the Committee during 1989 was the launching of the bar's new commercial legal aid scheme. The first matter undertaken by this scheme (a mortgagee's sale case) is still pending. The second, another mortgagee's sale case involving a guarantor, has just been referred to the Committee for its consideration.

It is important to realise that the small number of cases handled by the Committee is not in any way a criticism of the scheme. The need for legal aid in the commercial list is hardly the most pressing social problem facing the Australian community. The scheme is designed to deal with the occasional case where a litigant without substantial resources finds himself in the position of defendant in a commercial cause which requires the services of experienced counsel. The function of the scheme is to fill the lacuna which otherwise exists in this area.

The Committee expresses its appreciation to Malcolm Oakes and Philip Taylor who have given generously of their time in relation to the first pending matter. ❑

Computers Committee

The major event of the year concerning computers was the collapse of ESTOPL. This was a scheme which had been run by Counsel's Chambers Limited rather than the Bar Association. That company finally found that it was unable to continue with the scheme for economic reasons.

A committee of barristers comprising Einstein Q.C., Slattery, Street and Bannon called a meeting in September as a result of which efforts are being made to revive ESTOPL under the auspices of the Bar Association. This scheme is enthusiastically welcomed by the Computers Committee and it is hoped that ESTOPL will continue as a service provided by the Bar Association. ❑

Criminal Law Committee

The Criminal Law Committee this year had negotiations with the Legal Aid Commission with a view to setting up as part of the reading program practical experience of one month sessions at the Local Courts briefed for defendants by the Legal Aid Commission. The Commission did not welcome the idea and sought to retain the work for in-house solicitors. Recent changes in the Commission's personnel have produced changes in attitude.

There has been a vigorous campaign to retain committals. There were extensive negotiations, public statements and public meetings to continue committals and there was close liaison with the Law Society. It is believed that the substance of committals has prospects of being retained.

The revival of the Law Council's Criminal Law Section and co-operation with the Criminal Lawyers Association has meant that these with the Bar and the Law Society presented a united front on committals.

Numerous reports to the Attorney General were made about various pieces of legislation and the white paper which dealt with the composition of the Court of Criminal Appeal, appeal rights and changes in trial procedure.

There was liaison with the State DPP to effect a change in his briefing out system to provide more briefs for the very junior Bar in simple trials and pleas. ❑

Equity Liaison & Listing Committee

In the early part of the year the mounting congestion in the lists and consequent delays were of increasing concern among the judges of the Equity Division and the profession generally. These were exacerbated when Master Gressier took a period of extended leave. However as a result of certain representations to the Attorney-General, an additional master has been appointed and the business within the division is now progressing satisfactorily. ❑

Fees Committee

1. Recovery of Fees
   Fee recoveries continue apace. The members of the Fees Committee are so impressed with the results of their efforts that they are considering suggesting to the Bar Council that they should have a share in the Bar Association's commission of 10% of recovered moneys!

   The Committee is still considering the development of guidelines dealing with the vexed and complicated problems which result when a solicitor responsible for payment of Counsel's fees sells his practice, dies, merges or is absorbed or enlarges or reduces his partnership.

2. Arbitrations
   The Committee has enlarged its panel of Arbitrators so as to lessen the demands made upon the existing panel. The number of arbitrations has increased, although we are still having difficulty in getting the Law Society to attend to its administrative requirements in this area. The standard letters and materials relating to arbitrations have recently been revised, jointly with the Law Society. This means that the arbitrators and all parties to the arbitration will in future be provided with the same materials and common procedures for conduct of arbitrations.

3. Cancellation Fees
   One area which provokes many disputes with Solicitors, and which is the subject of many arbitrations is that of cancellation fees. By this is meant a fee which is charged not for the doing of work, but for time set aside when the hearing is obviated by some event such as settlement or vacation.

   It is necessary to remind even senior practitioners that generally speaking if there is no agreement between Solicitor and Counsel for the charging of a fee in these circumstances, no fee is chargeable. Absent some specific agreement, it will only be in unusual circumstances that any fee is chargeable.

4. Rule 64 Amendments
   Rule 64 (which relates to the imposition of a bar by an earlier unpaid Barrister preventing his successor from working on the case until he is paid) has recently been amended so as to impose an even more onerous obligation upon succeeding Counsel. Any Barrister who receives a brief in proceedings where it is obvious that some other Barrister has been employed before him is under an obligation to make adequate enquiries to determine whether his predecessor has been paid, and to reject the brief if he has not been paid or some suitable arrangement made.

   Additionally, any barrister invoking the provisions of Rule 64 must inform the Registrar in writing of that action and the circumstances in which it occurs.

5. Criminal Fees
   A further increase in the scale of fees paid by the Legal Aid Commission in criminal cases became effective from 1 July 1989. Whilst the scale is still not appropriate, it is pleasing that the Legal Aid Commission has not hesitated to make provision for the increase in its budget for the coming year. ❑

Law Reform Committee

The Law Reform Committee monitors pending legislation of interest or concern to the bar. Where an Act deals with subject matter in relation to which the bar might have a useful contribution to make or view to express, the Committee refers the draft legislation to a member of the bar who is asked to prepare a report as to what if any submissions should be made by the Bar Association. The report is then referred back, together with the Committee's own recommendation, to the Bar Council. The procedure provides a useful way in which the bar is able to make its views known on a variety of issues. ❑

Legal Education and Reading

The Committee would like to extend its thanks to the Law Foundation of New South Wales for its continuing and generous support for the Reading Programme. Two important projects are being funded by Law Foundation grants:

1. The Reading Programme in its present form was introduced at the beginning of 1985. Since then there have, of course, been many changes to the programme. With the Law Foundation's assistance a review of the reading programme is being conducted by Mr. Justice Gummow and Dyson Heydon Q.C. Their report will be published in due course.

2. The second Law Foundation grant will fund the purchase of a computer to enable litigation support training in computers to be introduced as part of the reading programme.

The Committee recognises the increasingly important role for computers in case management. It is important that now and in the future the Bar is able to meet the technological demands made upon it in this era.

The steady flow of people embarking upon practice at the Bar continues. Approximately 110 new barristers enrol as Pupils each year.

In February 1989 the reading rules were amended to reflect certain changes brought about by the introduction of the Legal Profession Act. In May the Bar Council passed a resolution requiring all Pupils enrolled in the reading programme to spend a period of not less than 10 days in attending Court with their Master and reading their Master's briefs in those matters. This requirement took effect in August. Additionally, a Bar Ethics exam for Pupils has been introduced.

The Legal Education and Reading Committee has introduced a form of certification by Masters. All Masters have been notified of its introduction.

This will probably be the last time the word "Master" will be used in this report. Following the impetus provided by Justice Jane Mathews at the Masters and Readers Dinner in June, the Bar Council has resolved to substitute the word "Tutor" for Master when the Bar Rules are next reprinted.

Masters and Readers Dinners are always cheerful and informal occasions, and I urge all members, not only Masters and Readers, to make an effort to attend. The next dinner is scheduled for 27 October 1989.

The Continuing Legal Education Programme for 1989 began in March with a seminar on Child Abuse. It continued with a seminar on 17 July, organised by the New Barristers Committee, on Recent Decisions affecting Practice in the Commercial Division. Mr. Justice Rogers was the speaker on that occasion.

Recently the Legal Education and Reading Committee considered the need for mandatory Continuing Legal Education for the Bar. O'Keefe Q.C. reported to the Bar Council that the Committee's recommendation was that no further action be taken in respect of mandatory Continuing Legal Education for the Bar, but that commencing in 1990 the Continuing Legal Education program be augmented by holding more seminar type presentations extending over 4 or 5 evenings, dealing with major topics, similar to the 'Seminars on Evidence' conducted by Glass Q.C. (as he then was). The Bar Council resolved to adopt the Committee's recommendations.

The Committee would welcome suggestions from members as to topics for our C.L.E. programme. If you think there is an area of the law which has been neglected, or an area which is growing in importance, please don't hesitate to inform O'Keefe Q.C. or Helen Barrett.

Last, but certainly not least, the Committee would like to extend its thanks to all those who give freely of their time to lecture the new barristers. The continuing success of the programme is a great tribute to you! Thank you. ❑

Library

The Library Committee has continued its policy of upgrading and extending the services and materials available to members. The effectiveness of this policy is reflected in the increase by members of use of the Library's collection in the past year.

The number of loans processed in the Library in 1988 was 15,194: 9900 of those items were borrowed by members from Selborne/Wentworth Chambers and 5294 by members from all other chambers. The 1989 figures to date indicate that the 1988 figures will be surpassed this year.

To help correct the imbalance of the Library's facilities by members from chambers outside Selborne/Wentworth, a facsimile machine was installed in the library. Members have made use of this increasingly popular service: 124 facsimiles have been sent since its instalment in March, 1988.

Members are reminded that for items not available in the Library, inter-library loans may be requested. Last year the Library borrowed 64 items from other Library collections.

The Library has recently acquired the following -

- Oxford English Dictionary, 2nd ed.
- Words and Phrases Legally Defined, 3rd ed.
- Australian Digest, 3rd ed.
- Australian Insolvency Management Practice
- Australian Industrial Safety, Health and Welfare
- Australian & New Zealand Equal Opportunity Law & Practice
- Australian Family Law Court Handbook

As part of the reading program, readers are now required to attend a short instruction course on the use of the Library conducted by the Librarian. This is to familiarise new members with the Library's collection and services.

