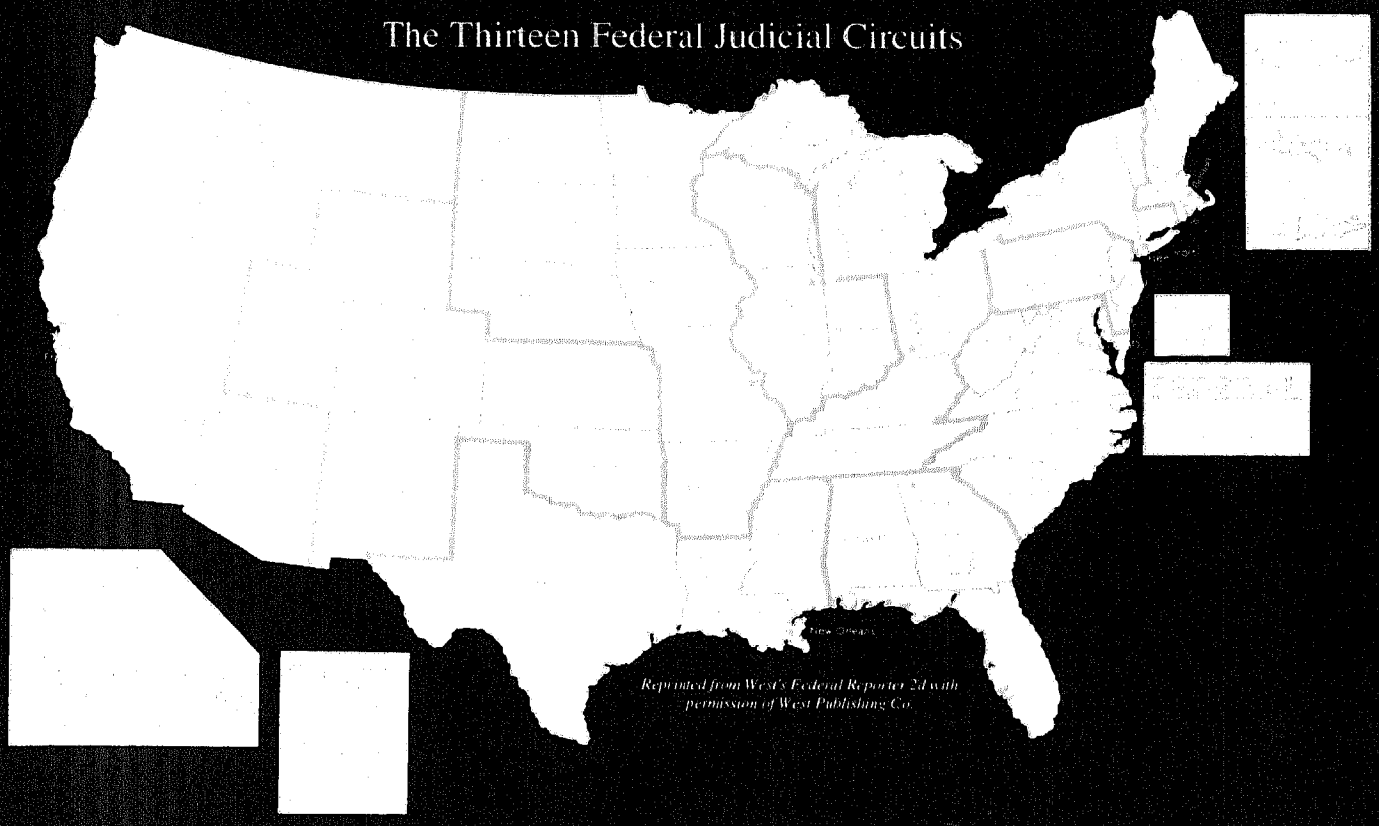
Bar News

The journal of the NSW Bar Association

UNDERSTANDING AND USING CITATIONS TO AMERICAN CASES



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in this issue .....

Bar Notes

List of Authorities

The Bar Council has had brought to its attention the perennial question of exchanging lists of authorities.

The Bar Council does not consider it appropriate to lay down any rules in this area because circumstances of individual cases do differ. It suggests, however, that the following four paragraphs should present a useful guide as to the appropriate etiquette in relation to lists of authorities:

1. Where a barrister provides to a judge's chambers a list of authorities for the purpose of assisting the judge's staff to have the authorities available in court, as a matter of courtesy that barrister ought to provide a copy at the same time to his or her opponent although he or she may exclude from that list cases which he or she is unlikely to cite or which he or she only intends to cite if they are cited by his or her opponent.
2. Paragraph 2 neither obliges a barrister to provide a list of authorities before the close of the evidence in the case nor does it oblige a barrister to provide a list of authorities to a barrister who has indicated that he or she does not intend to provide the first barrister with a copy of the list of authorities which he or she has provided or proposes to provide to the judge's chambers.
3. If counsel who receives a list of authorities intends to supply a list to the judge's chambers but not to supply a copy thereof to his or her opponent, he or she should return any lists supplied to him or her unread. ❑

T.R. Duchesne, Registrar. 17 February 1992

Policy On Venues

The Bar Council has adopted the following as standing policy:

1. No functions or events organised under the aegis of the Bar Council or the Bar Association of New South Wales, or with their support, shall be held at the premises of any club or other organisation which:
   (a) has a reputation for discrimination on religious, racial or sexual grounds; or
   (b) has admission procedures which operate in a way which has the effect of excluding persons from membership, or restricting the admission of persons to membership, on religious, racial or sexual grounds.
2. If any question arises, because raised by any member of the Association or otherwise, as to whether or not this standing policy applies to any venue selected or proposed for any function or event, the House Committee or any others charged with arranging that function or event shall make such enquiries in that regard as may be feasible. In the event that there remains any reasonable doubt about the answer to the said question, the function or event shall not be held at that venue.
3. This policy does not apply to a club or other organisation:
   (a) membership of which is lawfully open only to persons from a particular group, eg. members or ex-members of the services; and
   (b) which does not have a reputation for any form of religious, racial or sexual discrimination. ❑

Federal Court of Australia Notice to Practitioners - Listing of Cases in Sydney

1. *Short cases*, those expected to take less than 3 days, may be listed by the Judge presiding at the final directions hearing. Practitioners should attend that hearing with a list of preferred dates. Cases not listed at the final directions hearing will be referred to the List Clerk for a date for hearing.
2. *Long cases*, those expected to take 3 days or more, will ordinarily be placed in the Long Causes list which will be called over on the first Tuesday of each month. Practitioners attending the call-over should have knowledge of the case and of its state of preparation and should attend with a list of available hearing dates.
3. *Admiralty List* - All contested matters arising under the *Admiralty Act* will be placed in the Admiralty list which is under the control of Sheppard J.
4. *Corporations List* - All matters arising under the *Corporations Law* other than winding-up applications will be placed in the Corporations list which is under the control of Lockhart J.
5. *Industrial List* - All matters arising in the Industrial Division of the Court will be placed in the Industrial list which is under the control of Wilcox J.
6. *Intellectual Property List* - Intellectual Property cases, as defined in Order 54B Rule 1 of the Federal Court Rules, will be placed in the Intellectual Property list which is under the control of Gummow J.
7. *Taxation List* - All taxation matters will be placed in the Taxation list which is under the control of Hill J.
8. The Judge in charge of a list may allocate a case to another Judge for directions or for hearing or may grant leave to the parties to approach the List Clerk for a date for hearing or may place the case in the Long Causes list. ❑

L.J. Gilroy,
District Registrar
May 1992

Robing in the Industrial Court

This practice note determines the procedure to be followed and establishes the practice, procedure and usage of the Industrial Court of New South Wales with respect to the robing in the Court of Judges and Counsel.

The Chief Judge of the Industrial Court, Justice Fisher AO, has issued a practice note advising that robes shall not be worn by Judges or Counsel in or before the Industrial Court of New South Wales.

The practice note does not affect any Judge's decision to wear robes on formal occasions outside the hearing of proceedings in the Court, e.g. at the opening of Parliament, Church services at the Commencement of the Law Year or other formal and appropriate occasions. ❑

From the President

In my first chance to communicate through the Bar's official journal, I want to say how proud I am to be your President. You have had many more clever but none, I believe, who loved the Bar more.

Most will know that I had a serious health scare in the last quarter of 1991.

I now feel very strong and entirely well. This is indeed fortunate for the task you have given me is daunting. You will know from recent press reports that some of our modes of practice are under attack. There has been discussion between the Law Society Executive and ourselves about the matters and a meeting with representatives of the city firms concerned to complain, arranged and confirmed.

Sadly, someone chose to leak the contents of a discussion paper to the press. This John Marsden assures me (and I accept) was done without Law Society knowledge or sanction.

In my 30 years plus of practice the Bar has never criticised the solicitors publicly. All problems (and many have occurred over that time) have been ironed out by careful, unemotional and civilised discussion and agreement. We would like to keep it that way, for the benefit of the public and the whole profession.

The most important quality a barrister provides to the public is his or her independence. It is that independence which the corporate bar must be willing to fight for, in the public interest. A barrister has independence because :

- Barristers have no partners whose interests have to be balanced with those of a particular client;
- Barristers have no shareholders to answer to;
- Barristers have duties to the Courts, the Law and each client individually and no-one and nothing else other than their own integrity;
- Barristers are briefed by solicitors who alone have the ongoing relationship with the client: they cannot "steal" the client;
- Barristers can and do advise vigorously and without having to have any regard to whether the client will like the advice or not;
- Barristers are independent of the Government of the day, the bureaucracy, the multinational, the mega company and the *mega firm;*
- Barristers are bound to accept a brief for a client no mater how unpopular, unfashionable or "politically incorrect" his cause may be.

This independence is precious and in the public interest. Solicitors ought and in the main *do* value it, rightly. In the late seventies *every* suburban and country solicitor signed a petition urging preservation of the Bar in its present form.

The agenda of the large City Firm pushing the "practices" barrow is, I suggest not one which would have the support of the smaller city, suburban and country firms nor even I suspect, the support of a majority of the litigious partners in the larger CBD firms.

Let me say something about the five matters referred to in the discussion paper.

1. **Two Counsel**

The two counsel rule has long since been abolished. Notwithstanding that the view prevails at the Bar that most, perhaps almost all cases justifying the retention of Queen's Counsel require two counsel. This is efficient because it permits a junior to do the more routine parts of the essential forensic work whilst freeing the lead counsel to concentrate on the "big picture". For example, in every important case a transcript index which groups references by issues and adds references to other documents and statements must be done by someone constantly present at the trial and with appropriate forensic experience. If the Silk does it the rate for it is inappropriate, contrary to the client's interest. But it must be done.

As well, it is in the public interest that there be maintained a pool of hard/important case specialists "certified" as such. We call them Queen's Counsel. If they perform the routine tasks or appear in unimportant cases the currency is debased. Furthermore, appearing alone in such cases they take work appropriate to senior juniors who are testing themselves and are being tested by solicitors, to see if they are ready to take silk.

Moreover, all current Silks took silk knowing that for the future they would be holding themselves out as specialists in the kind of case that in general require two counsel. They did that knowing it would restrict *them,* but in the public interest.

In addition, Queen's Counsel have an important educational role which they willingly, freely and effectively perform, for the benefit of the bar and the public. That ought to be preserved.

All this is not to deny that there are cases where a Queen's Counsel alone is appropriate. A single issue but important criminal trial might be one. Appearing for the prime minister in a traffic charge another - his office requires it, not the charge. Argument of an important construction point might be a third. Again if senior counsel has successfully argued in the Court of Appeal he might well not require a junior to appear for the respondent in the special leave application.

These examples demonstrate why the public interest precludes a rule. The current practice is however very much in the public interest.

2. **The rule against conferring in solicitors offices**

The rule of course is not absolute as a reading of it demonstrates. It is a general rule which gives way to compactors full of documents or a need to see many people at once. But it

is important: it demonstrates the independence of the barrister to the barrister, to the client and to the solicitor. No firm can imply 'This is "our" barrister.' Other consultant professionals have their own rooms and so it should be.

3. **Cancellation Fees**

Fees should be negotiated between the solicitor and the barrister at the time of briefing. No cancellation fee is payable unless it is agreed to by the solicitor.

But barristers sell time. If a block of time is required which may not be used then a cancellation fee can be and often is negotiated. In my experience such fees are at a compromise level and significantly less than would have been earned if the time was used. Such fees remove any incentive to "keep the case going" which is clearly in the public interest.

But sometimes such fees turn out to be unfair in practice even if in accordance with a prior arrangement. We must always be sensitive and flexible about fees. Solicitors have to deal with the lay client and we must assist where there are problems.

All fees must be negotiable and must be appropriate to the needs of the client for advice and appearance.

A formula for every case is very hard to achieve.

4. **Appearances with solicitors**

Barristers appear with barristers if two counsel are required. We do not appear with solicitors for all the independence reasons outlined.

We have always supported the right of solicitors to audience, a fundamental departure from the English practice and we continue to support it. They can appear with other solicitors if they wish. We do not dispute that solicitors have important legal skills and that some have advocacy skills. But we are on about independence. With respect to them, the in-house amalgam advocates in the states where they exist lack it.

We firmly believe that our rule is appropriate, in the public interest.

5. **Wigs and Gowns**

We robe to emphasise to the client, to ourselves and to the world that we are first and foremost officers of the court. Our duty to the client although of enormous importance is in the end secondary to that.

In the context of the cab-rank rule this is important. It also emphasises that the individual barrister is "being" a barrister, not an individual in court, that a job is being done, not something personal.

Robes also tell the world we *are* those independent creatures, barristers. That of course is why the complaint is made: The mega firm wants to blur the distinction.

Included in this editorial is a photo taken at my English admission in 1988, with (inter alia) the Attorney General for the United Kingdom, Sir Patrick Mayhew.

I was in London for discussions with the leaders of the Bar of England and Wales about the Green Paper. I was much fortified by the vehemence with which they and he were prepared to fight for the independence of the barrister. All Australian barristers must be equally prepared. ❑

Adrian Solomons - The Bar's Good Friend

Sir Adrian was born on 9/06/1922. He was, for 30 years, senior partner in the firm Everingham Solomons & Co. of Tamworth. He was the litigation partner of that busy regional firm and used the bar extensively.

We knew him as "Sol". He died on 20/12/1992. I first met him whilst he was studying law with the Sydney University Regiment Group after World War II. He had served in the 2nd AIF with distinction for 6 years, enlisting on turning 18 in 1940. He graduated BA.LLB in record time and joined Col Everingham's firm in 1949.

He was a Country Party/National Party stalwart, serving as Federal President from 1974-1979. He was a member of the Legislative Council in NSW for more than 20 years.

Although he briefed the bar extensively, his loyalty to it, its independence, and to the Rule of Law were demonstrated most obviously as a politician. When the Askin Government sought to abolish juries and the right to silence in criminal cases, it was his work in committees that stopped the rot.

When Frank Walker set about an attempt to fuse the profession, Solomons not only defended the Bar in committees and in the House, but also persuaded every single suburban and country solicitor to sign a petition pleading for the retention of the independent Bar. Although from a National it carried the Labor caucus.

But weeks before his death he was lobbying independents about civil juries committal proceedings and the like.

He was always available when needed.

His local community service was a byword. He was a music buff, a traveller, a reader. He was a loyal husband, a devoted father and a great friend. May he rest easy. ❑

John Coombs

Understanding and Using Citations to American Cases

Robert Angyal, a member of the District of Columbia Bar, provides an insight into the labyrinth of United States Authorities.

It used to be said that it was the job of learned counsel appearing before the High Court to cite decisions of the US Supreme Court, and that it was the job of the learned justices to distinguish them. Lately, however, the High Court seems to have been placing considerable weight on US decisions. See, for example, *Attorney-General (NSW v Quin* (1989-1990) 170 CLR 1 at 38 n.5.