Members should be aware that their support staff can only gain admittance to the Law Court Library by attending a course of instruction in the use of that Library conducted by the Bar's Librarian. To date 187 persons have attended that course.

Due to the heavy demand for photocopying facilities two new copiers have been installed. Both have document feeders for quick use and they are both suitable for copying from books.

The Library's collection is growing at such a rate that its present accommodation will soon be too small to house it. As a stop-gap measure extra shelving will be installed during the Christmas break. It has been calculated that even with the new shelving the Library will probably only have a life span of another three years. It is thus essential that new premises be located before then.

In April this year Pamela Farmer resigned as Librarian. Pamela had been in charge since 1979. With her expert but firm guidance the Library flourished. We saw many changes during those ten years. Thus the collection grew to three times the size it was which required the Library to move in 1981 to larger premises and also required the employment of extra staff to meet users' needs. Sharon Willard was then employed as assistant Librarian and is now Pamela's successor as Librarian.

Members are again reminded that removal of reference material from the Library, eg., looseleaf services, unreported judgments and the like is strictly forbidden. Anyone found doing so will be barred from using the Library. Unfortunately, there have been some recent incidences of this behaviour which is inimical to the efficient running of the Library for the benefit of all members of the Association.

In conclusion, it is appropriate for the Committee to publicly recognise the continuing unstinting efforts of the Library staff, Miss Willard, Mrs. Dordevic and Miss Kormendy during the past year. Without their unfailing courtesy and assistance the Library could not possibly have provided the high standard of service to members which has been achieved. The gratitude of all concerned is accordingly acknowledged. ❑

Professional Conduct Committee # 1

PCC #1 members are Sir Frederick Deer (our "lay person"), Bennett Q.C., James Q.C., Maurice Q.C., Beazley, Greenwood, Street and Simpson.

During the course of the year we were unfortunate to lose the wisdom and succinctness of Sully Q.C. We extend our thanks and congratulations to His Honour on his elevation to the Supreme Court.

The Committee met fortnightly to consider new matters and to discuss continuing matters for recommendation to Bar Council. In 1989 the Committee received 25 new matters in addition to the matters carried over from the previous Committee. Referrals include requests by barristers for rulings as well as complaints against barristers from members of the public, solicitors and other barristers.

This year, thirteen of the complaints received have been dismissed by the Bar Council on the recommendation of the Committee. Such complaints have usually been from members of the public who have misconceived the role of the barrister.

Other complaints have been dismissed on the basis that the conduct does not fall within the definitions of "unsatisfactory professional conduct" or "professional misconduct" in the Legal Profession Act, Section 123. Nevertheless, in some instances the Bar Council has considered the barrister's behaviour to be worthy of counselling.

A number of complaints have also been withdrawn when the complainant has been given further information.

The Committee notes however a disturbing increase in the number of complaints being received. Mostly these are from dissatisfied litigants whose complaints seem to derive from inadequate information. Often it seems to the Committee that the discomfort of a complaint and an investigation could easily be avoided by better communication with the client with the solicitor present and a little more courtesy.

The Committee also extends thanks to Yvonne Grant for her assistance during the year and our congratulations on her new born. ❑

Professional Conduct Committee # 2

This year the Committee has had 29 complaints against barristers referred to it for consideration. The Committee reported to the Bar Council on 17 of these complaints. The balance are still pending.

Three complaints were the subject of summary dismissal and 14 complaints were the subject of full investigation.

The Bar Council considered that 12 of the 14 complaints so investigated involved no question of unsatisfactory professional conduct or professional misconduct and dismissed them. With respect to the other two, the Council determined, on the Committee's recommendation, that each involved a question of unsatisfactory professional conduct and that the barristers concerned be reprimanded accordingly. One reprimand involved an inordinate delay in attending to a brief whilst the other involved improper inspection of documents produced in answer to a subpoena. ❑

Professional Conduct Committee # 3

P.C. # 3 dealt with 31 complaints during the year. Eight were dismissed, some resulted in counselling and dismissal. A number were withdrawn. Two were referred to the Professional Standards Board and one was referred to the Professional Standards Board and one was referred to a Disciplinary Tribunal. The balance are in the course of investigation or report.

As well, ethical queries were responded to throughout the year.

Like last year, communication failures and "pressure to settle" were the common complaints. This emphasises the special need to listen to our clients so as to be sure they understand what is happening and that they understand their rights.

One complaint dealt with by P.C.C. #3 involved an allegation that in a personal injuries case counsel became demanding and heated in suggesting that the complainant settle the proceedings. As a result the complainant alleged that she felt compelled to settle the proceedings at the figure which was being put to her. The allegations of undue pressure by the complainant were denied by the barrister and his instructing solicitor. The appropriateness of the settlement being recommended was also emphasised by the counsel concerned. Ultimately the Council dismissed the complaint but the matter is illustrative of an ever present danger that persuasive advice for a client's own good can sometimes be misinterpreted as undue pressure.

P.C.C. #3 received an unusual complaint from a member of the Bar about the conduct of a Judge in the Family Court. The barrister felt that matters in the judge's judgment constituted criticism of the Barrister's professional conduct. The judge was alleged in his judgment to have failed adequately or seriously to address the matters which had been put to the Court by the Barrister. On the other hand, there were passages in the judgment where the Judge praised the Counsel for his industry. This complaint did not appear to the Bar Council to be one over which it had jurisdiction and the complaint was dismissed. The barrister was advised that if it was appropriate he should consider pursuing appellate review.

In another matter which came before P.C.C. #3 a complaint was made by the Director of the Legal Aid Commision of New South Wales concerning the conduct of a particular Barrister in a criminal trial. The accused had been given a grant of Legal Aid and the Barrister had been notified of that grant by a standard form letter drawing his attention to Section 41 of the Legal Aid Commission Act 1979. Section 41 provides that a legal practitioner shall not demand or receive any payment from a legally assisted person in respect of work assigned by the Legal Aid Commission to that legal practitioner. In the particular case the Committee found that the Barrister had not received any additional fees in breach of Section 41 of the Legal Aid Commission Act and this complaint was accordingly dismissed by the Bar Council. In the course of considering the complaint however the Committee formed the view that Rule 21 of the Bar Rules, which provides that a Barrister shall not engage in unprofessional conduct or do anything contrary to the standards of practice becoming a Barrister, would be breached if Counsel breached Section 41 of the Legal Aid Commission Act. ❑

Family Law Committee

The Family Law Committee has met constantly during this half year and is privileged in having one of its members who practises in Family Law, Chris Simpson, on the Council of the Bar Association. It is also working very closely with the Family Law Section of the Law Council, of which Twigg Q.C., our Chairman, is an executive member.

A major matter of concern has been the unpopular and expensive rolling list in the Sydney and Parramatta registries. Following upon a detailed survey conducted late last year, we collaborated with the Law Society in drafting a letter to Nicholson C.J. commenting on the adverse reaction of litigants and practitioners to the rolling list, and making constructive proposals to remedy perceived injustices deriving from its use.

Another major concern has been the proposed relocation of the Sydney Registry of the Family Court. Lengthy and detailed submissions have been made to the Parliamentary Standing Committee on Public Works with a view to relocation near the King Street Courts; or, failing this, improvements in the proposed building near the old Mark Foys building.

Members of the Family Law Committee are regular attendants, either as a delegate or an alternate delegate, at the meetings of the Legal Aid Review Committee established under the Legal Aid Commission Act.

The Judges of the Family Court have decided to reintroduce later this year a system of pleadings less like the present Equity Summons procedure and more like the old Matrimonial Causes procedure. Recommendations were made by the Bar Council in relation to these pleadings to the Judges Pleadings Sub-Committee and also in relation to a proposed redraft of the Statement of Financial Circumstances (Form 17). The new system is currently proposed to commence on 1 November 1989.

A representative of the Committee regularly attends quarterly meetings with the Judges of the Sydney Registry to discuss matters of mutual concern. Similar dialogue also takes place at the Parramatta Registry.

A revolutionary event occurred with the promulgation of a Scale of Counsels fees (on a party-party basis) applicable from 17 April 1989 in Schedule 2 of the Family Law Rules. This allows chamber work to be charged on an hourly basis rather than a fixed charge. Fees generally compare favourably with the current Supreme Court Scale. ❑

Membership Committee

Many interstate barristers are taking up practising certificates in New South Wales and joining our Association. This is particularly so of Victorian counsel. Every fortnight there are several new applications from Victorians for membership.

The fee for a practising certificate also covers membership of the Association. For the second time, there has been no increase in this fee. Members are reminded to pay the fee promptly. Delayed payments place extra stress on staff and facilities.

Members are encouraged to use the dining room at lunchtime. Not only does the new caterer continue to provide meals of better quality but there are also quick service daily specials. Members are also reminded of the occasional continuing education seminars which are held in the common room and of the facilities for recovery of outstanding fees. ❑

Managing Your Own Money

Earlier this year I was surprised to learn that a junior barrister had recently taken out a substantial endowment policy on his own life. He had done so to protect his wife and child in the event of his premature death. I was surprised because an endowment policy was in fact an entirely inappropriate method of securing for his family the protection they might need. I advised him to cancel his endowment policy and take out a term policy. I later learnt that he had done so.