But consider this footnote from the fifth edition of *Jacobs' Law of Trusts in Australia* (1986) supporting the proposition (relating to constructive trusts) that "[a] different view has been taken in the United States":

> *"People's Bank of Wilkesbarre v Columbia Collieries Co* (1915) 84 SE 914; *Drummond v Batson* (1924) 258 SW 616; *Olson v Cornwell* (1933) 25 P 2d 879; *Merrill on Notice* §1190 fn 63,65" (page 309, n.170).

The three cases cited are reported in three of the seven series of regional reports published by the West Publishing Company: respectively the South Eastern Reporter, the South Western Reporter and the Pacific Reporter. Each of those series reports decisions of appellate courts of a number of states in a region of the USA. For example, the Pacific Reporter covers decisions of these states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming.

The point is simple: one cannot tell from the citation which courts rendered the decisions reported[1]. That makes it difficult to evaluate their persuasiveness. Australian legal writings seem fairly frequently to omit this important information.

The purposes of this article are to explain briefly:

- The structure of US courts
- The implications of this structure for Australian lawyers
- Common citations to US cases.

1. The Structure of US Courts

1.1 State Courts

At first sight, the US presents a forbiddingly complicated picture. But the basic structure is fairly simple. Each of the 50 states is a separate jurisdiction. So too is the District of Columbia (Washington DC), the federal capital. As one would expect, there is a hierarchy of courts within each of these jurisdictions, with trial courts, an appellate court and sometimes an intermediate appellate court.

The reports of the state courts are outlined below in Section 3.1

1.2 Federal Courts

Superimposed on the 51 sets of state courts are the federal courts. These largely deal with questions of federal law (ie. arising under federal statutes or the US Constitution) although they also have jurisdiction where the parties are citizens of different states (in which case they apply state law). The reports of the federal courts are outlined in Section 3.2.

There are some specialist federal courts such as the Bankruptcy Courts and the Tax Court. Apart from these, there are three levels of federal courts:

The US District Courts, which are the trial courts. Each has jurisdiction in a district, a certain geographic area within a state. There are 94 US district courts. For example, the US District Court for the Southern District of New York covers, and sits in, Manhattan.

The US Courts of Appeals. There are 13 of these, each (except the Federal Circuit) taking appeals from the US District Courts within a geographic area called a circuit. For example, the US Court of Appeals for the Tenth Circuit takes appeals from US district courts in the states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. The map on page 7 shows the areas covered by the US Courts of Appeals.

The US Supreme Court sits at the pinnacle of the US judicial hierarchy. But it is a very different court from the Australian High Court. Most significantly for Australian lawyers, it is not a court of general jurisdiction. It has limited powers to review the decisions of the State courts. Its jurisdiction principally arises where the validity of a federal law has been questioned below, or where a State statute's validity has been questioned as being repugnant to the US Constitution. It always sits as a full court of nine justices, with oral argument severely limited (usually to one hour per case).

Like the High Court, its jurisdiction is largely discretionary; the equivalent to seeking special leave to appeal is seeking a writ of certiorari to review the decision below.

The limited jurisdiction of the US Supreme Court has given rise to results that may seem peculiar to antipodean eyes. For example, under Chief Justice Earl Warren, the Court in the 1960s greatly expanded the scope of the constitutional protections afforded by the US Constitution, particularly in the area of criminal law. Thus, for example, it held that every criminal defendant had a right to a lawyer: *Gideon v Wainwright*, 327 US 335 (1965). And in its famous *Miranda v Arizona* decision, 384 US 436 (1966), it held that a criminal suspect had to be informed of his or her rights to remain silent and to have a lawyer before being interrogated.

The State Supreme Courts, which interpret the states' constitutions, lagged behind for a time. Then, under the weight of conservative, Republican, appointees, the US Supreme Court became more conservative. By that time, some of the State Supreme Courts had caught up. As the US Supreme Court declined to extend constitutional protections or, in some cases, trimmed them back, State Supreme Courts, construing the often identical words of their state constitutions, were often able to find more extensive protections in them. As long as they merely construed their states' constitutions, no question of federal law arose, and thus no review of their decisions by the US Supreme Court was possible.

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1. The decisions, respectively, were rendered by the Supreme Court of Appeals of West Virginia, the Supreme Court of Arkansas, and the District Court of Appeals, First District, Division 1 of California (an intermediate appellate court).

2. The Implications of this Structure

Australian lawyers will immediately perceive some implications from the structure outlined above. First, there is the fact that the federal courts largely are confined to deciding questions of federal law. This means that unless one is interested in an area governed primarily by federal law (such as securities, copyrights, patents, trade practices or tax) or in constitutional questions, relevant decisions are more likely to be found in the state courts' reports. Second, that fact makes it all the more important to be able to assess the weight of such decisions. Finally, it obviously becomes important to cite such decisions in a way that enables the bench or the reader to know which court's decisions are being referred to.

3. The Structure and Citation of US Reports

3.1 The State Courts

Most states have an official series of reports for their appellate decisions. The conventional US rules of citation (set out in a citation guide published jointly by the law reviews of Columbia, Harvard, The University of Pennsylvania and Yale law schools[2], and referred to as "the blue book") require citation to these reports. The official reports are unlikely to be obtainable in Australia, but the West regional reporters (described below) are, and from the regional reporters one can pick up the official report reference. Because of this, it is better to cite both sets of reports. An example, citing to the Minnesota reports and the North Western Reporter, 2nd series, is:

Gardner v Conway, 234 Minn. 468,
48 N.W.2d 788 (1951)

which, one can tell from the reference to the Minnesota Reports, is a decision of the Minnesota Supreme Court.

More commonly used are the seven sets of West regional reports. The states that each covers are set out on page 7.

A proper citation to a California Supreme Court decision if one only refers to a regional reporter is:

Kinlaw v State of California, 814 P.2d 1308 (Cal.1991).

In this citation "P.2d" refers to the second series of the Pacific Reporter. One of the most critical pieces of information in this citation is "(Cal.)". This tells the reader it is a decision of the California Supreme Court, and thus probably likely to carry more weight than a decision of the Montana (pop. 799,065) or the Hawaii (pop. 1,108,229) Supreme Courts, which also appear in the Pacific Reporter.

It should be realised that these are huge sets of reports. As the list on page 7 shows, both the Pacific Reporter 2d. and the South Western Reporter 2d. currently contain about 800 volumes.

3.2 Federal Court Reports

The US Supreme Court

The official reports are the US reports, starting in 1789 and now running to about 483 volumes. There are two commercial series devoted to the US Supreme Court, West's Supreme Court Reporter and The Lawyer's Co-operative Publishing Co.'s Supreme Court Reports, Lawyer's Edition. The Bar Association's library holds the latter reports, both the first series (vols. 1-100, 1754-1955) and the second series (1956 to date). A citation to all three reports would read:

Gideon v Wainwright, 372 US 335;
83 Sup.Ct 792; 9 L.Ed.2d 799 (1963).

Note that because all three reports only report decisions of the US Supreme Court, there is no need to identify the court in a citation to them.

The US Courts of Appeals

Remember that there are 13 of these, each with its own circuit. Each is a separate court with its own character. Their many decisions are reported in the Federal Reporter (1st series), volumes 1-300 (1880-1924) (cited as "F.") and, since then, in the Federal Reporter, 2nd Series, vols. 1-about 942 (1924-1991) (cited as "F.2d"). To house just the Federal Reporter, 2nd series, to date takes about 51 metres of shelf space. A proper citation will identify which series is referred to and the court of appeals making the decision, for example:

General Motors Corp. v City of New York,
501 F.2d 639 (2d Cir. 1974).

Without the court being identified, it is impossible to evaluate the weight of the decision. A decision of the US Court of Appeals for the District of Columbia Circuit, whose caseload contains a large number of appeals from decisions of federal administrative agencies, is more likely to be persuasive on a question of administrative law than a decision of the Eighth Circuit, covering the relatively rural states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

The US District Courts

The decisions of the US district courts primarily appear in the Federal Supplement (1932 to date, vols.1-about 769) (cited as "F.Supp.").

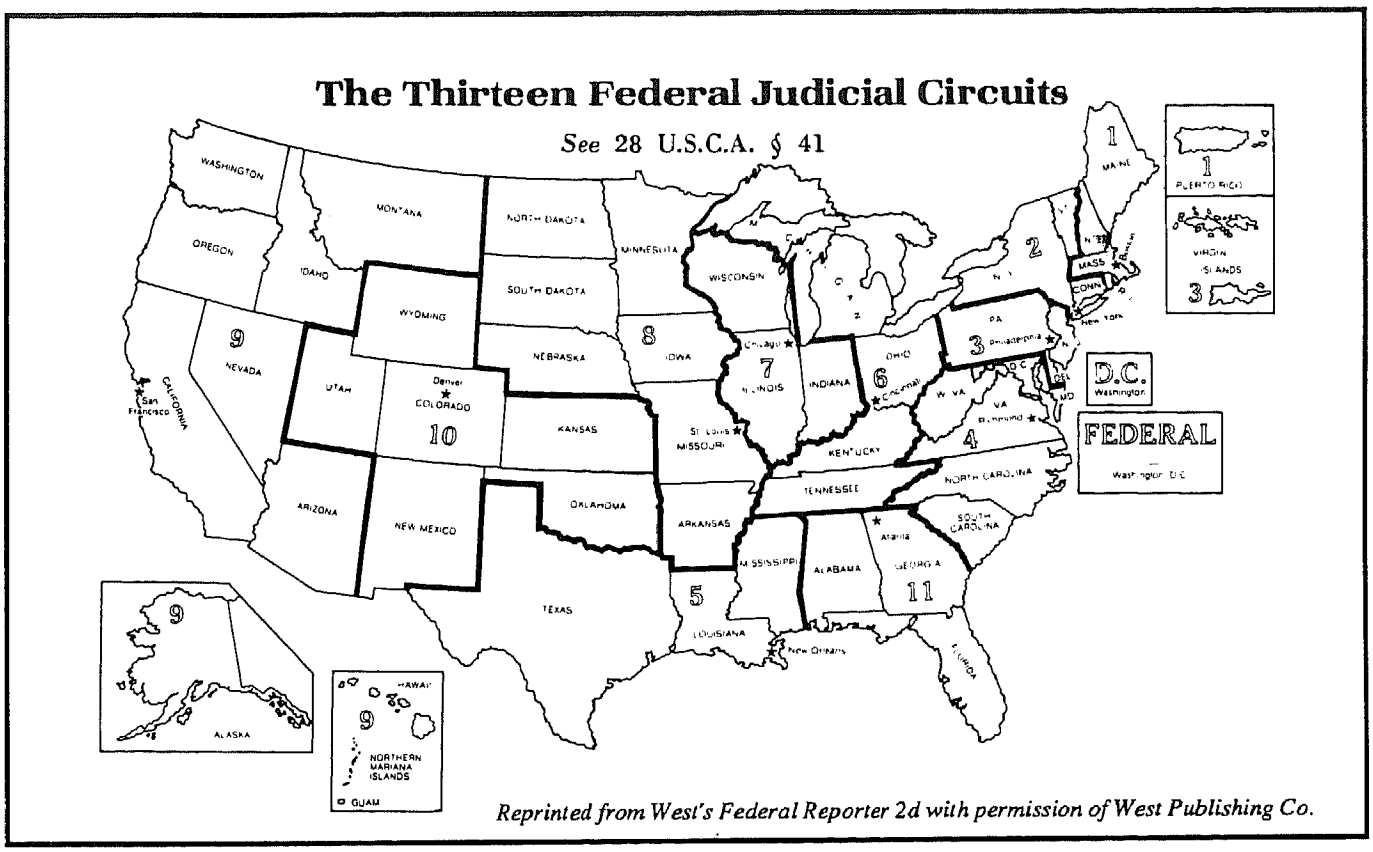
Again, it is important to identify the court that made the decision. A decision of the US District Court for the Southern District of New York, which sits in Manhattan, on a question of trademark infringement (eg, *Coach Leatherware Company, Inc. v Anntaylor, Inc.*, 751 F.Supp. 1104 (S.D.N.Y. 1991)), or on securities law, is more likely to be persuasive than decisions of the US District Court for the Western District of Arkansas on the same topics.

4. Access to the US law reports

The University of Sydney Law School's library has an excellent collection of US materials, including:

- The United States Reports
- The Supreme Court Reporter
- US Law Week (a weekly reporter on the US Supreme Court)
- The Federal Reporter, first and second series
- The Federal Supplement
- The United States Code Annotated (an up-to-date compilation of federal statutes, with annotations)
- All seven regional reporters, both the first and second series
- The two principal US legal encyclopaedias, Corpus Juris Secundum and American Jurisprudence 2d (each more than 100 volumes). ❑

2. *A Uniform System of Citation* (14th ed. 1986).



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THE REGIONAL REPORTERS

Atlantic Reporter

Atlantic Reporter (1st series): vols 1-200
(1885-1938) (cite as "A.").
Atlantic Reporter 2d: vols 1-583
(1938-1991) (cite as "A.2d").
States: Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont and District of Columbia Municipal Ct. of App.

North Eastern Reporter

North Eastern Reporter (1st Series): vols 1-200
(1885-1936) (cite as "N.E.").
North Eastern Reporter 2d: vols 1-561
(1936-1991) (cite as "N.E.2d").
States: Illinois, Indiana, Massachusetts, New York and Ohio.

North Western Reporter

North Western Reporter (1st Series): vols 1-300
(1879-1941) (cite as "N.W.").
North Western Reporter 2d: vols 1-461
(1941-1991) (cite as N.W.2d").
States: Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin.

Pacific Reporter

Pacific Reporter (1st Series): vols 1-300
(1883-1931) (cite as "P").
Pacific Reporter 2d: vols 1-802
(1931-1991) (cite as "P.2d").
States: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming.

Southern Reporter

Souther Reporter (1st Series): vols 1-200
(1887-1941) (cite as "So.").
Southern Reporter 2d: vols 1-568
(1941-1991) (cite as "So.2d").
States: Alabama, Florida, Louisiana and Mississippi.

South Eastern Reporter

South Eastern Reporter (1st Series): vols 1-200
(1887-1939) (cite as "S.E.").
South Eastern Reporter 2d: vols 1-396
(1939-1991) (cite as "S.E.2d").
States: Georgia, North Carolina, South Carolina, Virginia and West Virginia.

South Western Reporter

South Western Reporter (1st Series): vols 1-300
(1886-1928) (cite as "S.W").
South Western Reporter 2d: vols 1-797
(1928-1991) (cite as "S.W.2d").
States: Arkansas, Kentucky, Missouri, Tennessee and Texas.

Letters to the Editor

Billing System

The article by Paul Blacket in the Summer 1991 edition of *Bar News* discusses a computerised billing which was thought to be the only one tailored for the needs of barristers. There is now an even greater choice with at least four other such barrister accounting packages mentioned in the 1992 edition of the *Australasian Legal Software Directory*.

In fact, a wealth of computerised tools from which barristers can benefit have recently emerged. For example, a program called *Ready for Trial*! was developed for no other purpose than transcript analysis. Others such as *Personal Librarian*, can be used not only for transcript but also for a barrister's own specialised database of research, opinions and precedents.

Complete books including *FindLaw*, the electronic version of the popular *Finding the Law* are now available to search on computer. The ability to locate words irrespective of whether they have been properly indexed, make "ScreenBooks" considerably more useful than the paper version.

With such options, some types of computers are really starting to live up to the promise of giving users at the Bar an edge.

Simon Lewis
Legal Management Consultancy Services Pty Ltd.

Re: *Bar News*, Summer 1991 Edition

In the film *My Mother's Castle*, currently showing in town, the narrator has a line to the effect, translated: "Such is the life of man, moments of joy obliterated by unforgettable sorrow".

I know exactly what he means.

When I received my latest *Bar News* it fell open, naturally enough, at your photographic centre spread "Bench and Bar Dinner 1991". My spirits soared. There was I, top-centre, in fair focus, bow tie reasonably straight, thoughtfully positioned between your distinguished deputy editor ("the musical QC") and Delaney. Had fruitless years of scanning the columns of Diana Fisher et al. ended? Had I cracked it? But no. The viper of sorrow struck back in the very instant as I read your subscribed misappellation - "Tony Young".

As the remainder of December 1991 passed my identity crisis grew. Members of the profession, spying me in the curial corridors and lifts, would greet me with "Hi Tony" and then snigger and walk away.

Can even fulsome apology compensate? Careers can wobble and deflect under blows such as this.

Sack your proofreader!

Malcolm Young
5th floor Selborne Chambers

P.S. I wonder how the real Tony Young feels?

Dear Editor,

The Hon Mr Justice Miles asks why a witness taking the oath is required to hold the Bible in his right hand (*Bar News*, Summer).

My octogenarian memory is a somewhat unreliable instrument but I recall being told that in mediaeval times a convicted felon was debarred from taking the oath. On his conviction, the palm of his left hand was branded with the letter F. When about to take the oath, the potential witness was obliged to hold up his open left hand to disclose a possible brand. Only his right hand then became available to hold the Bible. Q.E.D.

David Selby
Warrawee

COMPULSORY MEDIATION?

The ambit of this article by Mary Walker is to provide a summary of the Chief Justice's Policy and Planning Sub-committee's Report on Court Annexed Mediation ("the Report") issued on 13 December 1991 and its likely effect on the Bar.

A controversial element of this report is that in the final stage of the recommended pilot project it is envisaged that mediation will be compulsory in several divisions of the Supreme Court.

MEDIATION

Prior to dealing with the Report it is useful to review the definition of mediation.

Mediation is not arbitration. Arbitrators adjudicate and impose a decision award or judgment on the parties to a dispute.[1] Mediation is not a pre-trial conference, issues and listing conference, a directions hearing, a Part 72 referral or any hybrid of these processes.

Mediation is one form of alternative dispute resolution ("ADR"). In the Supreme Court two forms of ADR are presently implemented, arbitration and referrals pursuant to Part 72 of the *Supreme Court Rules*, 1970 (there is, however, argument that arbitration is the second tier of litigation and not truly a form of ADR and expert appraisal is merely a part of the adjudication process).

Mediation is the process of the participants. Mediation is a voluntary process in which a third party, independent of the participants, acts as a catalyst to assist the parties to identify mutually compatible interests and reach settlement in a confidential forum.[2] Mediation is assisted negotiation by an impartial facilitator.[3] The mediator does not impose a solution.

The mediator's function is to establish a forum for negotiation and to specifically assist the parties *inter alia*:

1. to set an agreed agenda for the mediation by helping the parties to isolate the issues in dispute,
2. to help the parties identify the information required by each party to formulate a view of their own and the disputant's case,
3. to encourage lateral thinking to assist the parties to generate viable options for settlement,
4. to assist the parties to investigate options for settlement including options not necessarily part of the court process,
5. to create a positive tone and encourage the parties to arrive at a solution,
6. to establish "ground rules" of common courtesy and to guide the discussions and negotiations in a positive manner,
7. to help the parties by providing an overview and to recommend a course of conduct including disclosure of information, reality testing or obtaining independent expert advice, and
8. to remain impartial, neutral and to disclose any prior dealings or relationship with any participant to the mediation.

The mediator controls the process yet the parties control the exchange of information, the style of negotiation and outcome.

The skills required to represent one's client at a mediation are conciliatory rather than adversarial. This does not mean that the skills of an advocate are not utilised or that counsel relinquishes control of the process. The utilisation of negotiation skills is emphasised. Unlike other pre-trial procedures, mediation allows the lay client to be present and to participate in the forum.

THE PROPOSAL

In November 1990 a sub-committee was formed by the Chief Justice to inquire into the viability of implementing court annexed mediation. The sub-committee consisted of Clarke JA, Wood and Bryson JJ assisted by Principal Registrar Soden.

The essence of the recommendations in the Report is to establish a pilot project to integrate mediation into the court system, in particular, into the Common Law and Equity Divisions of the Supreme Court.

RECOMMENDATIONS

The principal recommendations of the sub-committee are:

1. that the use of court-annexed ADR mechanisms within the Supreme Court be expanded,
2. that the pilot project be conducted over a three year period,
3. that the pilot project have twin objectives;
   (i) to use ADR to reduce existing backlogs, and
   (ii) to establish long term ADR structures annexed to the Supreme Court, with emphasis on mediation,
4. that an ADR Steering Committee be established by the Chief Justice:
   (i) to oversee the implementation of the pilot project and to consider and make recommendations to the Chief Justice upon matters of policy such as accreditation of mediators, funding, training and the like, and
   (ii) to liaise with other courts within Australia operating court-annexed ADR schemes with a view to developing common policy as to matters of training and accreditation of mediators and to establish structures for the exchange of information and the mutual monitoring of programmes,
5. that arbitration continue to be conducted as a measure to reduce the case backlog and that it be considered part of the pilot project, and

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1. J Cooley, "Arbitration vs Mediation - Explaining the Differences", 69 *Judicature* 263 (1986), p. 264 *also* the Report, p.6.
2. Australian Senate Standing Committee on Legal and Constitutional Affairs, *Discussion Paper - No. 4: Methods of Dispute Resolution*, p.12 submission from Australian Commercial Disputes Centre p.6, (Evidence, p.2000); *also* "Guidelines for Solicitors Who Act as Mediators", *Law Society Journal*, July 1988.
3. A Floyer Acland, *A Sudden Outbreak of Common Sense*, Hutchinson Business Books, London, 1990, p. 18.

6. it is proposed that a legislative framework be enacted to enable the Supreme Court to develop ADR structures and procedures. This legislation would entail provisions relating to the jurisdiction of the Court to order parties to attempt ADR, confidentiality of mediation sessions and the protection of mediators from liability.

THE STAGES OF IMPLEMENTATION

Three stages of the pilot project will be implemented each with an expected duration of one year. It is intended that the pilot scheme will be evaluated on an incremental basis which may result in a change in the pilot project's proposed time frame. It is estimated that the pilot scheme will commence in mid-1992, however this may be delayed if the infrastructure is not established prior to that time.

PHASE I

In phase I, cases will be allocated to mediation or arbitration as and when they are reviewed at callover and directions hearings in the ordinary course. Judges, registrars and deputy registrars will make determinations in regard to the appropriateness of ordering parties to attempt arbitration or mediation.

PHASE II

In phase II, subject to considerations of funding and demonstrated need, two referral officers, one attached to the registry of the Common Law Division and one attached to the registry of the Equity Division, will be appointed. It is proposed that these officers will vet files approximately one month after the defence has been filed in a matter with the view to making recommendations to the Supreme Court about the appropriateness of ordering parties to attempt available ADR procedures. If a case is deemed suitable by these referral officers the parties will be required to attend a callover for the court to consider the recommendations and to make appropriate orders.

Case management procedures will be expanded under the pilot scheme. It is not accurate to presume that the procedures implemented in the Commercial Division of the Supreme Court will be adopted. The procedures enunciated in *Practice Note 68 of the Supreme Court Rules* will be expanded and implemented with a view to assisting the Court's referral officers to identify the most suitable cases for referral to mediation or other ADR mechanisms.

In phases I and II the court may order mediation in cases involving personal injury, possession of mortgaged property and simple contractual disputes. In this segment of the scheme where mediation is ordered by the Court, a case will not proceed to hearing unless the parties satisfy the Court that they attempted, with reasonable diligence, to have the dispute mediated.

PHASE III

In phase III in some cases the parties will need to provide the Court with certification that pre-filing mediation has been attempted prior to the commencement of proceedings. The cases which will require certification are: motor vehicle personal injury cases, industrial accident personal injury cases and occupiers' liability cases.

The defendant must accede to the plaintiff's request for a pre-filing mediation within three months following service of a notice of demand upon the defendant by the plaintiff, in default of which the plaintiff will be able to commence proceedings without certification. The parties will select a suitable mediator and remunerate them. The Court reserves the right to order the parties to arbitration for appropriate personal injuries cases although pre-filing mediation may have been unsuccessful.

The sub-committee also recommends cases concerning the possession of mortgaged property, particularly those involving actions by banks against individuals, should be referred to compulsory mediation at an early stage in the litigation process. Similarly, simple common law breach of contract cases should be referred.[4]

Mediation will be required in most equity cases including: family and neighbour cases, vendor/purchaser cases, partnership disputes and testator's family provisions cases.

SAFEGUARDS

Safeguards have been recommended in respect to the selection of matters for referral to ADR. It is submitted in the Report that, as a matter of policy, cases should not be submitted to ADR where:

(i) one or more of the parties is a litigant in person,
(ii) there is a history of violence or personal animosity between the parties,
(iii) the applicable legal principles are not clear and the law would benefit from a judicial exposition of those principles, or
(iv) the case involves an important issue of public concern which should be ventilated in the public arena.

Procedural safeguards have also been recommended which include the following:

(i) participation is regarded as only "presumptively mandatory". This means that an order to attempt ADR will not be made upon the showing of good cause by *either* party,
(ii) the parties may object to the appointment of a particular dispute resolver or alternatively, the parties may agree upon a suitably qualified dispute resolver, who will thereafter be formally appointed by the Supreme Court,
(iii) it should be made clear to the parties in the form of the order that they are not required to settle but simply to participate in the session in a constructive way, and
(iv) a case submitted (by court order or otherwise) to ADR should not lose its priority in the list.

Although mediation is compulsory there are instances where applications may be made to negate the referral in

4. *Report of the Chief Justice's Policy and Planning Sub-Committee on Court Annexed Mediation*, November 1991, pp. 84 and 85.

circumstances where the parties view the referral as unsuitable and which would fall within the safeguards noted above.

PROBLEMS

1. More Process, More Cost, No Benefit?

Is this another obstacle parties must overcome prior to obtaining a hearing date? Will it be perceived as an impediment or an inconvenience? The public perception may be that if the process is compulsory it is another cost to be incurred prior to the resolution of the matter. Will it be perceived as a disincentive?

Is this a medium which may be abused? Could it be used as a fact finding mechanism rather than for *bona fide* settlement negotiations? The caveat here is that the litigants and lawyers involved will lose their credibility amongst other litigants and lawyers if they abuse the system. A short term gain, even if possible, would be obviated by the refusal of litigants and lawyers to participate in future mediations with those who refuse to act *bona fide*. Further safeguards or mechanisms for review are required to deal with this problem if the scheme remains based upon compulsory referral. Should mediators, who have traditionally been neutral, become the instrument of conscience if a lack of *bona fides* becomes apparent in a mediation? What occurs if the mediator discovers *mala fides* in caucus? Is the confidentiality sanction of the mediation process paramount?

What will be the cost of this process? It is recommended that the remuneration of the mediator for court ordered mediation should be fixed by regulation, collected by the court and there should be provision for the waiver of fees in appropriate cases. Further, it is recommended that each party to the mediation be required to contribute a fee of $200 where the parties are ordered to attend mediation by the court. If the parties voluntarily select their own mediator the sub-committee recommends that they should bear the commercial cost of the process. It is envisaged that the filing fees of initiating process in the Supreme Court will be increased by $20 which will be earmarked for funding this pilot project.

Is there any benefit in the mediation process? Obviously, if the matter settles there are cost benefits, process benefits and the satisfaction of participants. If the matter does not settle benefits to the process may ensue such as defining the issues in dispute, determining by agreement non-contentious issues and refining the approaches of the litigants to reduce hearing time and the costs to be incurred.

A caveat is, if the mediator becomes the "conscience" of the mediation process because it is compulsory, and limits are placed on the solutions available to the parties, the mediation process may become another settlement conference with no specific benefit to disputants. The latitude available in the traditional mediation process for creative design and solutions in a confidential forum is the essence of its success.

2. Confidentiality

Confidentiality in mediation is a vexed issue. The forum is confidential. Most mediation agreements ensure that the negotiations and documentation which are part of the mediation process remain confidential.

In practice several issues arise:

(i) the private/public forum distinction,
(ii) privileged communications,
(iii) communications in joint session, and
(iv) caucus communication. [5]

Mediation is a private forum, therefore the risk of adverse publicity is negated.[6] An additional inherent safeguard is the overriding concept of privileged negotiations as part of settlement negotiations.[7]

Communications in joint session involving confessions and admissions are likely to occur in mediation. Safeguards have been created and are currently being refined. Attempts at creating safeguards are as follows:

(i) mediation agreements, confidentiality agreements and third party acknowledgements (eg. when interpreters or support persons are in attendance),

(ii) legislation such as the *Courts (Mediation and Arbitration) (C'wth) Act*, 1991 and the Community Justice Legislation make provision for the inadmissibility of admissions or confidential information obtained solely in a mediation session, and

(iii) guidelines prepared by different bodies and institutions such as the Law Society of New South Wales. ("Guidelines for Solicitors Who Act as Mediators", *Law Society Journal, July 1988.*)

Confidentiality in mediation was investigated in *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 18 March, 1992 S.C. Comm. D.) by his Honour Mr Justice Rolfe who made the following finding - no party is entitled to seek to prove any statements or admissions made on a confidential and without prejudice basis at mediation in subsequent legal proceedings except by consent in accordance with the joint judgment of Dixon CJ, Webb, Kitto and Taylor JJ in *Field v Commissioner of Railways for NSW* (1957) 99 CLR 285. It was not considered

5. W O'Rourke, "Current Controversies and Future Directions", *The Centre for Conflict Resolution Mediation: Current Controversies and Future Directions*, p. 3.
6. *ibid.*
7. *ibid.*

by Rolfe J that Notices to Produce issued after the mediation were an attempt to circumvent the confidentiality and the without prejudice nature of the mediation.

> "They do not seek to prove directly or indirectly what was said at mediation. They seek to prove, by admissible evidence, a fact to which reference was made at Mediation not by reference to the statement but to the factual material which sourced the statement. A finding to the contrary would mean that irrespective of relevance to issues the statement at Mediation made the factual material upon which it was based immune from subsequent consideration by the Court ... Once all this is understood the donors and the recipients of information can proceed without fear that their positions will be prejudiced."[8]

Traditionally, in caucus discussions, the mediator is bound by the mediation agreement not to disclose matters divulged in this type of private session unless permission is granted by that party (the *Settlement Week 1991 Mediation Agreement*, clause 18 however reversed this presumption; the *Settlement Week 1992 Mediation Agreement* has reverted to the traditional view, now clause 17).

Confidentiality in the mediation forum is yet to be adequately investigated and the guidelines refined. It is not the ambit of this paper to investigate this issue but merely to note that it is crucial to the success of the mediation process as an alternative to the litigation system that it remains confidential.

3. Certification

In phase III the parties will be required to furnish the court with a certificate from a recognised mediator to the effect that they have "attempted mediation". What does this mean? Is it sufficient merely to attend without providing any input? Presumably not. Consider the following scenarios:

(i) if a defendant views its case as a sure success on the issue of liability and attends the mediation, is advised by its legal advisers not to disclose information to the plaintiff, uses the forum as a fishing expedition, does not participate in the negotiations and succeeds at the final hearing of the matter what are the cost implications? Would the mediator be obliged to provide the appropriate certification?

(ii) Alternatively, what if the defendant attended the mediation but the only participation by the defendant was to file an offer of compromise pursuant to Part 22 of the *Supreme Court Rules*. Would this be sufficient to obtain certification and obviate a costs order against the defendant at the end of the day?