It is very easy for barristers to be so busy looking after the affairs of their clients that they neglect their own. The incident referred to has therefore encouraged me to write this contribution for Bar News in the belief that perhaps other barristers have also made inappropriate insurance arrangements for the protection of themselves and their families.

Temporary life or term insurance covers the policy holder against the risk that the life insured will die before a fixed age which, for example may be 50 or 55. If the life insured survives this age normally nothing is payable under the policy. Term cover therefore is not a means of saving for retirement. However, because there is a high statistical probability that a healthy person will survive the age of 55 the risk accepted by the life company under a term policy expiring at that age is low and it can afford to offer high cover for quite a modest premium. Term cover therefore is vastly less expensive than other forms of life insurance.

The period in a barrister's life up to say 45 is when his or dependents will be most vulnerable in the event of death. The barrister may have outstanding borrowings on home, chambers or both and children may be young and a financial burden for many years to come.

Hopefully by 50 or 55, when a barrister's substantial temporary life cover runs out, home and chambers will have been paid off, children largely educated and other savings accumulated.

Barristers holding temporary life cover should review their policies from time to time to ensure that the cover remains adequate. Inflation, growth in practice, a house move or an extra child or two can easily make what was once a good policy quite inadequate.

Premature death is not the only health risk faced by a barrister. A barrister may be unable to practise because of sickness or accident, but meanwhile a family has to be supported, overheads continue, and income tax must be paid. Insurance against sickness and accident is therefore needed. Barristers Sickness & Accident Fund is a suitable insurer. Barristers don't lightly take time off for illness or minor accidents and our low claims experience enables the fund to offer cover at very competitive rates. Premiums are fully tax deductible under Section 51 of the Income Tax Assessment Act.

A sickness and accident policy normally provides cover for only one year after the accident or the onset of the illness. A major illness such as cancer, multiple sclerosis, or hepatitis or a serious accident which does not attract any right to compensation may leave a barrister with no capacity to practise and no source of income except from any savings or private means. Prudence dictates that this risk be covered by a disability insurance policy. This will typically provide for income payments to commence one month or more after the accident or onset of incapacity and to continue until a specified age, such as 65. The Law Council of Australia has negotiated a standard form of disability insurance policy which is available through American Home Assurance and Business Men's Assurance and possibly other underwriters as well.

Disability policies may be either indexed or fixed. With an indexed policy the annual premiums increase with inflation but so does the cover. One can also secure policies which provide for income payments which will themselves be indexed during the period of disability. The advantages of having a policy in this form will be obvious. In any event barristers should periodically review their permanent disability cover as policies taken out even a few years ago may well be inadequate in the light of inflation, growth in practice or increased commitments.

Premiums paid for such policies are fully tax deductible under Section 51 of the Act.

Incidentally you need both sickness and accident and disability cover. Most of us pay tax on past income out of current income. You will therefore need to receive payments under both policies during the first year of long term disability in order to meet the tax liability on the previous year's income.

Superannuation contributions either to a fund such as Barristers Superannuation or to a life company or the like which issues special superannuation policies are deductible up to $3,000 a year pursuant to Section 82AAT of the Act. Premiums payable under ordinary whole of life or endowment policies or for term policies, however, are not tax deductible.

Barristers Superannuation operates an accumulation fund where members' contributions and the earnings and capital gains from those contributions build up over the period of fund membership. Fund membership therefore does not provide any significant protection against premature death, but is a worthwhile form of saving for retirement in view of the tax deductions available for contributions and the concessional tax treatment available for fund earnings and capital gains. Barristers over 40 should carefully consider making contributions to Barristers Superannuation, or some similar fund in excess of the tax deductible limit of $3,000 a year currently available, in order to benefit from the favourable tax treatment available for the earnings and capital gains of approved superannuation funds.

Apart from superannuation the best tax-free investment a barrister can make is to accelerate payments in reduction of any mortgage over his or her own home. Interest payments under a mortgage over one's principal residence are not tax deductible. Assuming a mortgage interest rate of 18% per annum at the present time, an early repayment of say $1,000 being an amount of principal otherwise due in say 1995 will secure for you a tax-free return of 18% per annum on that $1,000 between the date of payment and 1995. This is a much better overall return than that available from an investment of $1,000 in some income-producing asset. The barrister making such an investment would have to pay tax on the income and would be paying interest on the $1,000 still secured under the mortgage out of taxed income.

Other things being equal it is better to pay off one's home early (where the interest is not tax deductible) and carry the debt on one's chambers where the interest is tax deductible.

Finally it would be as well to be insured under an adequate professional indemnity policy. While the Gianerelli decision protects barristers and other advocates in respect of the actual conduct of Court proceedings no such immunity attaches to chamber work or to advice given in the context of negotiations for settlement. It won't do you much good to have paid off your house mortgage early to find that you have to raise a fresh mortgage to pay a Court verdict or settlement for negligent advising or failure to advise in the context of settlement negotiations (contributed). ❑ K.R. Handley Q.C.

Family Law Conference

"The Family Law Section is holding its biennial National Family Law Conference at the Gold Coast next year. 18-21 July 1990.

The Conference shall be followed by a satellite conference at Hamilton Island on Queensland's Great Barrier Reef.

Topics will include the rights and obligations of Third Parties, the dependent litigant, domestic torts, creative presentation techniques, cross-vesting, trends in valuations, Bankruptcy and Family Law, proceedings after death, Child and Spousal Maintenance, and enforcement, for orders for access. In addition, comparative aspects of Family Law in the United States of America, the United Kingdom, Hong Kong and New Zealand shall be dealt with.

The Section is also arranging for Family Law Moot Competitions to be held in each State of Australia during 1989-1990 and the final of the Australian Family Law Moot shall be held during the conference programme and thereafter, there shall be an international moot competition involving an Australian and a New Zealand team.

Any initial inquiries or interest in respect of this Conference should be directed to:

Gail Hawke
Capital Conferences Pty. Ltd.
P.O. Box E345,
Queen Victoria Terrace,
Canberra A.C.T. 2600

phone (062) 85 2048 facsimile (062) 85 2334 "

Silent Praise

Coram Gleeson C.J., Kirby P. and Clarke J.A.

Gleeson C.J.: Call the second case for hearing please.

The case was called and appearances announced.

Counsel: We are happy to be able to inform the Court that this appeal has settled and Terms of Settlement are available to be handed up.

Kirby P.: May I be so rude as to ask when this matter was settled?

Counsel: About 8.45 am this morning and we rang the Court immediately to notify it.

Kirby P.: It would be appreciated if Counsel would advise the Court when appeals like this settle. I have spent considerable time reading the papers in this matter. This is a terrible waste of the Court's time.

Counsel: We did advise the Court immediately the matter was settled.

Terms of Settlement were then handed up.

Gleeson C.J.: There will be Orders in accordance with the Terms of Settlement which will be filed with the papers. I congratulate the parties and their legal advisors on reaching this settlement.

Kirby P.: My congratulations are mute. ❑

Courtly Courtesy

Tobin QC

Q: "Dr. Gill, you were making the allegation, weren't you?

A: "I was pointing out the connection between and I was pointing out the letter of Mr. Smith and the surrounding..

Q: "You were making - ?

A: And the surrounding material related to -

Q: "Will you stop interrupting my interruption. Do you have any respect for the use of the English language? "

A: "I am not as good at using the English language as yourself, and I appreciate that distinction. I do have great respect and I have great admiration for the way you can put the words together."

❑ *(Chelmsford Royal Commission)*

Book Reviews

Annotated Admiralty Legislation
S.W. Hetherington (Law Book Company Ltd. $49.50)

The Admiralty Act, 1988 (Cth) came into force on 1 January this year. Before that and since 1911 the admiralty jurisdiction exercised by the New South Wales Supreme Court as a Colonial Court of Admiralty, was that possessed by the High Court of England at the time the Colonial Courts of Admiralty Act was passed in 1890. The High Court and other State and Territory Supreme Courts were also Colonial Courts of Admiralty and exercised the same jurisdiction. There was real doubt whether the Federal Court of Australia was a Court of "original unlimited civil jurisdiction" so as to also qualify as a Colonial Court under the 1890 Act. As has been noted by Brian Davenport QC (the Law Commissioner for England and Wales) the admiralty jurisdiction exercised by Australian courts was, to say the least, "confused and antique".

In 1982 the whole question of civil admiralty jurisdiction was referred to The Law Reform Commission. Its report, No. 33, entitled "Civil Admiralty Jurisdiction" was published in 1986. That report recommended the repeal of the Imperial legislation and the passing of a Commonwealth Act which put in place a uniform and comprehensive framework for the administration of that jurisdiction throughout Australia.

The new Act confers civil admiralty jurisdiction upon the Federal Court as well as on each of the State and Territory courts. It does not give any original jurisdiction to the High Court.

Stuart Hetherington's Annotated Admiralty Legislation (The Law Book Company Limited) provides a very good exposition of the new Act. In addition to reproducing the Act it reproduces the Second Reading Speech, the Explanatory Memorandum, the new Admiralty Rules (which are concerned principally with matters peculiar to admiralty jurisdiction such as preliminary acts, arrest of ships and limitation proceedings) and the admiralty jurisdiction provisions of the Supreme Court Act, 1981 (UK).