These scenarios are contradictory to the philosophy of mediation where it is presumed that the parties attend voluntarily and participate in the structured and supervised negotiation process by *inter alia* defining the issues in dispute, canvassing options for settlement and realistically approaching a settlement of the dispute. Is it appropriate to order parties to mediate where there is a lesser or greater reluctance by the disputants to submit to mediation? Is there any likelihood of success when there is an inequality of bargaining power or inequality of need or want to participate in the forum? Some of these issues were canvassed by his Honour Mr Justice Rogers in *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 24 February, 1992 S C. Comm. D. at p. 5).

How subjective would the certification by a mediator be? It is stated in the report that "It is important that there be some requirement that the parties make a genuine or *bone fide* attempt to participate constructively in the session". It is further suggested in the report that the approach of the mediator should be to determine whether a party has demonstrated a lack of *bona fides*, rather than whether a party has made a *bona fide* attempt. Cases of lack of *bona fides* envisaged in the report are:

(a) attempts by a party to threaten or intimidate the other party,

(b) the refusal to participate in any discussions at all, or

(c) the making of outrageously unrealistic settlement offers.

MEDIATION FORUMS - THE FOCUS IN 1992

The initiatives by the Chief Justice's Sub-committee are not the only initiatives implemented in respect of ADR which may affect members of the Bar in 1992. Below is an attempt to provide an overview of initiatives in the area of mediation. This list is not exhaustive.

1. SETTLEMENT WEEK

The Law Society has recently obtained funding for Settlement Week 1992. This scheme will encompass matters in the Supreme Court, District Court and the Family Court. The courts will vet files which are suitable for mediation in the above jurisdictions. The parties may or may not accept the invitation to attempt mediation.

The following timetable has been adopted for actual mediations:

(i) for the Family Court, the period between 22 June 1992 and 30 October 1992,

(ii) for the Supreme Court and the District Court, the period between 12 October 1992 and 30 October 1992.

2. COURT INITIATIVES

The Supreme Court will participate again in the Settlement Week initiative. Letters of invitation for mediation in Settlement Week 1992 have been sent in respect of 3000 matters pending trial in the Supreme Court. The pilot project should also commence in 1992.

The District Court will participate in Settlement Week 1992 and has sent letters of invitation in respect to 3004 pending cases for involvement in the Settlement Week initiative. The District Court Rule Committee has amended the *District Court Rules* to include Part 24C which is to take effect from 1 July 1992. The purpose of the amendment is to establish a Motor Accidents List in the District Court. The substance of the amendment is that in all proceedings commenced within the meaning of Part 5 of the *Motor Accidents Act*, 1988 the plaintiff shall file a praecipe for trial within six months after the commencement of the action. The praecipe must be

8. *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 18 March, 1992 S.C. Comm. D.) per Rolfe J at p.12.

accompanied by a certificate that appropriate documents have been served on the defendant's insurer, which include *inter alia* the statement of particulars pursuant to Part 12 rule 4A of the *District Court Rules*, relevant documents and reports including a letter from the employer, if any, of the plaintiff immediately before the accident including wage records and income tax returns for a period of two financial years ending immediately prior to the date of the accident (including a statement noting any income tax returns lodged by the plaintiff since the accident or if self-employed, copies of any accountants' reports or other documents on which the plaintiff intends to rely).

A status conference will be scheduled by the court for directions approximately three months after the praecipe is filed. A timetable has been fixed for the exchange of further documentation prior to the status conference. If no praecipe for trial and certificate are filed within the prescribed six months after the commencement of the action, the matter will be struck out.

These amendments to the *District Court Rules* have been implemented to encourage early settlement. Many of these matters will be referred to mediation either in future court programmes or through centres such as The Australian Commercial Disputes Centre. This will be discussed in further detail below.

The Family Court will also participate in Settlement Week 1992. Letters of invitation to participate have been sent in 350 matters pending trial in the Family Court.

The Land and Environment Court and the Federal Court have implemented mediation programmes in which registrars act as mediators of disputes.

The Administrative Appeals Tribunal has also implemented a pilot programme for the mediation of matters concerning customs disputes, disputes regarding social security and veteran affairs. Four members from the Sydney registry will mediate disputes. At present 15 members of the Tribunal throughout Australia are trained mediators. A pilot project in Queensland and Victoria of 56 matters in 1991 showed a ninety-five percent success rate. This may be an atypical figure as there is a naturally high settlement rate in this jurisdiction due to the many conferences held and careful monitoring of disputes by the members.

3. PRIVATE MEDIATIONS

There are many private mediations being held outside the ambit of the courts by parties either prior to the commencement of litigation or as an alternative to litigation proceedings.

4. CENTRES

Centres such as the Australian Commercial Disputes Centre have initiated programmes such as the NSW Compulsory Third Party Personal Injuries Mediation Program with the co-operation of the Motor Accidents Authority of NSW. This is a private scheme which has the co-operation of the majority of the insurers under the *Motor Accidents Act*, 1988 and has been created to offer mediation for claims or prospective claims arising under the *Motor Accidents Act*.

The Community Justice Centres were the first to utilise mediation on a systematic basis. The Community Justice Centres work in conjunction with the Local Courts, particularly in city and suburban locations, the most recent centre being opened in Bankstown. The majority of the matters mediated through this scheme are family, defacto and neighbour cases.

5. GROUPS AND PROFESSIONAL BODIES

Groups such as LEADR (Lawyers Engaged in Alternative Dispute Resolution) provide access to a panel of experienced mediators for private mediations and may soon provide a facilitation service.

The Law Society, through its Dispute Resolution Committee, has been active since 1987 and has had a major impact upon the introduction of mediation as an ADR option in New South Wales. The Law Society initiated Settlement Week 1991 and has again obtained funding to carry on this initiative by organising and promoting Settlement Week 1992.

The Bar Association of NSW recently resolved to offer training courses to members on how to represent a party at a mediation and to provide training for those barristers who wish to become mediators.

CONCLUSION

It was stated in the Premier's Policy Statement, "New South Wales Facing the World" that the Government is fully supportive of the Chief Justice's proposal for enforceable court annexed mediation and will be introducing projects in each of the State's courts during the next financial year.

The Attorney-General and the Minister for Justice have recently approved the adoption of the recommendations in the Report.

Most barristers are likely to have cases which will be referred to mediation either through the court process or recommended by lay clients or instructing solicitors. It appears that mediation will be a parallel process to litigation in most jurisdictions in the foreseeable future. ❑

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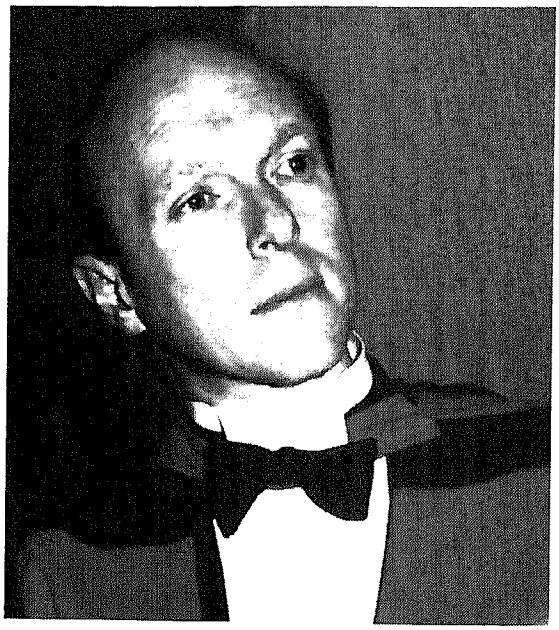
Friends, colleagues, members of the legal profession and members of the St Andrew's College family are invited to subscribe to a research fellowship to be established in memory of the late Dr Robert Trenton James Stein LLB(ANU), LLM(Dal), PhD(Syd,) AMusA(AMEB), 1950–1990.



Dr Robert Stein was born at Henty, and educated at Henty, Haberfield and Culcairn Primary Schools, and Henty High and Albury Grammar Schools. He graduated with an LLB(Hons) at the Australian National University and undertook post-graduate studies in Canada before reading for his PhD at Sydney University.

Robert was appointed temporary lecturer at Sydney University in 1976 and, after a period as Visiting Professor at Halifax, became Senior Lecturer and Postgraduate Sub-Dean in Law at Sydney. He was a leading authority on land registration systems, jointly authoring three books on land law and publishing many articles on law and history in journals in Australia and overseas. He was especially respected for his work on the Torrens system in Australia and overseas. In this area, he was acknowledged as an authority world-wide.

From his arrival at St Andrew's, Robert entered fully into the life of the College, offering his leadership and abilities in the service of the whole College family: as Librarian (1981–88); Woodhouse Fellow (1982–89); Dean of Students (1987–88); and Vice-Principal from 1988 until his death on June 25, 1990.

The contribution Robert made to the College "was notable for its dedication, participation in all activities, and in his genuine concern for the welfare and life of the College." He was 'Bobby' to the students — their friend and trusted confidant. It was 'Bobby' to whom they turned when they wanted to have a special talk. He was the strength they looked to in their times of need. Outside the College, Robert was loved by many and respected by all who knew him.

The memorial "Stein Research Fellowship" is to be a prestigious award available for legal research at doctoral or post-doctoral level within The University of Sydney. The Fellow is to reside in St Andrew's College, giving tutorial assistance to undergraduate students and in general contributing to the life of the College. The Fellow is to receive full board and lodging, currently valued at $10,000 pa, for a period of not more than three years.

Donations should be made to 'St Andrew's College Foundation Trust' and will be tax-deductible under section 78(1) (a) of the Income Tax Assessment Act.

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Master and Readers Dinner

Mr Justice Sully discourses on the vicissitudes of life at the Bar

Mr Chairman, Mr Attorney, Ladies and Gentlemen,

Thank you for the chance to join you this evening. It's nice to be back among old friends at the Bar, and, as far as the pupils are concerned, perhaps some new ones also.

Those of you who are masters will know, and those of you who are pupils will soon learn that into the life of every busy Barrister there must fall from time to time not, as the song suggests, "a little rain", but instructions which are to the following effect:

"Herewith our file. Will Counsel please advise and in due course appear."

My instructions this evening are in exactly that state of disarray. When Tobias QC telephoned with the invitation, I did not forget, I am pleased to think, my training as a barrister, and I asked the obvious question, namely, "What on earth am I going to talk to them about?". He snapped into his most silken mode: "Old chap", he said soothingly, "just talk to them about anything you like, but it's in order to introduce a little levity". Well, it has been three years since I last practised at the Bar, but when I did practise, that sort of brief was known colloquially as a "flick pass", and there was a well established etiquette for dealing with it: flick it back to whoever sent it: flick it on to some other poor unfortunate: but at all costs flick it away from yourself before what is now the sound of something ticking becomes the sound of something exploding. Alas, and as you can see for yourselves, when one becomes a Judge, it is not only in respect of one's income that the buck stops.

So, what's topical? Well, if I were a Junior, and even more so if I were a pupil, I would be more than just a little worried by the inquiry by the Trade Practices Commission which is about to break over the Bar, and I would be just as worried by the accompanying campaign against the Bar which is so obviously taking shape. So, I thought that I would say something about those matters. I must at once pause and follow with due reverence in the footsteps of the learned President of the Court of Appeal who is, after all, my second chief work supervisor, and say that the author's views are the author's own.

Let us being, then, with a reference back to the Monroe Doctrine. Not, of course, the version for which the late President James Monroe is famous, but the alternative version for which the much later Miss Marilyn Monroe is responsible.

An interviewer once asked Miss Monroe for her views about sex. He did not put the question in the form of the question that has made, if not quite a living national treasure at least a living professional anecdote out of at least one member of this Bar, but in the form: "What *do* you think about sex?" Miss Monroe was equal to the occasion, although she did not answer in the preferred forms for a good witness, which is to say that she did not reply: "yes" or "no", or even: "I don't know" or "I can't remember". She replied, simply: "I think it's here to stay".

I tell ;you that, because it seems to me that whenever judges and barristers start talking about the rule of law, or the Bench or the Bar, they always show, so worldly-wise and sophisticated as they think themselves to be, a truly childlike faith in that later version of the Monroe Doctrine. Certainly, there might have to be a change of nuance here, or some silly little appeasement about shaking hands, there; but, in the end, "I think it's here to stay".

Well, I'm not so sure. I say so because, in my view, there are present, this time around, two new factors which are very worrying.

The first is the resentment which has been generated by the undoubted fact that, broadly speaking, the Bar has seen off very successfully its critics of the last 12 or 15 years or so. Anyone who read the editorial which appeared in one of last week's *Herald*s under the heading: *"Lawyers: this time get it right*, will have remarked on the undisguised bile and venom with which that editorial expressed resentment at that apparent success of the Bar. It seems to me that that is a very dangerous sentiment to have swirling around the Bar in the coming days.

The second factor is, of course, the joining by, as it would seem, at least some of the mega-partners of at least some of the mega-firms, of the new campaign against the Bar, bearing in mind always that such a campaign against the Bar will necessarily develop, if successful, into a campaign against the independence of the Bench, and so against the very foundations of the rule of law itself.

The importance of this adherence of these mega-partners to the anti-Bar, or as I would prefer to call it, this anti-rule of law, campaign is that they have the capacity to give that campaign a veneer - they could never give it any more than that - of respectability and even of responsibility which the campaign does not have and must not be allowed to pass itself off as having in fact.

So, let us take, like good barristers, a closer measure of the enemy, starting with those golden oldies among the new campaigners, the politicians, academics and journalists.

The measure of the politicians can be taken from something said the other day by a leading Government spokesman. He rebuked another Member by saying of him: "he prefers to live in the world of outmoded symbols rather than in the real world", the real world, mark you, "of triple-A ratings and the economy".

The kindest thing that can be said about that level of thinking is that it is the ultimate in cynicism, regard being had to Oscar Wilde's definition of a cynic as somebody who knows the price of everything and the value of nothing.

The measure of the academic members of the new campaign - and there would be no show without this particular Punch - is best taken in a programme note in which the English playwright, Robert Bolt, describes as follows a character in one of his plays:

"A studious unhappy face lit by the fire of banked down appetite. He is an academic, hounded by self doubt to be in the world of affairs and longing to be rescued from himself."

Quite so.

The measure of the journalists and so-called "media personalities" can be taken by a paradox. They call themselves the Fourth Estate, and then have the nerve to criticise us for

being, supposedly, attached to legal fictions. The notion of their being a Fourth Estate is not only ridiculous in itself, but involves at least as great an appeal to legal fiction as could ever be laid at the doors of John Doe and Richard Roe.

The measure of the new campaigners, the mega-partners, can be taken in one simple word: greed. Naturally they would never put it so bluntly. They prefer to call it "the dynamics of microeconomic reform"; "economies of scale"; or, if the mask slips just a little, "client billable hours". The fact remains, to paraphrase Gertrude Stein, that "greed is greed is greed". It is true that a couple of years ago greed actually won the Academy Award for *Wall Street*, but anyone with eyes to see now knows that Gordon Gekko was wrong. Greed is not good; in the end greed does not work; but in the meantime greed can do an awful lot of damage to an awful lot of people and institutions.

That, then, is the enemy. What should be the Bar's response?

It seems to me that the answer to that question depends upon what exactly the Bar wants to achieve. If the Bar will be content, once again, merely to win the battle, then press releases and PR and rallies and meetings might once again do the trick. But if the Bar is willing, this time around, to do something better than that, and to make for once a serious effort not only to hold the line, but actually to turn around positively the tide of opinion, then it will be necessary for the Bar to re-think carefully both the theory and the practice of some basic principles.

Judges and barristers are very good at talking about the rule of law. The phrases trip easily off the tongue, and they sound good. Thus we talk about a body of independent and principled judicial decision; or about the searching out of the truth in adversarial proceedings conducted by fearless and independent barristers. Unfortunately, most of us stop at that point, without acknowledging and thinking through the undoubted fact that there lies behind that notion of the rule of law a series of interlocking assumptions, a breakdown in any one of which will necessarily entail the breakdown of the rule itself.