The annotations to each section are divided into a number of sub-headings. The most commonly used are described as follows - "Background", "Comparable Legislation", "Cases", "Cross references" and "Comment". The cross references include references to the relevant parts of The Law Reform Commission Report which itself is a comprehensive and scholarly work.

Hetherington's book is a useful starting point for the practitioner who has to interpret and understand the workings of the new Act and Rules. As the author notes in his preface the ALRC Report is "an essential reference work for any student or practitioner of Admiralty jurisdiction". I endorse that comment and recommend that those who acquire Hetherington's book also acquire a copy of that Report. ❑ A.J. Meagher

(l to r) Mr. Justice Carruthers (present Admiralty Judge) and Justices Yeldham, Sheppard and Samuels, all of whom sat in the Admiralty Division in the past.

Land Law - Peter Butt
(2nd ed. Law Book Company 668 pp
Hard Cover $82.00 Soft Cover $51.00)

As the author explains in the preface, this work began life as a second edition to the author's Introduction to Land Law published in 1980. That earlier work was a concise and clear introduction to a subject often found difficult by students and practitioners alike, perhaps more acutely by the former group. By reason of the earlier work being, and being styled, an introduction, the primary and most often experienced function of that work was the enlightening of those studying property law, rather than those practising it. This work deserves no such limitation. It is an invaluable addition to the legal literature on property law.

In the preface, the author confesses his abject surrender to a temptation to expand the work. Those concerned with property law, in whatever circumstances, can be grateful for this weakness of the author in the face of temptation especially as it is combined with his customary clarity of expression, scholarship and practical insight.

The work is broken into twenty four chapters. The early part of the book is devoted to an exposition of the sources and growth of land law in New South Wales and the origins and development of English land law. Such topics as feudalism and tenure (free and unfree), the legal machinery used in regulation of property rights, ownership, the doctrine of estates, uses, trusts, executory interests, the rules against perpetuities, settlements and trusts for sale are carefully and clearly treated. This treatment is, wherever possible, placed in the context of the development of land law in New South Wales and of its importance or relevance to the present day. It is not easy with a book such as this to identify particular parts which require or suggest the need for special mention. However, bearing this in mind, worthy of particular mention is the chapter in the early part of the work entitled "Land". This is an invaluable spring to replenish the reader's stock of knowledge and understanding of fundamental concepts and principles which recur in practice with some regularity. The section in this chapter on fixtures gives the reader a thorough and thoughtful analysis of a topic, clear discussion of which can be impeded by the number of cases on the topic. The chapter also contains an interesting

discussion of boundaries of land, including tidal boundaries, accretion and erosion, the medium filum rule and the statutory alterations to that rule.

The last ten chapters of the book comprise over two thirds of the volume of the work. These chapters contain expositions upon the important basic topics in the area: co-ownership, leases, easements and other incorporeal hereditaments, covenants affecting freehold, mortgages, old system land (including deeds and priorities of interests), Torrens Title, Strata Title, prescription and limitation, Crown land, rent control and security of tenure.

Each of these chapters provides thorough and extensive discussion which will almost certainly provide any practitioner with either an answer to, or insight into, any particular problem. For example, the eight page section on deeds in the chapter on old system title is a concise treasure trove of principle and authority. Also, the short ten page chapter on Crown land supplies an intelligible framework from which one can, if necessity dictates, descend with relative safety into the bog of Crown land legislation.

The work is marked by the easy and clear enunciation of underlying principle, the impact of relevant legislation upon that enunciation of principle and the provision of references to authorities and commentaries in a luxuriant and helpful fashion truly reflecting the care and scholarship which saturates the whole of this work.

No lawyer in New South Wales whose practice involves real property should allow himself or herself to be without access to this work.❑ James Allsop.

Letter to "The Times" Editor

"From Mr. Kynric Lewic, QC

Sir, Not long ago, my opponent in the Court of Appeal was a young fellow member of chambers who capped his argument by assuring the judges that "if my learned friend is right, there will be dug a bottomless pit that will forever hang over the head of my client".

He won.

Yours faithfully,
KYNRIC LEWIS
Penrallt, Llysfaen,
Cardiff, South Glamorgan "

(The Times Wed. 14.6.89)

Tax Planning vs. Investment Planning

G.O. Gutman, an investment adviser, tells the Bar to find time to manage its money.

According to Mr. David Bloom, QC * 'The nature of a barrister's practice does not permit of much tax planning - short of negatively geared investments, home investment ..... and service companies or trusts....'.

This statement seems to strike an unduly gloomy note because few tax planning strategies come to mind from which barristers, by the nature of their practice, are excluded. More importantly, however, the statement misses the real snag as Mr. Bloom neatly recognises, when he says: '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'.

What such a typical barrister lacks time for is not so much tax planning, but the more crucial exercise of investment planning. Tax planning, for which expert advice is readily available, aims at defending the income stream against the depredations of the Commissioner: investment planning sets personal financial objectives and the best strategies for reaching those objectives. That exercise calls for personal input in weighing such distasteful and sombre questions as

- how much do I need to spend each year
- when do I want to retire
- what lifestyle will I adopt when retired and how much will it cost
- what risks can I afford to assume in the pursuit of accelerated income and asset growth
- how much do I want to leave to my heirs.

The effluxion of time eventually provides answers to all such questions, as options narrow, and as, in the absence of clear strategies, objectives once potentially attainable, drift out of reach.

In recent decades, especially in Australia, 'tax planning', 'tax minimisation', 'tax schemes', were the order of the day. With a good scheme many people thought asset growth could in practice be left to look after itself: no special plan needed. The events of the last decade have rung the changes on whatever plausibility this attitude might once have had. The broad sweep of economic and political reforms during the 1980s have sharply contracted the scope for 'tax planning' and have shifted emphasis to the need for investment planning for the higher income earner.

How has this come about? There are five main ways to achieve tax efficiency.

The first is through converting income into capital gain. This is most often done through negatively geared investments, where tax deductible interest payments finance the acquisition of assets which appreciate. Capital gains are still worth aiming at for those in the top income tax brackets. But they have become distinctly less attractive since the introduction of capital gains tax; with recent reductions in top marginal income tax rates; with the sharp rise in (real) interest rates, and the introduction of dividend imputation. Capital gains will lose further appeal as personal income tax is reduced and when inflation recedes.

Secondly, there is income splitting where part of a high income is distributed towards dependants or beneficiaries taxed at a lower marginal rate.

The opportunities for this have become more restricted as the classes of eligible beneficiaries have been narrowed; as top marginal tax rates have dropped and with the introduction of imputation which allows companies to make tax free distributions. The benefits from income splitting are as a result confined to no more than about $7,500 per eligible beneficiaries; say, $30,000 of tax saving in the case of a high income earner with a wife and 3 other eligible beneficiaries.

The third method is by investing in things for which the Government offers concessional tax rates e.g. gold (until January 1, 1991), occupational superannuation, Friendly Societies (taxed at 30% as against 39% for companies), film investments, rural investments and Management and Investment Companies (MIC's) etc. The scope and attraction of all of these has been sharply reduced in recent years. The best bet left is generally the domestic residence - for as long as it remains exempt from capital gains tax.

The celebrated economic guru, Milton Friedman, once said, 'the best tax shelter, always, is high living'. He meant that a yacht, a Rolls Royce or a luxurious residence tend to appreciate in value more than inflation and in addition yield an untaxed use value (enjoyment) which would otherwise need to be purchased from post-tax income, e.g. by hiring a yacht. The fringe benefits tax however, has sharply reduced the ways (once numerous) in which consumption expenditures could be made tax deductible.

The main remaining class of measures is concerned with shifting assessable income from one period to the next on the principle that (particularly with interest rates high) taxation delayed is income gained. Here, too, recent changes such as the introduction of quarterly tax payments have narrowed the scope for tax-effective conduct.

Overall, the general administration of tax laws has tightened. The fiscal authorities have become more aggressive and the courts more supportive of stricter application of the provisions in the tax code (Section 28) and more recently Division 4A) under which it is not acceptable to enter into schemes for the sole or dominant purpose of obtaining a tax benefit. The severity and uncertainty of enforcement provisions make sensible people more cautious in weighing the possible benefit from schemes against the potential psychic and financial trauma of having to validate them in the courts.

All this has been plain for some time. I mention it because few methods of tax minimisation come to mind from which barristers cannot benefit along with other tax payers. What has happened is that the whole universe of tax planning has shrunk, partly as a result of increased administrative prowess (or ferocity) by the Commissioner and partly as a result of tax reform, such as capital gains tax, lower personal and company tax rates, dividend imputation and elimination of many tax concessions. Moreover, the trend towards lower taxation and

a more level taxation playing field is bound to continue. The trend is world wide and would be difficult to resist for Australia in view of the globalisation of markets which has resulted from financial deregulation.

It is this factor which, as the emphasis on tax planning is fading, has enhanced the role of investment planning and investment strategy. The reason is that global deregulation has expanded world financial markets and at the same time destabilised them.

Investment options and opportunities have become globalised along with fluctuations in asset markets resulting from unstable interest and exchange rates and domestic inflation.

There is no such thing as a risk-free investment. While this has always been true in a theoretical sense, the de-regulated environment is making questions of risk more central to investment decisions.

Basic tenets once widely accepted, such as 'putting your savings into Government bonds, or residential property or blue chip shares' have become less adequate.

The basic principle of providing against risk remains the strategy of 'spreading the risk'. This is no mere homely rule of thumb but a colloquial way of referring to the law of large numbers, first proposed by the mathematician Gauss in the 18th century, but rigorously proved only 200 years later.

Spreading the risk on the simplest level involves a carefully weighted balance between the five main types of assets: property, equities, fixed interest securities, foreign currency assets, precious metals and a range of collectibles. A more precise classification would, of course, be needed for purposes of portfolio allocation; thus it might distinguish between at least five types of property (residential, industrial, commercial, rural, retail) which can each follow quite diverse trends; while fixed interest securities run all the way from bank guaranteed bills to junk bonds and 30 year US Treasury issues.

The extension and deepening of financial markets has so far failed to improve their stability. It has, however, crated a widening range of products which cater for investors who are prepared to pay premiums to avoid risk; or, for that matter, for investors who wish to make profits by assuming those risks.

To revert to my point of departure. What would one say about a farmer who labours hard to get his crop planted in the field and erects scarecrows to keep the (taxation) birds at bay: but who fails to make provision to harvest and store his crop and to sell it? The same comment might apply to a professional person who in Mr. Bloom's words 'can afford the price of a good suit but not the time it takes to have it measured'. Inevitably, such a person will with time become sartorially derelict, much as one who begrudges the time to have a bespoke financial plan tailored to his requirements may eventually drift into financial dereliction. ❑

G.O. Gutman is Managing Director of Investment Funds Management Pty. Ltd., 140 Pitt Street, Sydney.

* David Bloom, QC - Practice Companies and Service Entities in Bar News Spring 1988, page 17.

Supreme Court of New South Wales Appointment of Sittings for 1990

1. Sittings of the Central Criminal Court shall begin on Monday 15 January 1990 and end when the fixed vacation begins.
2. The Sydney civil sittings will commence on 29 January 1990.

Appointment of Circuit Sittings for 1990

Court of Sittings	Commencing Date	Duration
Albury	Monday 23rd July (Civil)	2
	Monday 6th August (Criminal)	4
Armidale	Monday 26th March (Criminal)	3
	Monday 25th June (Civil)	1
Bathurst	Monday 9th July (Civil)	2
Broken Hill	Monday 11th June (Criminal & Civil)	3
Coffs Harbour	Monday 9th July (Civil)	2
Dubbo	Monday 25th June (Civil)	2
Goulburn	Monday 29th January (Criminal & Civil)	3
Grafton	Monday 30th April (Criminal)	4
	Monday 23rd July (Civil)	2
Griffith	Monday 25th June (Civil)	2
Lismore	Monday 25th June (Civil)	2
Narrabri	Monday 18th June (Civil)	1
Newcastle	Monday 5th February (Civil - Jury)	3
	Monday 5th March (Criminal)	3
	Monday 26th March - Civil - non Jury)	2
	Monday 30th April (Criminal)	3
	Monday 21st May (Civil - Jury)	3
	Monday 18th June (Civil - non Jury)	2
	Monday 9th July (Criminal)	3
	Monday 30th July (Civil - Jury)	3
	Monday 3rd September (Civil - non Jury)	2
	Monday 8th October (Criminal)	3
	Monday 5th November (Civil - Jury)	3
Orange	Monday 12th February (Criminal)	4
	Monday 23rd July (Civil)	2
Tamworth	Monday 2nd July (Civil)	2
Wagga Wagga	Monday 9th July (Civil)	2
Wollongong	Monday 12th February (Civil - Jury)	3
	Monday 5th March (Criminal)	8
	Monday 30th April (Civil - non Jury)	2
	Monday 28th May (Civil - Jury)	3
	Monday 18th June (Criminal)	9
	Monday 20th August (Civil - non Jury)	2
	Monday 3rd September (Criminal)	10
	Monday 19th November (Civil - Jury)	2

The fixed vacation begins on 17th December 1990 and the first day of term in 1991 will be 28th January.

Mid-Atlantic Litigation

Garry Downes Q.C. reports new developments in disaster litigation revealed at a recent conference of the U.I.A.

Strasbourg is practically at the geographic centre of Europe. It is in easy reach of Switzerland, Germany, Italy, Austria, Holland, Belgium and the remainder of France. It is also the political centre of Europe as the site of the European Parliament. Its European and worldwide influence will inevitably grow as the potential impact of the abolition of all trade barriers within the European Economic Community in 1992 comes to be appreciated. Strasbourg is a famous cathedral city, the capital of Alsace, and the centre of its wine and gastronomy. Strasbourg is also the location for an interesting international legal conference to be held in September 1990. The conference is to be conducted by the International Union of Lawyers or the Union Internationale des Avocats (the UIA).

So what is the UIA? The UIA was formed in 1927 by a group of Paris lawyers. It was orientated to the civil law and the French language. That was so for many years. However, the UIA has recently developed a much more international outlook. English has been introduced and is used at least as much as French. Common law issues are discussed both separately and in comparative law contexts. Its current president is Ian Hunter Q.C. from England. The Australian Bar Association is a constituent member of the UIA.

The UIA recently held its 33rd Congress at Interlaken in Switzerland. I attended the congress as the representative of the Australian Bar Association. It was a memorable experience.

The Congress took place in a spectacular setting, seemingly at the foot of the Jungfrau. The sessions of the Congress were held in the Grand Hotel Victoria Jungfrau and in a nearby convention centre.

Over a period of three days, in large plenary sessions, and in small working groups, a variety of topics were covered. On the first day I listened with interest to a full days plenary session (with simultaneous translation) on New Trends in Tort. I went to the session with the expectation that I would hear reports about the current authority of Junior Books Ltd. v. Veitchi Co. Limited [1983] 1 A.C. 520 and similar matters. However, that was not to be. Instead, I heard an interesting debate about disaster litigation: the Piper Alpha Oil platform fire, the Pan American crash and so forth. What emerged from the debate was a new type of litigation: one that depends, at least from the defendant's point of view, as much upon media merit, as upon legal merit. The idea is that groups of plaintiffs, lead by a small, but very experienced, group of solicitors embarrass defendants and their insurers into making substantial offers of settlement in response to media publicity emphasising the "immorality" of large corporations associated with the disasters forcing plaintiffs to wait a substantial time for the hearing of litigation calculated only to procure their "just and obvious entitlement". I have the feeling that members of the Bar do not play a great role in this kind of litigation. A variation of the litigation occurs when there is some, albeit tenuous, link with the United States of America. In those circumstances the litigation is commenced in the USA. The purpose here is to achieve what was described as a mid-Atlantic settlement, namely, one in which the compensation is half way between European levels of compensation and the damages that might be awarded by a jury in the United States. Recent Australian asbestos litigation and potential AIDS litigation suggests to me that there may be lessons for us in this European model.

Many other topics were covered at the Congress. I also attended sessions on international arbitration and trial practice, including alternative dispute resolution in the USA, and the use of video links in hearings. There were also sessions on intellectual property, banking and many other topics.

The social programme was first class. It ranged from a pleasant day travelling by the highest railway in Europe to the Jungfraujoch, to a luncheon concert by the celebrated chamber group, I Salonisti.

The Interlaken Congress was one of the best organised and most interesting conferences I have attended. Undoubtedly, English is not as dominant in UIA as it is in the IBA. Neither is common law thinking. However, the genuine opportunity to experience different systems of law and the cultures in which they operate more than compensates for this.

The UIA has a number of active committees in which members can become active. I am now the Vice-President of the Working Group on International Litigation.

The Strasbourg Conference will be held from 10-13 September 1990. I have brochures for it for anyone interested. I urge members, however, to consider joining the UIA, whether or not you are considering attending the 1990 Conference. Joining the UIA will give you an introduction to its activities and enable you to share, from Australia, in the activities of an important international legal body It will also permit you to attend conferences of the UIA at a discount about equal to the cost of membership. The UIA has Conferences every year, always at interesting places, and seminars much more frequently.

If you are interested, write to me at 7/180 Phillip Street, Sydney (DX399).

No Early Opening

The Bar Association asked South Sydney Council to consider opening the Domain Parking Station from 6.00 a.m. The Council's response was that it was unable to vary the existing operating hours because of the "substantial increase in operating and implementing costs involved with earlier openings including, the costs to Council to amend the software which operates the parking equipment and the additional staffing requirements involved. ❑

Poetry on Motion

They do things differently in Missouri, as this judgment demonstrates: almost anything goes in the Deep South.

United States of America, Plaintiff
v.
One 1976 Ford F-150 PICK-UP VIN
F14YUB03797, Defendant

No. S82-200C(D)
United States District Court,
E.D. Missouri
Southeastern Division

Dec. 19, 1984.

Government sought to forfeit pickup truck used in connection with raising of marijuana. The District Court, Wangelin, J., held that pickup truck used to carry tools needed to raise marijuana was used to facilitate the offense and was thus subject to forfeiture.

Judgment for plaintiff.

MEMORANDUM
WANGELIN, District Judge.

This matter is before the Court for a decision following a trial on the merits. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1355 and Title 21 U.S.C. § 881. In accordance with Rule 52 of the Federal Rules of Civil Procedure, this Court hereby makes the following Findings of Fact and Conclusions of Law. Any Finding of Fact equally applicable as a Conclusion of Law is adopted as such and, conversely, any Conclusion of Law equally applicable as a Finding of Fact is adopted as such.