The first such assumption is that most people are, at least for most of the time, decent and responsible people who will choose to obey the law. It is assumed, secondly, that such people will so choose to obey the law, not from an understanding of or a liking for the law, but rather because, at the end of the day, they are prepared to trust and respect the law, realising whether by reason or only by instinct, that the law is the cement that holds together everything else in any civilised society. It is assumed, thirdly, that they will so trust and respect the law because they are prepared, at the end of the day, to trust and respect, particularly, the Courts which administer justice according to the law, and the Bar which provides the principal professional support to the Courts. Fourthly, and finally, it is assumed that that trust and respect will be forthcoming to, relevantly, the Bar, because of the existence in every true barrister of certain essential characteristics.

What are those essential characteristics? There are, I suggest, three of them.

The first is integrity. Integrity does not mean what you can get away with. Integrity does not mean what is included between the covers of the Bar Council's black book of rules and rulings. Integrity for a real barrister means, simply, the behaviour of a lady or a gentleman. In this context, a lady or a gentleman is not a person who speaks with an exaggerated accent and who knows, so to speak, how to eat jelly with a fork. A lady or gentleman is a person who applies in a patient and disciplined way to the whole of life, the Golden Rule: not Lord Wensleydale's version, but the other version that speaks about treating others as we would have them treat us.

The second essential characteristic is courtesy. By that I do not mean extravagant protocol or manners. I mean what William of Wyreham meant when he said all those hundreds of years ago: "Manners maketh man". He was, of course, then safely beyond the reach of the anti-discrimination legislation, but these days he would be, no doubt, happy to comply with that legislation by adding: "and woman". It has always seemed to me that, at every point of contact in the normal course of a barrister's work: with the instructing solicitor and the client: with the witnesses, the professional opponent, and with the Court itself, simple good manners will get a simple good result, or at the very least, will make a significant contribution to the obtaining of such a result.

The third, and final, of those essential characteristics is what I would call a sense of vocation. By this I do not mean some exaggerated pietistic pose. I mean rather, and to begin with, a sense of privilege. For it is, in truth, an immense privilege to be a barrister. A barrister - I mean, of course, a real barrister - does not practise a trade or conduct a business; nor does he merely practise a profession. A real barrister answers a vocation and thereby follows in a very real and fundamental sense, a calling. Not any one of us has some claim of right to that calling. It is a gift of Divine Providence, and it might with all justice have been given as well to somebody else as to you or to me. Anybody who has a grasp of that reality of privilege will naturally have a grasp of the necessary co-relative, which is responsibility and duty. And it is in truth a tremendous responsibility and a tremendous duty that the barrister carries. Every time a barrister goes to Court, the good fortune, the good name, and sometimes even the very liberty of the client go with him. So do his own good name and the good name of his calling.

When I speak of a sense of vocation, I have in mind a properly formed interior disposition which holds in what I would call a prudent moral balance that sense of privilege and that sense of responsibility and duty of which I have been speaking.

A barrister who has these essential characteristics will not need any Bar Council book of rules and rulings. He will know instinctively, and, due allowance made for human failty, will do as instinctively the honest and upright thing according to the given circumstances.

I know that all of that must sound a bid ponderous; but I say it all to you because I love the Bar with a passion. I practised at the Bar for twenty seven and a half years, and I can tell you truly that I never once regretted that choice. Furthermore, I not only love the Bar, but I believe in the Bar and its special place in the upholding of the rule of law in which, also, I believe with unwavering conviction. I do not want to live in a world where there are, so to speak, 2 motor cars in every garage and every imaginable gadget in every kitchen, but where we are all a race

of slaves in those things that really matter: that is to say, in the things that touch the heart, move the mind and lift the spirit: and I believe as a matter of abiding conviction that, in the end, it is the rule of law as I have earlier spoken of it, and that rule of law alone, that can protect us against such a prospect.

I, and all who love the Bar as I do, will hope that this time around the Bar will try to do more, much more, than merely hold the line one more time. If the Bar will but reassert those essential characteristics in principle, and, much more importantly, rejuvenate them in patient and consistent practice, then, I believe, the tide can indeed be turned positively around.

For those decent and responsible ordinary people of whom I earlier spoke are not stupid. They are the people who make up our juries; and anyone with any jury experience at all will know that, as I say, they are not stupid. They do know a good thing when they see it; and, much more importantly, they know when they are being short-changed in something that they have a right to expect. A return, consciously and consistently, by the Bar to those essential characteristics of which I have been speaking, will not be lost on those people; and will draw back to the Bar that trust and respect and that broad community support which, also, the Bar has allowed to hemorrhage away so badly in recent times. That broad-based trust, respect and support alone will give the Bar the protection it needs against those who would destroy it; and so, by necessary extension, will protect also the true independence of the Bench, and so, by necessary further extension, the very rule of law itself.

I began with an anecdote. May I conclude with a very quick game of Not-So-Trivial-Pursuit? The rules of the game are simple. I will give you two very short quotations. You might care to guess at the identify of the speaker: it is the same speaker in each case.

The first quotation is:

"The lawyer doesn't consider the practical repercussions of the application of the law. He persists in seeing each case in itself. (The lawyer) cannot understand that in exceptional times new laws are valid"

And the second:

"Let the profession be purified. Let it be employed in public service. Just as there is a Public Prosecutor let there be only", -"only", mark you, - "Public Defenders".

The speaker is not, as it happens, one of our politicians having an attack of the populist vapours; nor one of those knights of the woeful countenance from the world of academe; not even one of those journalists or so-called "media personalities" who are always so sure that they have every answer to every problem if only we will let them stuff their social fantasies down our throats at our own cost. It is not even one of the mega-Gekkos.

The speaker is Hitler. He was expounding his vision of the German Bar in his version of a new world order.

Food for thought, isn't it?

I'll leave you to do some thinking. ❑

More Pitfalls for Plaintiffs Under The Workers' Compensation Act

We are all familiar with the provisions of ss. 151G and 151H of the *Workers' Compensation Act 1987*. Despite the recent amendments to those sections, it is still necessary for a plaintiff/employee to establish damages for non-economic loss in excess of $60,000 (now $67,800) for injuries received after 1 July 1987 before that plaintiff can succeed against his employer. He must establish that same amount or a loss of not less than 33% of the maximum amount payable under the "Table of Maims" set out in s.66 of the Act before that plaintiff is entitled to damages for economic loss.

We all know how hard it is to advise a plaintiff with any confidence that he is likely to exceed those thresholds when for injuries occurring after 1 July 1989 he must give up his rights under ss.66 and 67 of the Act for lump sum workers' compensation if he commences common law proceedings.

A recent decision of Mr Justice Allen in *Leonard v Graham Smith & Anor* (6 March 1992, unreported) has illustrated other obstacles for an employee/plaintiff to overcome.

The facts involved an employee of the Wyong Shire Council being injured when his leg was crushed by a front-end loader driven by a contractor. The injured employee brought common law proceedings under the *Motor Accidents Act 1988* against the contractor but not against his employer. The third party insurer of the front-end loader joined the employer as a cross-defendant and raised as part of its defence the provisions of s.15Z(2)(c). The effect of that sub-section is to allow a non-employer defendant to reduce the damages which it is obliged to pay to an employee/plaintiff by the amount which it would have been entitled to recover from the employer as a joint tortfeasor if the *Workers' Compensation Act* were not in force.

His Honour found that liability was to be apportioned as to 75% to the contractor and 25% to the employer. The effect of that apportionment was that after his Honour had assessed the plaintiff's damages under the *Motor Accidents Act* , the amount was reduced by 25% in order to implement the 151Z(2)(c) defence.

The cross claim brought by the third party insurer against the employer failed despite the apportionment of 25% because the damages awarded were not sufficiently high to come within the thresholds provided by the *Workers' Compensation Act* . This followed as a result of s.151Z(2)(d). A verdict was entered for the cross defendant.

The final position of the plaintiff/employee was that as well as having had 25% of his verdict deducted, he will be obliged to repay to the worker's compensation insurer from the balance, those moneys paid to or on his behalf under the *Workers' Compensation Act* because of the effects of s.151Z(1)(b). This follows because no liability was found against the employer on the cross-claim. ❑

C R R Hoeben

Eulogy By the Hon Neville Wran AC QC at the Memorial Service for The Late Tony Bellanto QC - Sydney

We have all heard the saying "when they made him they threw away the mould". That observation was never more pertinent than in the case of our late lamented friend and colleague, Tony Bellanto. He was truly a unique person - an unforgettable character.

I remember in the late 1950s when we were relatively young, Wentworth Chambers was built to provide accommodation exclusively for barristers. Naturally there was a lot of competition amongst the barristers to get onto a floor which had leading QCs and top flight law clerks. When the dust settled, the fourth floor remained for those who had missed out on the better floors.

The barristers who took chambers on the fourth floor were, by and large, the odds and ends of the Bar - those whose only thing in common (apart from being barristers) was that there was no place or welcome for them on any other floor in the building.

Tony Bellanto was one of the odds and ends, and I was too. We were in good company however. Lionel Murphy, later Federal Attorney General and a High Court Justice; Jack Sweeney who became a Justice of the Federal Court; Bill Fisher, Chairman of the Industrial Commission of NSW; and Frank McGrath, Chairman of the Workers' Compensation Commission, and a number of others who distinguished themselves on the bench were occupants of the fourth floor.

In other words, many of the rejects went on to bigger and better things. Tony Bellanto, who could have been a judge ten times over, went on to dominate the criminal bar of New South Wales and to command a practice in the field of criminal law unmatched by any of his peers.

I think his temperament probably precluded him from accepting office on the bench. Tony, as we all know, was a great mixture of aggression and compassion. He revelled in the court dramas in which, so often, he was a principal actor and he loved the conflict through which, so often, he obtained justice for his clients.

He was a very passionate person - passionate in his beliefs; passionate in his commitment to win; passionate in pursuit of justice for his clients. The trials in which Tony Bellanto appeared for the accused were emotionally-charged trials. Tears were common: tears when he won, tears when he lost. He was always a fervent advocate of an accused's entitlement to the presumption of innocence. In recent times, I think he would have been appalled by the way in which the value of that presumption has been savagely diminished by means of trial by media and the failure, all too often, of the courts to bring the media to account.

Tony Bellanto was marvellous with juries. He spoke the language of the common man and he spoke it with conviction and sincerity which, more often than not, persuaded juries to give his clients the benefit of the doubt.

He was an extremely clever barrister and a complete criminal lawyer. He was a dramatic actor whose grasp of the law was sure and firm - an actor whose script was always well prepared.

Tony's advice to his son that genius is 1% inspiration and 99% perspiration was the principle that guided him. He started work early in the morning and worked until late at night making sure he had a meticulous grip on the facts and a thorough understanding of the legal background applicable to his case. His clients got 110% value because he put 110% of himself into each and every case in which he appeared.

I have said he was aggressive and passionate, yet he was not arrogant. I must say he was a master of flattery and even when he was one of the most senior Queen's Counsel in New South Wales, he would always, on being introduced to a minor bureaucrat or official, address that person as "Sir", and more than once, in the course of a trial if a constable's evidence was proceeding according to Tony's liking, the constable would be promoted to a sergeant in the course of Tony's cross-examination.

After less than a decade in Wentworth Chambers, his true worth was recognised by his peers and he was elected to the Bar Council. It was about the same time that he became a member of the AJC. He loved racing and it wasn't uncommon for Tony to finish a case on Wednesday before lunch and coincidentally find himself on Wednesday afternoon at the races at Canterbury. Indeed racing, apart from his family, was his relaxation. It is well known that he was generous on and off the racecourse and many an unfortunate has gone away either from the racecourse or the law courts with money in his pocket deposited there by this man of considerable compassion.

Today, of course, is evidence of his many friends from diverse walks of life. Indeed I think it's fair to say that Tony Bellanto was universally liked, mainly because he never tried to score points from his friends and acquaintances and was always willing to put himself out to help a lame dog over the stile.

He had one tilt at parliament when he ran as the endorsed Labor candidate for Fuller and although he didn't do so well in the silver-tail end at Hunters Hill, down around the Gladesville area he picked up a lot of votes, but on the occasion he stood, the swing wasn't there generally to carry even such a popular candidate to office against the sitting member.

So there we have it. He liked a bet; he liked an argument; he liked a drink; but most of all he loved his family, of whom he was immensely proud and of whom he spoke with affection to his colleagues at the Bar frequently.

Theirs, of course, is the greatest loss and our deep sympathy is with them. But at least they have the satisfaction of knowing that in his lifetime he was greatly admired by his professional colleagues, and genuinely loved by his friends. He will forever be remembered as a great barrister, a man of honour and to all who had the privilege to enjoy his company, a good friend. ❑

LEGAL ETHICS

During the past year the Bar Council continued to perform the functions delegated to it by the *Legal Profession Act 1987*. There are four Professional Conduct Committees (PCC) consisting of council members, delegated barristers and Council-appointed lay members who are allocated work by the Professional Affairs Director, Helen Barrett, at the direction of the Council.

Members should be aware that the Bar Council has a duty to assist complainants with the formulation of their complaint. After receipt of the complaint the member is asked to make comment and generally evidence is collected in written form. Individual members of PCCs are allocated the file and work in conjunction with the Professional Affairs Director in preparing reports to be considered by the PCC which then makes a recommendation to the Bar Council.

On receipt of the report the full council considers it. Broadly speaking there are three main methods of dealing with matters referred:

1. Dismissal by the Council if no question of professional misconduct or breach of professional standards is found to have been raised by the material before the PCC or the Council (s.134) or if the complaint is adjudged to be frivolous or vexatious (s.132).
2. If the PCC Council considers there has been a breach of professional standards which does not warrant referral to the Board but that there is conduct requiring a reprimand the barrister can be asked to consent to a reprimand (s.134). It is to be noted that this power only relates to breaches of professional standards and not questions of professional misconduct. If consent is not given the matter must be referred to the Board.
3. Referral of the conduct or breach complained of to the appropriate Tribunal or Board (s.134(i)(c) and s.134(i)(b)).

In recent months we have seen the handing down of several decisions by both the Tribunal and the Board; abstracts of these decisions appear below. In the case of Board matters publication of a member's name is prohibited by the act (s.145) as proceedings are held in camera.

A review of complaints received, fortunately, reveals that there are relatively few which rely on allegations of moral turpitude such as criminal, dishonest or fraudulent conduct. The bulk of the complaints received arise out of allegations that barristers are guilty of various degrees of negligence, incompetence or dilatoriness. An example of the kind of conduct referred to is the decision No. 9 of 1991 dealt with below. Members are asked to note that in such circumstances even though the penalties applied might appear to be of a moderate nature the cost penalty which is visited upon the barrister has been quite substantial in each case where there has been a finding adverse to the barrister.

Another fruitful source of complaint are those cases where the barrister is alleged to have had direct contact with the client where the rules dictate that a solicitor should have been present. In some cases there were no solicitors ever effectively instructing the barrister (a breach of Rule 26). In others there were instances where a solicitor was instructed but not present at vital times such as conferences and gaol visits (see Rules 33 and 34).

In some instances while the Council has considered that the case has not involved a question of breach of professional standards it has deemed it prudent to counsel or advise the barrister about the risks inherent in his or her conduct.

MATTERS NOT REFERABLE TO THE STANDARDS BOARD WHERE THE BARRISTER WAS REPRIMANDED OR COUNSELLED

In one matter a barrister appeared in litigation on his own behalf but corresponded directly with the opposing party when that party was represented by solicitors. In the circumstances it was held that this conduct was a breach of Rule 21 as being contrary to the standards of practice becoming a barrister and the barrister was reprimanded.

Rule 33 was applied in the case of a senior member of the Bar attending a conference with his client at a gaol without requiring the presence of his instructing solicitor. In this instance because of the context in which the visit took place the barrister was merely counselled but members are again reminded of this rule.