1. The defendant herein is a truck.
The vehicle type is a pick-up,
Alleged by a fed
To be found in a bed
Of marijuana, caught in the muck.

2. On August 16, '82,
In Perry County, Missouri, who
Should appear
But claimant Hudson with gear
As a one-man pot-tending crew.

3. Claimant drove defendant that day
With tools to care for his
Illegal hay.
He was observed by the fed
Placing metal by a shed
Where other tools of his trade would stay.

4. The claimant's arrest was then made,
Tis illegal, after all, his trade,
And defendant was seized
With comparative ease
By the government, with which it has stayed.

5. Claimant now wants his truck back
And he bases his legal attack
On the grounds that defendant
Though found in pot fields resplendent
Was not used as an illegal hack.

6. While tis true that not one plant or seed
Could be found on defendant, indeed
Claimant's argument is tissue
For the dispositive issue
Is did defendant facilitate the deed?

7. In the *U.S. versus One Cadillac* ,[1]
The Second Circuit addressed this attack,
And those judges renowned
Eventually found,
Claimant's assertion misread law and fact.

8. They gave "facilitate" a wide definition,
These jurists of great erudition,
They found that seizure was proper,
Now here's the heart-stopper,
If the truck *in any manner* facilitates the illegal condition.

9. In *Cadillac*, as in the case at bar,
Defendant just transported men near and far,
But this was sufficient
To make claimant's trade more efficient
And therefore justified seizing the car.

10. Thus the *Cadillac* case this Court will follow,
Renders claimant's contention hard to swallow,
And the Court will now render
Judgment against the defender
Because claimant's contentions are hollow.

11. Now the moral in this case 'bout the truck,
Is easy, in case you are stuck,
If in an illegal endeavour
A vehicle is used whatsoever,
Then, my friend, you are clear out of luck.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff shall have judgment against defendant on plaintiff's complaint.

(599. F.Supp. 818)

[1] United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2nd Cir.1977).

Identification and Recollection

The tradition of oral testimony and vulgar interest, seduce some barristers into cross-examination which betrays little understanding of the difficulty and unreliability of human recollection.

An experiment conducted in the Reading Course in 1989 was structured to provide three incidents which were carefully scripted and filmed. Several days later the barristers were asked to prepare affidavits recalling the occurrences.

Forty affidavits were tendered. The deponents may be assumed to have been honest, diligent in their efforts to recall the events, possessed of above average intelligence and linguistic skills and subject to none of the anxieties of deponents who must anticipate cross-examination.

The three incidents were designed to be increasingly memorable. The first involved a young woman interrupting to deliver a routine message. The second involved a young man dressed in distinctive clothes engaged in a short conversation which was unusual. The third interruption involved a woman in extraordinary clothing engaging in an extraordinary dialogue.

Some conclusions may be drawn which are of general interest:

1. Every affidavit was in some respect wrong.
2. A large measure of accuracy was evident in conclusions as to tone or attitude; but as conclusions, and not observations of physical indicia, they would probably be inadmissible.
3. Approximately 30% were inaccurate as to detail on such matters as clothing and height.
4. Over 15% had the sequence in which the three simple events happened, wrong.
5. Approximately 70% recorded the conversations in a way that was substantially accurate; 30% were not.

Not surprisingly, many deponents fell into error by inserting what they believed to be correct, for example, "Barry Handley" was recorded as "Ken Handley". Another startling revelation was that the person who recorded most of the events with the greatest accuracy also recorded other events completely inaccurately with the same apparent precision. One barrister suspected a ruse, recognised that the last actress was a member of staff and he made a positive identification. The most chilling aspect of the whole exercise was that the person so positively identified was not involved at all.

The fertility of the human imagination may be demonstrated by some examples. Julie Farran, the secretary to the Registrar of the Bar Association, a young woman, 4'11" in height, was described as aged 20 to 55 years; having a height from small to tall; in one case, carrying a cleaner's bucket and mop (which she wasn't); in another carrying a shopping bag (which she wasn't); and in three cases wearing a wig (which she wasn't). Debbie George (of Counsel's Chambers) referred to a fax from Dublin: it became a telex to London, a fax from Holland, a fax from Ireland, a telex from Adelaide and finally the return of a book on loan from the University of Dublin! Brian Fenech, who assists in the Bar, was variously described, not as an elevator man, but as a courier, repairman and maintenance man; with a purple jeep carrying, not a board rack, but a surf ski, a yellow surf board and ski racks.

The script designed to give offence was as follows:-

"You are a pack of over-priced yuppy dinky motherfuckers."

"Would you leave."

"I am leaving, you tell that President of yours, Barry Handley, to shove the lot of you up his Bulli Pass."

Corruptions included "Shove it up his Kyber Pass"....."Stick something in his pipe"..."Stick the lot of you up his fucking arse"..... perhaps revealing more than was intended. One barrister would not descend to "vulgar expression" used to refer to persons who engage in "Oedipal sexual relations".

We again record our thanks to our actors who were volunteers. ❑ P.M. Donohoe

Re-Structuring the Attorney-General's Department

The Attorney-General has approved the restructuring of senior management and court support services areas of the N.S.W. Attorney General's Department to rationalise the delivery of administrative services to the Court System.

The structure of the Department has been significantly altered, and its capacity to service the Courts enhanced, through the creation of a Court Services Division under the supervision of a General Manager. At the same time the position of Deputy Secretary within the Department has been redesignated as Deputy Secretary and Director General of New South Wales Court Services, to assume accountability for the delivery of all services from the Department to the Court System.

Deputy Secretary and Director General
of N.S.W. Court Services - Mr. P.J. Webb
General Manager,
N.S.W. Court Services Division - Mr. T.B. Keady
Director, Higher Courts
and Support Services - Mr. I.P. Barnett
Director, Local Courts
and Support Services - Mr. J.A. Keating

The structure and functions of the remaining two divisions of the Department are unchanged. Mr. L.G. Glanfield is the Director of the Legislation and Policy Division and Mr. A.J.B. George is the Director of the Management Division. All Division Heads within the Department report through the Deputy Secretary and Director General of N.S.W. Court Services to the Secretary, Mr. T.W. Haines. ❑

Around the Courts

The Commercial Legal Aid Scheme

This scheme, which was the Bar Council's response to a suggestion by Rogers C.J. Commercial Division, was set up and has been administered in its first period of operation by the Commercial Law Liaison Committee, chaired by David Bennett Q.C. Its aims and general outline have been explained in an earlier article in Bar News of Spring 1988. In short, it is a pro bono publico scheme, whereby counsel donate their services, instructed by solicitors working on the same basis.

The scheme has had a couple of cases referred to it by the Commercial Judges, and it is hoped that the Bar's participation will benefit not only the hapless client, involved in litigation either financially or legally beyond his or her grasp, but also the court, whose modern approach to commercial hearings does not work at its best when a litigant appears in person.

The first case was perhaps typical of what we may expect and will be a common occasion for this scheme's involvement. A guarantor/mortgagor wished to cross-claim against the plaintiff bank in order to raise matters concerning the bank's conduct of the mortgage sale of her properties held as securities by the bank. The issues included the scope of an exclusion clause in the mortgage and the effect of the Trade Practices Act upon that clause.

The fact that the scheme's first client was unsuccessful in court is not itself a sign of weakness in the scheme. Indeed, it seems clear that even this losing case benefited from the able representation provided by Malcolm Oakes and Philip Taylor. Messrs. Blake Dawson Waldron instructed counsel and are to be commended for their thorough-going contribution.

Some queries and problems will need to be tackled fairly soon. However, taking the most obvious one - how to select persons to be chosen under the scheme - alone, it is likely that more experience will be required before present general principles can be empirically refined. ❑

Local Court

The Chief Magistrate of the Local Court, Mr. Briese, has issued a practice note in respect of criminal proceedings.

Practice Note No. 1/89

The development of time standards for case disposal is part of the Court's overall programme of case flow supervision. In accordance with that concept the Chief Magistrate has issued the following Practice Note.

(i) This Practice Note does not apply to Civil Claims or Family Law.

(ii) This Practice Note applies to all charge and summons matters.

(iii) Courts with infrequent and irregular sittings, and those which have developed time standards to meet local conditions, will comply as far as possible with the Practice Note.

1. On the first return date, where possible, pleas of guilty should be entered and finalised on that date.

(a) On the first return date, an adjournment will be granted for a period (preferably not to exceed 14 days) in order to allow the defendant to obtain legal advice. If a plea of guilty is determined upon, the defendant should obtain all necessary references etc. in order to be able to have the plea dealt with on the adjourned date. Unrepresented defendants will be informed by the Court of the purpose for the adjournment.

2. On the adjourned day, the defendant will be required to inform the court whether a plea of guilty or not guilty is then to be entered.

(a) (i) Pleas of guilty (summary): should be dealt with if possible. If a further adjournment is required to obtain references, pre-sentence reports etc., the minimum period of adjournment commensurate with obtaining those materials will be granted. This should not exceed four weeks. But as a matter of practice such material should be obtained during the adjournment period and the matter disposed of on the adjourned date.

(ii) Pleas of guilty (indictable): Prosecution must be in a position to advise when a brief will be ready for service. This should not exceed 4 weeks. The matter will be adjourned for service of the S.51A brief. The committal for sentence to the District or Supreme Court should be dealt with on the adjourned date.