Counselling by a senior member of the Bar Council was required in another case which involved a breach of Rule 26. A junior member had provided unpaid assistance to a member of his family in a conveyancing matter but allowed his name to be used on the contract as the vendor's agent and thereafter corresponded, in respect to the transaction, on his chamber's letterhead and signed himself as a barrister.

A comment made by a member of the Junior Bar in the hearing of a complainant was wrongly taken by the complainant to have been intended for her. On this being pointed out she withdrew the complaint but the Bar Council thought it appropriate to advise the member of the need to be careful in making such comments in the future.

Counselling was also prescribed where the barrister spoke to a client directly taking it upon himself to advise the client of her obligation to meet the fees of her solicitor. The member was reminded that this was an action which was not properly within the scope of his retainer.

DISCIPLINARY TRIBUNAL DECISIONS

Since the promulgation of the 1987 Act there have been five decisions handed down by the Disciplinary Tribunal. The decision concerning *Glissan QC* was dealt with in the last edition of *Bar News* while two very recently published decisions will be dealt with fully in a later edition. At the time of going to press the Tribunal has dismissed a complaint against *Crispin QC* but has not published its reason.

In the case of *R A S Skiller* a complaint alleging, inter alia, breaches of Rule 26 (acting without the intervention of an instructing solicitor) and Rule 29B (soliciting a sum of money directly from a client for counsel's fees) was found proven. Skiller was suspended for six months and costs payable by him were determined at $7,500.00.

Members are reminded that s.134 of the *Legal Profession Act* requires the Bar Council to complete an investigation and, if it is satisfied that the complaint *involves any question* of professional misconduct it *shall* refer the complaint to the Tribunal.

In this edition we publish the decisions in respect of *Vernon* and another matter where the complaint was dismissed.

NEW SOUTH WALES BAR ASSOCIATION v VERNON

On the 8th of April, 1992 the Legal Profession Disciplinary Tribunal handed down its decision in relation to a complaint against C B Vernon alleging professional misconduct. The

Tribunal comprised Staff QC, McAlary QC and lay member D Mahon.

Complaints had been made against Vernon by the Bar Council pursuant to Sections 134 and 135 of the *Legal Profession Act, 1987*. There were various allegations contained in the original complaint and subsequent amended complaints but the three found to be significant by the Tribunal were, in summary, as follows:

(i) That the barrister swore a deliberately false affidavit.
(ii) That the barrister made a deliberately false statement to a Local Court Magistrate concerning advice given to him by the then President of the Bar.
(iii) That the barrister's conduct in breaching the law by the use and possession of cocaine and heroin for periods of ten and six years respectively justified the conclusion that he was not of good fame and character and was not a fit and proper person to remain on the Role of Barristers.

The first allegation revolved around Vernon's swearing of an affidavit to explain his failure to appear at the Federal Court hearing which had been listed for the 4th of September, 1989.

The affidavit deposed that committal proceedings in which Vernon was involved had commenced on the 31st of August, 1989 and were expected to finalise on that day. The reality was that those proceedings had commenced on the 28th of August, 1989 and had been listed to continue for more than one week, which they did. In proceedings before the Tribunal, Vernon alleged that he had instructed a solicitor to prepare the affidavit and had sworn it without having first read it. The Tribunal was not prepared to disbelieve Vernon on this point but held that his conduct in swearing the affidavit without reading it, and a subsequent failure in a later affidavit to draw attention to the erroneous statement in his earlier affidavit, amounted to gross recklessness. The Tribunal went on to say "the lack of a due sense of responsibility is a grave defect of character in a barrister. The Court and his colleagues are entitled to expect the exercise of a sense of responsibility in his dealings with them. To act so recklessly is almost as grave a defect of character as to lie to a Court and may readily result in similar damage to the administration of Justice".

The Tribunal found that Vernon's conduct in relation to the affidavit constituted professional misconduct.

As to the second allegation, it was common ground that after a conflict had arisen in the committal proceedings referred to earlier, Vernon sought advice from the then President of the Bar, Handley QC. It was also common ground that the advice he received from Handley QC was twofold, namely that he could continue to act for one set of defendants but should not cross-examine another defendant. The first limb of the advice had vindicated Vernon's stand before the Magistrate but the latter placed him under an important restraint. His subsequent report to the Magistrate emphasised the former and ignored the latter. After hearing evidence from Vernon, the Tribunal was not satisfied that he deliberately misled the Magistrate but observed that this conduct reflected his recklessness and lack of responsibility.

The Tribunal held that this conduct did not amount to professional misconduct but was unsatisfactory professional conduct.

As to the third allegation, it was admitted by Vernon that he had been using cocaine and heroin for periods of ten and six years respectively. However, with the exception of his arrest and subsequent conviction, this use was in private and the Tribunal accepted that it did not affect his professional activities. In these circumstances, the Tribunal held that this conduct did not amount to professional misconduct but constituted unsatisfactory professional conduct.

Other allegations contained in the various complaints were dismissed.

The Tribunal ordered that the name of Christopher Bernard Vernon be removed from the role of practising barristers, that his practising certificate be cancelled and that he pay the Association's costs of appearing and investigation on a solicitor-client basis. A costs order was made in Vernon's favour in respect of the unsuccessful complaint.

NEW SOUTH WALES BAR ASSOCIATION v A BARRISTER

In October, 1991 the Legal Professional Disciplinary Tribunal published the reasons for its decision on a complaint brought under the *Legal Profession Act, 1987* against a barrister. The Tribunal comprised Byers QC, McAlary QC and lay member D Mahon. The decision had been given at the conclusion of the hearing.

The proceedings alleged that the barrister had breached rules 8(1) (criminal briefs not to be retained except in most compelling circumstances) and 9 (criminal brief to be retained over civil brief) of the Rules of the Bar Association. The facts were that, prior to the 24th of July, 1989, the barrister had been briefed to appear in the trial of a charge of supplying heroin which was due to be heard on the 27th of November, 1989. The only substantial issue in the trial was the admissibility of alleged confessional material. It was not disputed in the proceedings before the Tribunal that this was a "serious criminal offence" within the meaning of Rule 8(1). On the night of the 24th of July, 1989, the barrister was briefed to attend a police station on behalf of another client who had been charged with the rape of a number of women. After the charging of the second client, the barrister persuaded him to submit to a DNA test the result of which led the police to drop the charges against him. This occurred on the 11th of October, 1989. The Government then announced the establishment of a Royal Commission to enquire into the second matter. The barrister received a brief to appear, with a leader, at the Royal Commission.

The Tribunal found that, due to his leader's illness, a great deal of the burden of preparation for the Royal Commission fell upon the barrister. Further, his leader was not always able to complete a full day of hearing which meant that the barrister could not be released from the Royal Commission to attend to other matters. Both senior and junior counsel were worried that the police were going to use the Commission to fight a rear guard action over their conduct and to try to secure an ex officio indictment against their client.

On the 22nd of November, 1989, the barrister phoned his instructing solicitor in the first case and told him in detail the circumstances he was in including the fact that he had been for sometime at that stage, closely involved with the second matter and that the client trusted him. The solicitor then asked the barrister to return the brief, which he did. Other counsel was instructed. It was common ground before the Tribunal that the brief had been returned in sufficient time for other counsel to properly master the case in the terms of Rule 8(1). The client consented to the brief's return.

At the time the brief was returned, Rule 8(1) did not contain the proviso that a barrister may return a criminal brief with the consent of the client given with full knowledge of all the circumstances concerning its return. However, the Tribunal held that the Rule was not exhaustive of all circumstances in which a criminal brief might be returned and that, even in the absence of the proviso, it could not see how the return of the brief with the approval of a fully informed client could be

professional misconduct. The Tribunal found that this was the situation in this case. Further, the Tribunal found that the nature of the barrister's involvement in the second matter and his leader's ill health meant that the barrister's continuous presence at the inquiry was essential if the client's interests were to be adequately safeguarded. In the opinion of the Tribunal, those factors prevented the barrister's conduct being considered to be "professional misconduct" or "unsatisfactory professional conduct".

As to Rule 9, the Tribunal was of the view that the words "civil" and "criminal" were not meant to cover the entire field of legal proceedings. In particular, the Tribunal was not persuaded that civil proceedings in Rule 9 extended so far as to include a Royal Commission. In any event, the Tribunal further held that, as the barrister had returned the brief, as he had been requested so to do, well before the Royal Commission started, there was no clash to which Rule 9 could apply.

The Tribunal made no order as to costs.

STANDARDS BOARDS DECISIONS

Members are advised that there have been several complaints made of the type that is represented by Matter No. 8 of 1990 (a case of duress being applied during advice on settlement). It is ironic that, over the past four years, most of such complaints have arisen in cases where the complainant's decision to settle has been required to be the subject of evidence by the complainant before a Judge; ie. in proceedings before the Compensation Court and the Family Court.

Some little time ago the Council held a meeting for practitioners who regularly practised in the Compensation Court in order to point out some of the risks that might arise when advising on settlement. It was pointed out at that meeting that:

(1) During conferences concerning possible settlement the solicitor or an experienced clerk should be present at all times;

(2) The barrister should take care that comprehensive *written* instructions were taken by the solicitor or clerk;

(3) The barrister should develop a format or routine to ensure that the advice he gives is always as comprehensive as possible and is easily understood by the lay client.

These steps should be followed even if evidence is to be given by the client concerning the giving of the advice, the understanding of the advice and a desire to have the proposed settlement approved.

Matter No. 8 of 1990 arose out of Common Law proceedings where no such evidence was required. In such cases it is all the more important for steps (1), (2) and (3) to be followed. Of course in any case, where approval is dependent upon evidence or not, the primary consideration must be that the client's access to the court is not frustrated by use of threats or an overbearing attitude to induce him to settle contrary to his preferred course.

At present the Bar Council's Rules Committee is considering the suggestions that Rule 2(b) be changed in the manner suggested by the Board.

REPORT OF DETERMINATION OF THE LEGAL PROFESSION STANDARDS BOARD MATTER NO. 8 OF 1990

The complaint about the barrister to the Board in this case was that he had acted in breach of Rule 21 by engaging in conduct or acting contrary to the standards of practice becoming a barrister and/or was otherwise guilty of unprofessional conduct. It concerned behaviour of the barrister during a conference with the client who was the plaintiff in a personal injuries action. In the conference there was discussed an offer of settlement which had been made by the defendant. When the client had indicated that he wanted to reject the offer and would not settle for anything less than a higher sum it was alleged that the barrister, amongst other things, became angry and used abusive language; told the client that unless he signed written instructions to refuse the offer then the barrister would withdraw and gave him 20 minutes to make up his mind. It was said that the client accepted the offer because he believed if he did not do so he would be deprived of legal representation.

The Board noted that there was no complaint that, objectively speaking, the defendant's offer was not proper and acknowledged that it was appropriate for the barrister to point out substantial risks on liability as well as damages. The Board noted that with this particular client that was probably not an easy task.

The Board found that the barrister did threaten to withdraw from the case. It found that he appeared to become angry and used offensive language in describing the chances of success. It found that the client had been told that written instructions to refuse the offer were required and that he should make up his mind within 20 minutes or so. They were not all matters that the barrister could be criticised for. The Board described it as "perfectly proper for the plaintiff to be asked to provide written instructions and for counsel, if he believed this to be the case, to warn the plaintiff that an adverse decision in a hearing might result in the plaintiff losing his home and to attempt to persuade the plaintiff to settle". Nevertheless, the Board concluded that, when all the matters were taken into account, the barrister had placed the client under undue pressure to accept the offer. Although the barrister had the duty to advise the client regarding the desirability of the offer "he also had the obligation to allow" the client "the exercise of his own free will". In this case the Board concluded that the client's acceptance of the offer was not the result of an "exercise of his own *free* will".

The Board has specifically referred to the decision of the Legal Profession Disciplinary Tribunal in *Glissan* and the view expressed in that decision that a barrister may always, should the advice not be accepted, return the brief. The Board indicated that it was unable to share that view. It emphasised the cab-rank rule and a client's right to have his or her own rights determined by the court and not by counsel. Specifically, the Board was of the view that Rule 2(b) of the Bar Rules extended to a client deciding to reject counsel's advice to accept an offer of settlement instead of the court determining the issues. The Board was of the view that there was a clear inconsistency between an obligation to appear and the existence of any discretion to withdraw if advice as to settlement is not accepted. Thus Rule 2(b) "would not justify the barrister's conduct in threatening to withdraw his services, even if this threat had occurred long before the hearing" and certainly not in the precincts of the court whilst waiting for the case to be called on (which were the circumstances in this case, even though the chances of it being reached were not good). The Board found the barrister guilty of unsatisfactory professional conduct.

Another member of the Board, who agreed with all of the above, added his own specific observations which ought to be set out in full :

"Counsel has a duty to facilitate and not to frustrate the client's access to the courts. If counsel believes settlement is in the best interests of the client, counsel may seek to persuade the client to settle a case by reasoned argument. The client may

accept counsel's advice. Settlement then becomes the client's preferred course. But the client's access to the courts is frustrated and denied if he is induced by threats or an overbearing attitude to settle contrary to his preferred course. The situation is the more acute in the case of a "spec" brief, that is, where counsel does not expect to be paid a fee unless the case is won or settled. In such a case, counsel is subject to a conflict of interest. If the case is settled he is assured of payment. If it is not, his fee is in doubt. If the case is likely to be lost, he is unlikely to be paid unless the case is settled. In these circumstances, counsel has a special responsibility to avoid excessive persuasion, however altruistic his true motive, lest the standing of counsel be called into question. It is contrary to the public interest that the standing of the Bar should be embarrassed in such a way."

That member's very strong view was that refusal by the client to accept a reasonable offer of settlement is not a ground upon which counsel is entitled to return a brief, including a "spec" brief. He recommended that the matter should be resolved beyond doubt and that the Bar Council should consider amending the rules to that effect.

One other important but incidental matter arose. In the barrister's correspondence with the Bar Association the barrister had made it clear that he had informed the client that unless he received written instructions to refuse the offer he would withdraw from the case. He resiled from that statement in his sworn testimony before the Board. The Board did not find the barrister's evidence before it on this point convincing. In reaching its conclusion that he had threatened to withdraw from the case it necessarily rejected his evidence. Accordingly, this apparently caused the Board "to consider whether it was not obliged to terminate the hearing and refer the complaint to the Tribunal pursuant to S143(3) of the Legal Profession Act". However the Board was of the view that the construction of the statute was such that it was not able to refer to the Tribunal a matter such as that arising in the course of the hearing. One member of the Board recommended that the statute should be amended to enable the Board to make such a reference.

The Board found that the barrister was guilty of unsatisfactory professional conduct, reprimanded the barrister and ordered him to pay the Bar Council's costs of the proceedings.

REPORT OF DETERMINATION OF THE LEGAL PROFESSION STANDARDS BOARD IN MATTER NO. 9 OF 1991

The barrister's client in this case had had a car accident and had made a claim under the *Motor Accidents Act 1988*. A section of that Act provides that if proceedings are commenced more than 12 months after the claim then the claimant must provide a full and satisfactory explanation to the court for the delay. In this case, the time for commencement of the proceedings expired on 21 or 22 January 1991. The barrister had originally been briefed to advise in December 1989. In December 1990 (about a month before the expiry), he had been specifically briefed to draft the statement of claim. There was some evidence to suggest that he had been earlier asked in conference or by telephone to draft the statement of claim.

It was alleged that the barrister was guilty of unsatisfactory professional conduct. The two grounds were failure to draft the statement of claim and failure to respond to the solicitors' communications between December 1990 and June 1991 (when his brief was withdrawn and the complaint made). Both grounds were made out: the Board found unsatisfactory professional conduct, reprimanded the barrister, fined him $750.00, ordered him to pay to the complainant any disbursements incurred on any application for relief under the *Motor Accidents Act* and ordered him to pay the Bar Council's costs of the proceedings.