(b) Pleas of not guilty

(i) Summary matters: will be forthwith listed for hearing. Prosecution and defence must be in a position to advise the Court of the number of witnesses required and the estimated length of hearing.

(ii) Indictable matters: prosecution must be in a position to advise when a brief will be ready for service. This should not exceed 4 weeks. A date will be fixed for service of the S.48 brief. A date will be fixed for the defence to serve notice and that date will be the next adjourned date (the total period should not exceed 6 weeks).

(iii) On the next adjourned date, indictable matters will be fixed for committal hearing. Both parties should be in a position to give a proper estimate of hearing time.

(iv) If the matter is to proceed by way of paper committal only (i.e. no witnesses are to be called), practitioners should be prepared for the matters to proceed on the adjourned date.

The Criminal Listing Directorate

On the 13th July 1989 the Directorate completed two years of operation. A number of changes were implemented during this period which affect the listing of matters before the District Courts . The Director, John Castellan, describes the changes.

SYDNEY DISTRICT COURT

The Directorate is now located at Remington Centre, Level 12, 175 Liverpool Street, Sydney.

Trials, short matters and appeals are allocated hearing dates at the Directorate's Call-overs which are conducted at the new premises. Call-overs are conducted at Long Bay Goal for those accused who are in custody and are unrepresented.

Pre-trial hearings are conducted by the trial Judge in lengthy special fixtures.

Trials are listed for the first day of each week. Priorities are determined four weeks prior to the trial week. As Judges become available during the trial week trials are allocated in order of priority.

The Director is not able to allocate specific dates for Sydney Trials, however some degree of certainty was introduced some 18 months ago.

Trials with priority 1 to 13 are required to be ready to proceed on the Monday.

Trials with priority 14 to 16 are not required to proceed before the Tuesday.

Trials with priority 17 to 20 are not required to proceed before the Wednesday, and

Trials with priority 21 or more are not required to proceed before the Thursday.

Trial priority information is pre-recorded and can be obtained as follows:

Trials: listed one and two weeks ahead (02) 287 7531
listed three and four weeks ahead (02) 287 7530.

Where there is to be a change of plea or a change in the estimated duration or there is some difficulty in the trial proceedings - parties should contact the Senior Listing Officer (trials) (02) 287 7323.

Similar difficulties in short matters and appeals should be notified on (02) 287 7334.

SYDNEY WESTERN DISTRICT COURT

The head office for Sydney West is located at Level 1, 20 Charles Street, Parramatta - (02) 891 0839. The Directorate also has offices located at Liverpool Court House - (02) 602 7122 from which all Liverpool and Campbelltown matters are listed and an office at Penrith Court House - (047) 313 999 which is responsible for Penrith and Katoomba listings.

Trials are fixed at call-overs conducted monthly at each centre and are listed some 2-4 months in advance. Trial priorities are determined 4 weeks prior to hearing.

Trials are listed for specific dates with the number listed determined by the number of trial Courts available.

3 trial Courts - list 8 trials Monday - 8 trials Wednesday
2 trial Courts - list 5 trials Monday - 5 trials Wednesday
1 trial Court - list 3 trials Monday - 3 trials Wednesday

At Parramatta and Penrith the trials listed are called over by the Senior Judge at 9.15 a.m. and 9.30 a.m. respectively.

Trials are then allocated to available Judges, the remaining matters are stood over or transferred to other centres.

One week per month is set aside at each centre for short matters and appeals.

COUNTRY DISTRICT COURT

The Directorate has regional offices located at:

Lismore	(066) 21 9992
Newcastle	(049) 26 0644
Wollongong	(042) 27 3923
Dubbo	(068) 81 1401
Wagga Wagga	(069) 23 0552

Country trials are now listed for Call-over by the trial judge in Sydney, two weeks prior to the sittings. Those ready to proceed are then allocated specific trial dates. Up to five trials are listed each week of the sittings. (One category A trial and one short Category B trial is listed as a back-up on the Monday, one short category B trial is listed on the Tuesday, one category A trial and one short category B trial is listed as a back-up on the Wednesday).

Parties are advised as to what information the Judge will require at the Call-over and in most cases this is conveyed to the Court by City agents. In order to further reduce the inconvenience and costs to parties it is proposed to conduct these call-overs at country centres where possible.

At this stage short matters and appeals will continue to be listed for the first day of the sittings. Enquiries regarding country trials should be directed to (02) 287 7534 or to the appropriate Regional Office.

Practitioners experiencing listing difficulties should contact me on (02) 287 7321.

Category A includes those matters where:-

- the accused is in custody (on remand)
- the allegations are of child sexual assault
- culpable driving charges involving a death
- the trial is listed as a special fixture
- a trial is given a Category A rating by a Judge or by the Director. ❑

Calling Counsel

In R.V. Jaquith (17 February 1989) the English Court of Appeal made the following observations about Counsel involved in a case giving evidence within the proceedings.

1. No advocate should ever give evidence if that could possibly be avoided.
2. Where it was not possible for an advocate to avoid giving evidence, he should take no further part in the case. It necessarily followed that, if he was not being led, the trial must stop and a re-trial be ordered.
3. There was a duty on counsel to anticipate circumstances in which he might be called upon to give evidence. Experienced counsel ought to be able to anticipate whether such a situation might arise. If so he should withdraw from the case.
4. Where it came to the notice of a legal adviser, through an accused person, that one of his co-defendants had attempted to pervert the course of justice, there was a duty on the legal adviser, usually the instructing solicitor, to take a detailed proof at once to provide a record and for further investigation.
5. Where the giving of evidence by an advocate caused real embarrassment or inhibition or difficulty regarding cross-examination by other advocates, the judge should exercise his discretion to withdraw the case from the jury.

Their Lordships did not seek to lay those matters down as ones of principle, there might be others to be added; they merely thought that they deserved consideration.

(The Times, 21 February 1989)

Second Greek/Australian International Medical and Legal Conference

Eminent legal and medical speakers guarantee high standards at the Second Greek/Australian International Medical and Legal Conference in Athens and Corfu in 1990.

The success of last year's conference is indicated by the 80 percent repeat acceptance rate for the second conference scheduled for 25th May to 1st June next year.

Already, there has been overwhelming response to the preliminary announcement, with over 500 people from both professions having registered their intention to attend.

Speakers will include Sir Ninian Stephen, Sir Gustav Nossal, Mr. Justice John Phillips, Professor Graham Burrows, Dr. Paul Nissele, Professor Steve Cordner, Dr. Nick Bouras from Guy's Hospital, London and a number of eminent Greek speakers including Professor Papadatos of the University of Athens.

State Bank Victoria will again be the major sponsor of the conference with the Bank's Chief Executive Officer, Mr. Bill Moyle, attending as a keynote speaker.

The conference will include four full days of sessions with a social program featuring a full day cruise to Kassiopi and a performance at the Herod Atticus Theatre by internationally acclaimed young pianist, Demetri Sgouras. There will also be tours to Egypt and Turkey before and after the conference.

Contact: Second Greek/Australian International Medical and Legal Conference: C/- Secretariat I.C.M.S., P.O. Box 29, Parkville, Victoria 3052. Telephone (03) 387.9955. ❑

Winds of Change

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely difference defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

(Ketteman v. Hansel Properties [1987] A.C. 189 at 220 per Lord Griffiths.)

USA - National Employment Law Institute Conference

The National Employment Law Institute Conference will be held in Vail, Colorado, from 10 to 17 March, 1990.

The conference attracts delegates from all around the U.S.A.

The papers which are presented are of a high quality and quite informative. Some of the topics at the last conference were: Developments in Employment Discrimination; Wrongful Termination and Emerging Torts; Age Discrimination and Affirmative Action.

Many of the topics discussed, as well as recent developments in the U.S.A., are of interest and relevance to Australians.

For more details contact Les Kaufman on (03) 608.7517 or fax (03) 600.0796. ❑

Changing Roles

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 19 May 1989 and have not been admitted for five years:

Bronwyn Gai Bartley
Michael Joseph Corbett
Michael Hamilton Corrigan
Stephen David Davidson
John Martin Exner
Poornananda Gnanakaran
Shanthini Gnanakaran
Alexis Lynne Hailstones
Stephen John Hall
Michael William Hogan
Anthony Sylvester Jeffries
Peter Ernst Jorm
Mohammed Ikbal Khan
Jennifer Anne Laing
Kieran Maurice Lane
Ian Longfield Marjason
Andras Markus
Karen Jane Metcalfe
Michael John Middleton
Geraldine Ann O'Toole
Catherine Alice Ridge
Inez Cassandra Siciliano
Niranjan Sinnetamby
Ruth Grace Smith
Anthony Francis Walsh
Catherine Anne Watts
Judith Irene Wilson
Mary Agnes Young
Andrew Thomas Zbikowski-Spence

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 19 May 1989 under the L.P. Act:

Lynette Maria Brady
Pervaiz Ahmad Buttar
Errol John Considine
John Richard Cooke
Hugh Stephen Cullinan
John Leslie Cunningham
Robert Alfred William Field
Andrew John George
Brian Alexander Given
Barbara Jill Guthrie
John Kenneth Whalan Hughes
Kim Louise Hurley
Nargis Shamsher Kanji
Leslie Laurence Keady
Maureen Ann Kingshott
Lindsay Graham Le Compte
Warren Kenneth Lee
John Anthony Leslie
Bruce Richard Love
Michael Francis Morahan
Anthony George Nevill
William Edward Plunkett
Myer Samra
David Mayo Webb
Peter John Whitehead