Some observations made by members of the Board in their reasons for determination should be highlighted.

1. The solicitor thought the time expired before it did. This was suggested in the brief. The barrister claimed that his oversight was therefore not causally related to the failure to file within time because of the solicitor's misunderstanding. This submission was rejected. The Board said that it was the barrister's obligation to come to his own view about whether the claim was barred and to form an opinion independently of the solicitor's observations.
2. Despite the fact that the time ran out in January and the specific instructions were received in December (with the intervention of vacation) there remained an obligation to draft the process as soon as possible. If "anything is to be taken seriously, it is time limitations and applications for relief from non-observance of time limitations".
3. Even if the barrister was under the impression that time had expired, he was under an obligation to draft the process as soon as possible in order to maximise the client's prospects for statutory relief from the time bar.
4. The barrister agreed that his failure to respond between December 1990 and June 1991 amounted to unsatisfactory professional conduct and submitted that a reprimand was the appropriate penalty. The Board did not agree. It set out a series of letters, telephone calls, communications with the barrister's clerk and indications given by the barrister regarding doing the work. There was also a history of unanswered letters and telephone calls before December 1990 going back to at least July 1990. The Board said that delay had to be seen in the context of the urgency of the instructions. In this case, there was a time bar and the work should have been done quickly. The weight given to subjective features on the question of penalty was discounted by one member because of "the frequency and flagrancy of his defaults during the period December 1990 to June 1991". The Board rejected the reprimand submission and imposed the fine.
5. One member of the Board was of the view that once the time limit had expired in the case where the counsel had held the brief for a year then the brief ought to be returned immediately because drafting the process for relief from being out of time represents the barrister with a conflict of interest because of the barrister's contribution to the breach.

RULINGS

Members are reminded that in the event that they require advice on, or a ruling in respect of, any matter (whether apparently covered by the rules or not), they should contact any Senior Member of the Bar Council. In some cases, they will be asked to confirm, in writing, the verbal ruling given and to forward a copy thereof to the Registrar as well as to the silk giving the ruling.

In many instances the request for advice can be dealt with by the Professional Conduct Committee however, usually, because of time constraints, requests are dealt with by the Senior Members. Members are encouraged to use this service whenever they have doubts about which course or option to pursue.

❑ J Poulos QC, R Coolahan, R D Cogswell

Human Rights - Time For the Bar to Look Out

by Nicholas Cowdery QC

We have the very good fortune to live in a society which is regulated by the rule of law and in which the fundamental rights and freedoms of humankind are observed and enforced. So why should we be concerned about issues involving "human rights"? More especially, why should the New South Wales Bar Association, our professional body, be concerned about them?

The present status was not achieved by accident or divine gift. It is the product of centuries of struggle by people of principle against powerful odds. We happen to be enjoying the fruits of that struggle - but they must be safeguarded. In other countries they are yet to be won. Associations of lawyers are at the forefront of that struggle.

Perhaps our own first great advance was the Magna Carta of 1215. It was the first of two outstanding British Bills of Rights, the second being in 1689. The former was principally concerned with economic rights, the latter more with civil and political rights. They were both, however, conservative products of confrontation between the monarchy and the citizenry, the power and the subject. They were confirmatory of existing rights that were seen to be under threat from above.

By contrast, the American Declaration of Rights of 1776 and the French Declaration of the Rights of Man and of Citizens of 1789 sprang from the violent reshaping of those societies and were revolutionary, much more declaratory of general principles of future application. Britain and Australia have been influenced by them not least through their acknowledgement and reflection in international instruments.

Particularly in developing countries - in many of our neighbours' - the struggle to achieve what we now enjoy is in its infancy. The general principles enunciated in international instruments are often ignored, subverted or breached. Lawyers constantly strive to have them implemented.

Writing in *Law News* (Vol. 27, No. 11 January-February, 1992) the President of the Law Council of Australia, David Miles, referred to a "very important obligation we have as lawyers" - namely the obligation not to ignore abuses of the legal rights of others. He asked for "individual commitment and concern" from all practitioners. There are occasions, however, when collective action carries more weight, and the New South Wales Bar Association (a constituent member of the Law Council) is well equipped and well placed to take representative, collective action as the need arises in particular cases.

On occasions responses are required to threats at home. As John Philpot Curran said in 1790, "the condition upon which God hath given liberty to man is eternal vigilance", and the vigilant have been required to act even in Australia to remind the wielders of power that there are fundamental principles that may not be bent in the names of expediency or pragmatism.

More often, however, the outcome of crises in other lands may be influenced by representations from foreign observers. The powerful usually seek to maintain a good international public image and are sensitive to international criticism.

There are practical purposes which may be served at the same time. Elsewhere in the same issue of *Law News* Dr Blewett, the Minister for Trade and Overseas Development, commented on the commercial opportunities for lawyers as advisers and active participants in trade in the Asia-Pacific region. There are multiple benefits to be had. An interest in the human rights problems of a country gives some insight into the culture, politics and ethical and moral values of the society. Knowledge of those matters aids communication and interaction with its members. That in turn oils the wheels of professional and commercial dealings. Conversely, for those already doing business there it is a small but effective step to become involved appropriately in human rights concerns.

"... the membership of the New South Wales Bar Association is sometimes seen as a smug, self-gratifying group of highly privileged members of society."

As a professional body the membership of the New South Wales Bar Association is sometimes seen as a smug, self-gratifying group of highly privileged members of society. That is a generalisation and probably an exaggeration. Whatever the accurate description may be, it is certainly inward-looking. But why? The world is shrinking. This is an Asian-Pacific country although with largely European traditions. Richard Woolcott, the retiring Secretary of the Department of Foreign Affairs and Trade and a former distinguished career diplomat (*The Weekend Australian* 22-23 February, 1992, page 31), is in no doubt that our future lies in Asia - and it begins now. "We are the odd man out in Asia and the western Pacific. Our mission is to make ourselves the odd man in." Our future success will be measured by "the speed with which we are able to adapt ourselves to our inescapable geopolitical environment". That requires application not only by government, but by individuals involved in trade and commerce, education and cultural exchange. We cannot fail to accept and to act upon our links with the people of Asia and the Pacific.

We are all boat people. Those presently arriving happen to come from South-East Asia. They are coming in part because we can provide what is simply not possible in their countries of origin because of racial, political, religious or economic oppression. The oppression of peoples is an international human rights problem. We should do what we can to relieve it, by actions or by words (which are our tools of trade).

Members of the Bar have many avenues available:

The Bar Association as a body should be encouraged to formulate policies on key international human rights questions and to intervene, by way of correspondence and representations, in cases of abuses of the rights of professional bodies of lawyers or individual practitioners. (In an abolitionist country, the Bar Association does not even have a policy on the death penalty.)

A case in point is the Malaysian Bar. In 1990 the New South Wales Bar Association hosted Dato' Param Cumaraswamy in the Common Room. He is a past president of the Malaysian Bar Council and a human rights lawyer of international standing. The Malaysian Bar had experienced enormous difficulties arising out of its stance upon the shameful dismissal of the Lord President (the equivalent of the Chief Justice of the Australian High Court) and later the charging of the then Vice-President (and now President) of the Bar Council with contempt of court by reason of material in an affidavit filed in support of an application by the Bar Council to the Supreme Court of Malaysia.

There has been continuing harassment of the Bar by the government. Late last year the ruling UMNO party declared that it would curb the power of the Bar by amending the Act by which it is constituted to delete its primary object - "to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour".

Following an international outcry (in which our voice should have been raised) UMNO backed down; but the Bar remains a target for governmental attack and seeks continuing international support. Our Bar is in a position to provide it on a regulated and continuing basis at virtually no cost but to great effect. We can also assist and encourage Malaysian law students in Sydney, fortifying them for their return to practice in Malaysia. In these activities we could learn something of value for ourselves.

- The Law Council Human Rights Committee will always welcome assistance from individual practitioners with knowledge of or an interest in particular human rights issues or countries as the need arises.
- Lawasia's Human Rights Standing Committee, similarly, welcomes support from interested people. Its secretariat in Manila publishes regular bulletins and reports on human rights problems in the region and it holds regular conferences and seminars.
- The International Commission of Jurists (of which Kirby, P is the Chairman) provides another avenue for information, interest and activity. It meets monthly in Sydney.
- However, the power of the individual should not be underestimated. Those actively involved in the work of Amnesty International know the value of an appropriate letter.

There are many other bodies to which members of the Bar may render practical support. Assistance to the poor and oppressed, the less fortunate than ourselves, is a tenet of the great religions of the world. It makes good practical sense. Sometimes it gives a warm inner glow. There is a strengthening case for lending our individual and collective commitment to the cause of the observation and enforcement of human rights. We can give it, as a body, by remaining vigilant and by giving support in a structured way to people of principle, especially individual lawyers and their associations, who carry on the struggle here and abroad. ❑

A letter from the Managing Editor of CCH Australia Limited

Many would no doubt agree with a former mayor of New York[1] when he said "I am certain that the good Lord never intended grapes to be made into jelly".

However, a British cleric had once decreed that "Wine is the juice of the grape gone bad" and this was probably closer to the mark as a description of a recent case involving sec 52 of the *Trade Practices Act*.

This case[2] actually involved the juice of the grape gone bad.

It also involved the use of what our vignerons euphemistically refer to as the "Hume River" (ie Highway No 1), up and down which flows much juice of the grape. It was in pursuit of this practice that a certain vigneron contracted for the carriage of bulk wines from vineyards to bulk storage. Unhappily in fulfilment of the contract the carrier transported some of the wine in a tanker that had on an earlier trip carried mineral oils. This blend of wine and oil scored high on bouquet but nil on drinkability; then to make the whole matter worse the contaminated wine was added to other wine already in a bulk storage tank.

Upshot was vigneron sued carrier claiming in contract and for contravention of sec 52 of the *Trade Practices Act*, submitting that by presenting the tankers for the purpose of loading bulk wine, pursuant to the contract, the carrier represented that the tankers were free of any substance capable of contaminating the wine and that that representation was false.

However, the NSW Court held that the mere presentation of tanks for the bulk carriage of wine, pursuant to a contract of carriage, when those tankers were contaminated, was not misleading or deceptive conduct in breach of sec 52.

The favourite author of a former PM[3] once wrote that

> "Civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."

Exactly where on this standard of judgment the *Privacy Amendment Act* sits is left to your own assessment. What's more to the point is what that legislation sets out to do ... which is to attempt to reverse the widespread expansion over recent years of the use (some critics say "indiscriminate use") of the credit reports and personal information garnered by credit reporting agencies.

The recent legislation now limits access to credit reports to the actual providers of credit. Access to credit information files by insurers, real estate agents, government licensing bodies and the like is prohibited.

All the provisions of this important new law have been analysed in a new tab division (added in April) to our ***Australian Consumer Sales & Credit Law Reporter***. It was written by Graham Greenleaf, who is a lecturer in law and an expert in data protection and privacy law.

This is a letter we sent to the subscribers to our ***Journal of Asian Pacific Taxation*** which, as you'll observe, accompanied a special issue of that Journal. It says something about us and our Journal and the IPBA.

"Dear Subscriber

Toshio Miyatake is a long time friend of CCH. He is also an eminent tax lawyer and as such chairs the tax law committee of the Inter-Pacific Bar Association.

He suggested to us that the papers to be presented at the Association's Sydney conference would represent a valuable contribution to tax knowledge within the Asia Pacific region and were ideally suited for publication in our Journal.

We thought the idea a good one ... hence this special issue which contains all of the papers to be presented.

As we note in our introduction to this issue, one of the aims of the IPBA is for the exchange of views and information between practitioners in the Asia Pacific region and this, as you as a subscriber to this Journal well know, is the main function of the Journal. Indeed, Toshio's thought that it is becoming "more important to keep abreast of the developments in the area of tax law as the Asia Pacific economies grow in size, strength and influence in the world" will no doubt meet with your ready agreement.

It's our pleasure to be able to send you this extra issue of the Journal."

Mention of this conference brings to mind that IBA conference last year[4] which was opened by the Governor of Hong Kong whose opening words were: "'The worst kind of diplomatists,' wrote that great diplomat and diarist Sir Harold Nicolson, 'are missionaries, fanatics and laywers'."

CCH Notes from Europe

According to CCH's ***French Business Law Guide***[5] France has recently eased restrictions on foreign investment in French companies. The government hopes that this liberalisation will not only bring more foreign investment into the country but also create new jobs. *In industry alone 20% of jobs are in companies under foreign control.*

An advance bulletin to ***German Tax & Business Law Guide***[6] reported the commencement on 1 April this year of the second set of comprehensive rules requiring collection and recycling of packaging and deposits of containers.

Retailers must now remove special wrapping or offer customers the opportunity to unwrap the products and leave the packaging on the store's premises (these provisions would apply, for example, to boxes for tubes of toothpaste or those containing nails or screws). Retailers must provide suitable containers to help customers sort the packaging, ie separate bins for cardboard, plastic and foils. Germany is the first country to enact comprehensive rules on the collection and recycling of packaging materials. The rules have become necessary as a consequence of Germany's dense population and affluent society which have created an immense refuse problem.

The Darrow file

In his book *Clarence Darrow for the Defense*, Irving Stone writes:

> "If someone made a mistake he [Darrow] would drawl, 'Hell, that's why they make erasers'."

1. Fiorello "The Little Flower" La Guardia, 1882-1947, was a US Congressman from 1917-1933, but is best known as being the "reform" Mayor of New York, 1934-1946.
2. *McWilliam's Wines Pty Ltd v LS Booth Wine Transport Pty Ltd* (1992) ASC ¶56-136 is reported in our ***Australian Consumer Sales & Credit Law Reporter***.
3. Ayn Rand in *The Fountainhead*, 1943.
4. The section on Business Law of the International Bar Association's Conference in Hong Kong, September 1991.
5. This loose-leaf service is a joint publication of CCH Editions Limited of the UK and Editions Francis Lefebvre of France.
6. The loose-leaf reporting service of this name has just been published by CCH Europe Inc of Wiesbaden, Germany.

*Facing the Heart of Darkness**

Rohan de Meyrick and Peter Tillman relate the experience of fifty-three new barristers who survived the February 1992 Readers' Programme).

"The horror .....the horror .....".

Those were the words uttered by one shell-shocked reader as the intense pressure and voluminous paperwork mounted, towards the end of week one in the readers' programme conducted by the New South Wales Bar Association. His exhausted colleagues shook their heads in agreement.

At 9.00 am on the 10th of February, 1992, fifty-three new barristers had gathered in the Bar Common Room to face baptism into their new profession. There were ten women and forty-three men in a group of varied ages and legal backgrounds. We were entering a jungle, expecting the natives to paddle us smoothly down the river. However, as the first day progressed we began to realise that the tribal elders were intent upon dragging us by the hair through the thickest undergrowth at breakneck speed. This bruising journey was to include terrifying encounters with many warriors of jungle warfare, as well as some moments of sheer insight from several wily witch doctors, wise in tribal lore.

***

The morning of day one was not too demanding, with introductory speeches from Coombs QC and Tobias QC followed by a number of general lectures. A drafting exercise for the afternoon meant a working lunch. This was a sign of things to come. Later that afternoon Chris Gee QC succeeded in awakening the readers to the sheer terror of how little we really understood about the practical application of the laws of evidence. Within five minutes of the lecture finishing, Butterworths had sold out of copies of "The ABC of Evidence"!!

For the next four weeks the group was privileged to be addressed by numerous eminent senior barristers and judges. There was a veritable avalanche of information presented in written and oral form. The typical day went from 8.30 am to 6.00 pm with five or six lectures punctuated by a practical session where moot applications were presented before a Judge, Registrar, or Magistrate, under the watchful eye of senior barristers and the dreaded video camera. The briefs for these applications were usually delivered at very short notice resulting in late nights and early mornings in a desperate attempt to adequately prepare.