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 30June 1989 and have not been admitted for five years:

Pamela Anne Budai
Paul Henry Burton
Jeffrey Denham Chard
John Conomor
Brendan Gregory Docking
Bruce Graeme Finlay
Alvan James Freeman
Edwin Hermann Fritchley
Stephen John Higgins
Li Li Kuan
Sandra Evelyn McCullough
Kirsten Elizabeth Mallam
Cia Papas
Peter John Julian Robinson
Susan Granville Taylor
Robert Allen Walker
Guy Price Williams

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 30 June 1989 under the L.P. Act:

Murray John Allatt
Beverley Baron Bignold
Gregory John McCarry
George Adrian Montgomery
Austin Harold Rummery

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 4 August 1989 and have not been admitted for five years:

Kevin Vincent Bennett
Anne Kathleen Britton
Geoffrey David Llewellyn Cahill
Geoffrey Cameron
Bruce Edward Caulfield
Denise Cranfield
Michael Robert Davis
John Colin Harris Dewdney
Adrian Geoffrey Diethelm
Christine Maree D'Souza
Francisco Esparraga

Beverley Helen Forner
Dennis Martin Gilligan
Kim Christine Gould

Anthony William Greig
Paul Anthony Grimble
Robin Lynette Gurr
Phillip James Hetherington
Matthew David Howison
Richard Thomas Kenna
James David Lonergan
Janette Belva McClelland
Leslie John McKay
Daniel John MacCallum
Carolyn Denise Mall
David Alexander Nimmo
Mark Anthony O'Neill
Jane Elizabeth Peters
Louis Eric Wilson Ribot
John Leonard Richardson
Susan Lynette Robey
Clifford Anthony Russell
Carolyn Ann Stott
Phillip Raymond Thompson
Garry Tierney
Trevor John Vella
Diana Gay Viney
John Charles Wasson
Kim Francis Watson
Thomas Barry Williams
Amber Rose Willoughby
Roewen David Wishart
Wendy Ann Wright

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 4 August 1989 under the L.P. Act:

Rosalind Frances Atherton
Geoffrey Charles Casson
Micheline Sarah Dewdney
Ian Ronald Dobinson
Graham John Evans
Peter Stirling McDougall
Edmund Patrick Hugh McNeile
Jane Frances Merkel
Noel Henry Peters
Garry Clifton Pickering
Peter Francis Tilbrook
David Anthony Turley
George Zdenkowski

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 22nd September 1989 under the L.P. Act:

Wendy Louise Ambler
Carol May Fletcher
Francis Bernard Healy
Kingsley John Perry

Corporate Lawyers

The next Australian Corporate Lawyers' Conference will be held in Melbourne on Wednesday, 8 November, 1989 (which is the day following Cup Day) at the Hyatt Hotel. The format will be a one-day conference with an array of interesting speakers drawn from the business and legal community.

A detailed conference program will be available soon.

For further information contact Graymore Williams Pty Ltd, Level 3, 575 Bourke Street, Melbourne, Victoria 3000. Telephone (03) 629 7848; Fax (03) 614 6587. ❑

Old Editions of Books

Justice Einfeld is at present working on a scheme under which old editions of textbooks, digests and the like, instead of being thrown away, can be sent to Courts, Legal Aid Officers and the like in African countries where they are in short supply. The scheme has not yet got off the ground but when it does, in the next few months, requests will be made to members of the Bar to donate outdated books rather than throw them away. Collections will take place several times a year.

Accordingly, it is requested that members who intend to throw books away refrain from doing so for the time being so that when the scheme commences a substantial number of books will be available for collection. ❑

Endless Nightmares

"The application of the [Limitation] Act to the circumstances of the present case is extremely difficult. It is a piece of legislation the obscurity of which has long been deplored by judges both in England and Australia. It was, of course, introduced as a result of a recommendation of a Law Reform Commission. This Court was the beneficiary of extremely able and persuasive arguments by counsel on behalf of both the applicant/plaintiff and the defendant/employer. Nonetheless the obscurities of [the] legisation have not been fully elucidated."

(Meagher J., Dousi v. Colgate Palmolive Pty. Ltd., 12 May 1989) ❑

This Sporting Life

Bench and Bar Golf Day - Easter Tuesday

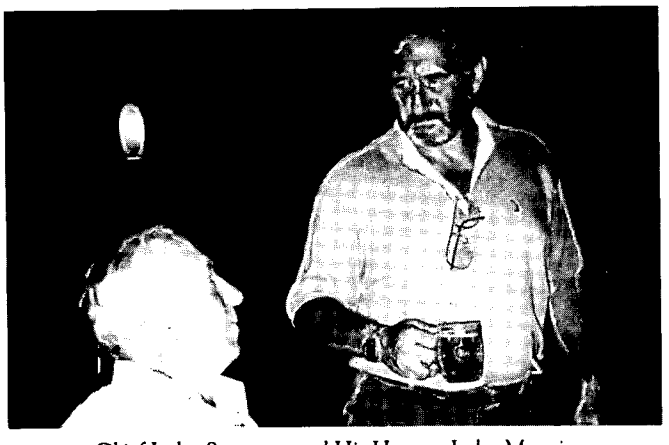
For the third year running the organisers of this event have been able to arrange fine weather, on this occasion spliced between ten or more days of almost continuous rain. Fifty-two members of the Bench and Bar experienced remarkably good conditions on Pymble Golf Course for what has become the most popular match on a golfing calendar.

The day again went to the Junior Bar who defeated the Bench and Senior Bar by seven matches to six. Bill Cook, the former Registrar of the Association ,serving between 1964 and 1985, in whose honour the trophy of the day was named, was present both to play golf and award the W.F. Cook Cup to Greg Burton who was identified as the most Junior of the "baby" barristers taking part.

The best card of the day was returned by Rod Skiller and Neil Francey with 47 points for the Junior Bar while Judge Freeman and Judge Kinchington were the best for the Bench and Senior Bar on 43 points.

The best nine holes scores were returned by Judge Maguire and Roy Ellis (24 points), Judge Ward and Tony Puckeridge QC (25 points), Steven Finch and Peter Barber (22 points), and Phil Greenwood and Peter Gray (23 points). Julian Sexton took out the long drive on the second hole. John Rowe was nearest the pin on the eleventh and Judge Denton did likewise on the eighteenth hole.

Members should keep in mind that the Bench and Bar needs to field a team of eight in the Annual Council of Professions Golf Day at Avondale to be held this year on Wednesday 8 November 1989. ❑ Paul Webb



Chief Judge Staunton and His Honour Judge Maguire
"You're not sending me to Bourke again!"

Bill Cook presenting the Cup, named in his honour, to Greg Burton, who accepted it on behalf of the Junior Bar.

Cricket

The NSW Bar enjoyed a brief but highly successful 1989 cricket season by defeating both the Victorian and Queensland Bar elevens.

NSW v. Victoria

Despite difficulties with inclement weather and with the aldermanic assistance of O'Keefe Q.C., the annual clash against the Victorian Bar finally occurred at Middle Head on 19 March 1989 with the satisfactory result of a comfortable win to NSW by 56 runs, thereby reversing a series of unpleasant losses. NSW batted first and suffered some early losses before Laughton (32) and Foord (72) became serious, and with a brisk 54 from Wilkins, the total was 182 off the prescribed 50 overs. Poulos achieved the highest strike rate with 4 off the one ball he survived.

Faced with lively bowling and tight fielding Victoria struggled and were never likely to achieve the target. Naughtin (2-26) and Collins (1-13) gave nothing away in their spells of 8 overs each and provided an ideal foil for Sandrasegara who bowled his leg spin with good effect to obtain 3 valuable wickets, including that of the Victorian captain, Gillard Q.C. Harris, who had opened the batting, secured more wickets than runs, when he bowled 4 overs for 2-12, in cleaning up the tail-enders.

The game ended on an unfortunate note when Collins and Naughtin, both seeking the glory of catching the last Victorian batsman, collided in full flight and were obliged to miss the post-match formalities due to hospital commitments.

NSW v. Queensland

Again overcoming the weather and industrial unrest, NSW was finally able to play Queensland in Brisbane on 13 May 1989 and secured a satisfactory verdict by doubling the Queensland score in winning by 107 runs. Sent into bat by Crooke Q.C., the Queensland skipper, NSW scored freely with Burchett (67), in his first appearance, Harris (21), Reynolds (42) and Hamman (39) providing most of the total of 7-214 from 45 overs.

Showing the benefits of vast experience on circuit, the opening bowlers King and Hamman showed little effects of a debilitating dinner at the Tattersalls Club on the previous evening and restricted Queensland to 37 runs off the first 18 overs, with Hamman getting cheaply the prized wicket of Traves; a Shield player in recent years. Connorand Naughtin, aided by enthusiastic fielding and the capable wicket keeping of Ireland, then dispatched the remaining batsmen for a modest total of 107. It was Wilkin's turn for hospitalisation for stitches to a cut hand sustained when effecting a catch, but he was fit enough to be conspicuous when Queensland were hosts that evening at a dinner in their Inns of Court and again on Sunday when the hosts were subjected to repeated post mortems of diminishing veracity. ❑