By week three this hectic programme was taking its toll. Alcohol and tobacco habits were developing in plague proportions, and at least half the group was in desperate need of treatment for caffeine addiction. Eyesight problems were rife as readers spent long hours attempting to read the rainforest-destroying volume of printed materials provided for them. At the same time an *esprit de corps* was developing amongst the readers of a kind usually reserved for those who have fought together in wars.

Week four began with morning tea in the President's chambers, as guests of His Honour Mr Justice Kirby, and ended with a sobering guided tour of the morgue at Glebe Coroner's Court. This typified the breadth of experiences that the programme entailed.

The course culminated in a full-day trial held on Saturday 7th March. Federal and Supreme Court Judges had given up their time to preside. Much work was put into the preparation for these trials, both by the course organisers and by the readers. Senior barristers acted as instructing solicitors, junior barristers as court officers, and actors and architecture students served as witnesses. Readers were briefed in either a common law matter involving an insurance claim on a strangely inflammable brothel, or in a copyright case involving remarkably similar architectural plans. No punches were pulled in these trials, as the readers sought to test their advocacy skills in the adversarial bearpit with a level of competitiveness that belied the "mock trial" tag.

After the trials, well earned drinks were provided in the Bar Common Room for all those involved. Foe became friend as the cases were dissected over a beer between counsel, judges and witnesses. The winners were grinners, the losers were philosophical (except Brad Richards who, after several beers was heard to mumble something about an appeal!). Others seemed preoccupied in putting their new-found persuasive skills to use by making improper advances to the scantily clad young actresses who had portrayed the role of prostitutes in some of the mock trials. In the true spirit of equal opportunity, some of the young male architectural students also got their fair share of attention from female counsel! The day was capped with a dinner in the Bar Dining Room, complete with after dinner speeches, and even a makeshift talent quest, which featured the golden voices of Guy Griffin ("I did it my way") and Francois Kunc ("Nessun Dorma").

The programme was a resounding success. We had experienced a gruelling month that simulated the workload of successful counsel, whilst being flooded with the experienced advice and guidance of numerous Judges (including His Honour Mr Justice Gleeson the Chief Justice of New South Wales and His Honour Mr Justice Kirby, the President of the Court of Appeal), judicial officers from various jurisdictions, the Honourable Peter Collins MP QC Attorney General, as well as many senior counsel and senior juniors.

In the great chasm between knowledge and experience, we had faced the heart of darkness, only to emerge with light at the end of the tunnel and a sound understanding of how to reach our destination.

With its emphasis on ethics, etiquette, and the proper conduct of professional practice, the Bar Readers' Programme imparted to us the importance of ensuring that the Bar continues to provide a high standard of service to the law and to the community it serves in order to justify and maintain its independence and relevance in the years to come.

Thanks and gratitude are extended to Murray Tobias QC, Phil Greenwood and their fellow Reading Committee members for the care and attention given to devising the Programme. Thanks also to Michelle Goodwin (the Bar Association's Education Officer), for organising such an intensive and effective four weeks.

In addition we are forever grateful to the following persons who, during the course of those four weeks, shared with

us the fruits of their extensive knowledge and experience:

Stevens QC and David Davies (pleadings), R Angyal, M Walker and Bennett QC (ADR), R P Greenhill (on a range of topics), Mr Justice Sheller (presentation of legal argument), West QC (opinion evidence), Peter Garling (subpoenas), Deputy Chief Magistrate Mr Gilmour (Local Courts), Porter QC (committals), Horler QC (a number of topics), J Bishop (criminal trials), His Honour Judge Flannery, M Walker, Bellanto QC and Cowdery QC (jury empanelment), Ellicott QC (judges), Simpson QC (opening addresses), Knoblanche QC (addressing the Court from the Judge's perspective), Coleman QC and Letcher QC ("chief"), Burbridge QC, Collins QC and Brett Walker (cross examination), Wheelahan QC (Witnesses), Sullivan QC (advices), Mr Justice Cole (Commercial Division), Graham QC and L Levy (interlocutory applications), Malcolm Oakes and G C Lindsay (equity), Registrar Berecry (Registrar's Court), Masters Windeyer, McLaughlin and Greenwood (Masters' Court), Mr Justice Beaumont and Mr Justice Davies (Federal Court), Alan Dawson (Federal Court mediation), Einstein QC, Grieve QC and L Delaney (practice management), Mr Justice Coleman (Family Court), Mr Justice Hunt (Defamation List), Mr Justice Young (a number of topics), Mr Justice Wood (Common Law listing), C T Barry (Common Law procedures), Mr Justice Bannon (Land & Environment Court), McAlary QC (closing), S M Grant (Compensation Court), and Mr Glass (Coroner) and staff of the Coroner's Court.

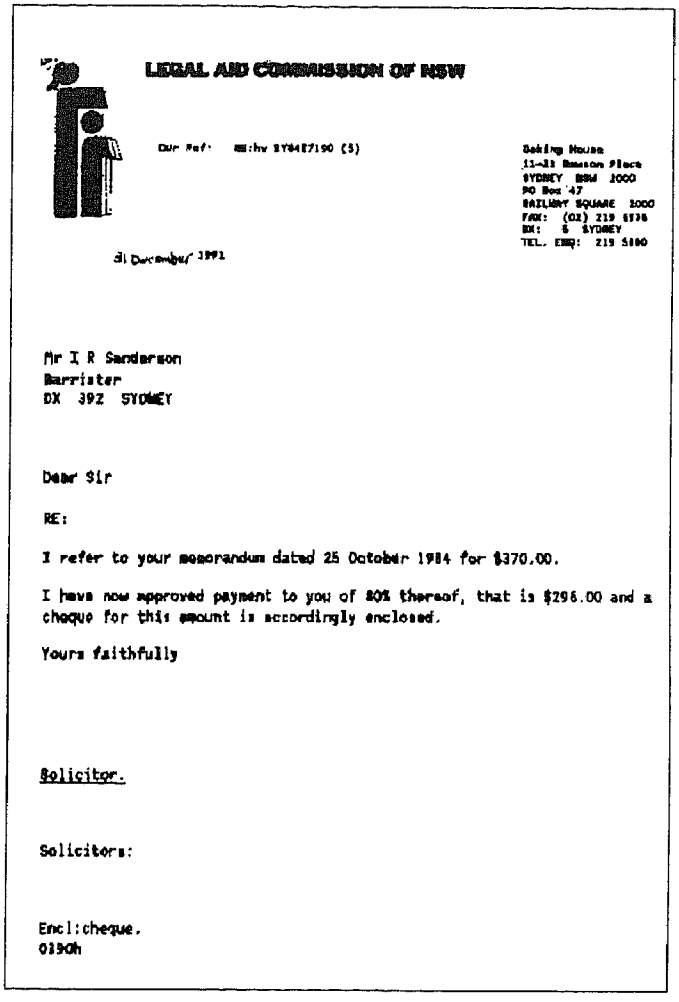
In particular, we are grateful to the legion of others who gave their time freely to contribute and assist.

To all the abovementioned, the class of Feb.'92 salute you! ❑

Rohan de Meyrick
Peter Tillman

* With apologies to Joseph Conrad.

Is This A Record?



LEGAL AID COMMISSION OF NSW

Our Ref: RE:hv 1Y0487190 (S)

Bailey House
11-31 Rawson Place
SYDNEY NSW 2000
PO Box 47
RAILWAY SQUARE 2000
FAX: (02) 219 5738
DX: S SYDNEY
TEL. EXT: 219 5100

31 December 1991

Mr I R Sanderson
Barrister
DX 392 SYDNEY

Dear Sir

RE:

I refer to your memorandum dated 25 October 1984 for $370.00.

I have now approved payment to you of 80% thereof, that is $296.00 and a cheque for this amount is accordingly enclosed.

Yours faithfully

Solicitor.

Solicitors:

Encl:cheque.
0190h

Hole in One

At a recent sittings of the Compensation Court in Broken Hill Judge Moroney was hearing a case arising out of an assault at the Wilcannia Golf Club.

During the course of submissions his Honour sought some information as to what sort of a place Wilcannia is.

His Honour: "How many golf courses are there in Wilcannia?"
Mr Wilkins: "I don't know but if there were two that would be all there were."
His Honour: "How far is Wilcannia from Broken Hill?"
Mr Wilkins: "About 200km."
His Honour: "Where is it from Broken Hill?"
Mr Wilkins: "It is east of Broken Hill."
His Honour "Is it as big as Broken Hill?"
Mr Wilkins: "No, it is a small place."
His Honour: "Does it have as many people as Broken Hill?"
Mr Wilkins: "No, it has a small population."
His Honour: "Then why is it a diocese?"
Mr Wilkins: "Because there are lots of kangaroos in need of pastoral care." ❑

Law Council Report

Migration Work and Lawyers

The Law Council, supported by constituent bodies, has continued to oppose strongly the Government's plan to require lawyers to register as migration agents if they held clients with migration applications.

The Government has agreed that lawyers who only give general migration advice will not have to register, but it is insisting that lawyers who help with applications must register. This appears to be the first time lawyers have been required to register with the Government before being eligible to provide legal services in a particular area of the law.

The new scheme was supposed to start on 1 July, but the Law Council has been advised that the legislation establishing the scheme will not be dealt with by Parliament until the Budget sittings.

The LCA maintains its firm opposition to registration of lawyers. When the legislation for the scheme becomes available the LCA will consider whether there are grounds for challenging the constitutional validity of the legislation.

Many Questions on Cost of Justice

The Law Council and its constituent bodies have now been working in connection with the Senate enquiry into the cost of legal services for several years. The Senate committee's report is expected to be out by the middle of the year.

The Law Council made a major initial submission in 1989. Later it made several more written submissions on particular issues, and proposed the introduction of a uniform mediation system in all Australian courts.

Representatives of the Law Council (and of the constituent bodies) gave evidence at public hearings held by the committee some time ago. A few weeks ago there were more public hearings in Canberra, when the LCA President, David Miles and the President of the Law Society of New South Wales, John Marsden, appeared and gave evidence.

Subsequently, David Miles received a request from the committee that he provide written answers to 42 questions - most of them dealing with major issues - which the committee had not dealt with when he gave evidence.

In the meantime, work has been proceeding on the preparation of responses the substantial range of discussion papers issued by the committee. The detailed work on these responses has largely been done by the constituent bodies, with the Law Council bringing all the material together for presentation to the committee. There will also be a final general written submission summarising the Council's views as to the issues on which the Senate Committee should concentrate in its report.

Advocacy Institute Swamped with Applicants

The Australian Advocacy Institute established by the Law Council has been swamped with applications from lawyers wanting to undertake its courses.

At the first workshop on basic advocacy skills, held in Adelaide, 62 took part. Another 30 were unable to be accepted because of lack of space.

Mention of the Institute in a newsletter recently sent to LCA members has brought a flood of enquiries and applications. The Institute will hold further workshops (they have already been held in Brisbane, Hobart, Melbourne and Adelaide) as follows:

Melbourne	July 25-26
Perth	August 15-16
Townsville	September 26-27
Sydney	October 17-18
Brisbane	November 7-8
Melbourne	November 21-22

For information, please contact Anne Craig, Australian Advocacy Institute, Law Council of Australia, PO Box 1989 Canberra ACT 2601, or DX 5719 Canberra. Telephone (06) 2473 788 Fax (06) 2480 639.

The Institute's Chairman is Mr Justice George Hampel of the Supreme Court of Victoria.

Legal Professional Privilege Fight

The Law Council is engaged in a debate with the accounting profession over legal professional privilege.

The accountants have vowed to fight to have legal professional privilege apply to communications between them and their clients on taxation matters.

LCA President, David Miles, says it is shallow and dangerous to see legal professional privilege simply as something that gives lawyers a competitive edge over accountants. He says the proper functioning of the legal system depends on legal professional privilege, and that is its sole but extremely powerful justification and the reason why it does not apply to communications between clients and other advisers, such as accountants.

The TPC Turns to Lawyers

The Trade Practices Commission announced at the COJI hearing in Canberra (see above) that it will next turn its sights on to the legal profession in its current study of competition in the professions.

Much of the debate on legal professional privilege was stimulated by the TPC's study of the accountancy profession, and the accountants' claims in the area.

The Law Council will be heavily involved in assisting the TPC with its study and in commenting on its findings.

Australia-Wide Admission At Last

The thorny question of national or reciprocal admission to legal practice is coming to a head and is likely to be implemented on New Year's Day next year.

This will happen as part of the government "mutual recognition" plan that will mean that all professions and trades in Australia will be subject to a new principle: that a person "registered" (meaning, for lawyers, admitted to practice and holding a practising certificate) in one State or Territory is entitled to "registration" in any State or Territory.

This is the gist of the "mutual recognition" legislation which the Commonwealth Government will bring into the Australian Parliament, acting for all Governments. The Law Council has been working for some time to devise suitable practical arrangements for a new regime, having taken the initiative early in 1991.

The LCA is now pressing for some changes in the proposals to ensure that State and Territory Supreme Courts deal with appeals from decisions of local registration bodies (courts, admission boards, Law Societies or Bars) and, so that

those bodies have the opportunity to scrutinise applications before the applicant is able to practise in the local jurisdiction.

The LCA has sought clarification as to how the mutual recognition principle is to operate in relation to jurisdictions with separate branches of the legal profession and those with fused professions.

The LCA President has asked all constituent bodies to consult urgently with the admitting authorities in their jurisdictions to discuss admission arrangements and to settle what post-admission, academic and practical requirements might be needed. ❑

Mediation Training for the Bar

On 23 April 1992, the Bar Council accepted recommendations from its alternative dispute resolution task force (Coombs QC, McColl, Walker and Angyal) and resolved to offer two types of training courses in mediation to members of the Bar.

The first course is a three-evening, six-hour course providing a basic grounding in the techniques of mediation. This course is designed to cater for barristers likely to be briefed to appear for a party at a mediation in Settlement Week 1992, as a result of the Chief Justice's pilot project of court-annexed mediation, or in a privately-arranged mediation. (The former two schemes are described elsewhere in this issue.)

The second course, to be held in August, will be an intensive four-day course designed to equip participants to mediate disputes and is expected to satisfy accreditation requirements for, eg. participation as a mediator in settlement weeks and probably for inclusion on the panel used by the Australian Commercial Disputes Centre to select mediators for its compulsory third-party mediation scheme (described in this issue at page 9.

Final timing, content and costings of the August courses are currently being finalised and will be announced to the Bar as soon as possible. ❑

Balancing the Bar's Books

By Lyn Murray, who founded Barristers Management Services based on seven years' experience managing barrister's financial and administrative affairs.

When the cold west winds of June begin to blow and the Tax Man cometh, barristers can be left asking themselves some leading questions: How much have I earned? What tax deductions do I need? What can I claim? What about superannuation?

Though sometimes caricatured as distracted figures, hurrying along, robes flapping and papers flying, barristers more often appear awesomely competent.

And yet I have found that there is one area in which (naturally with many honourable exceptions) they let their control and self-confidence falter and even become disorganised, and that is the area of ... money.

Many have only limited administrative assistance. They work in less structured business systems than solicitors, and often make do for secretarial support with help from the floor typists, paid by the hour. Computers are being used increasingly, but many barristers do not have time for the discipline and changes that computers require.

An awareness of their needs, derived from seven years spent managing finance and administration for barristers, led me to set up Barristers Management Services (BMS). The idea came to me after observing a similar external service set up for specialists at a major Sydney hospital, which administered all the doctors' accounts, including raising invoices, issuing receipts and following up overdue accounts.

BMS is designed to meet the particular requirements of each individual barrister, as the time their work requires may range from several days to only a few hours each week. No job is too small, since the system is set up to accommodate all barristers' requirements.

All BMS client's affairs are handled on the BMS computer system, using purpose-designed software, with each barrister's fees and accounts being maintained separately (and in full confidence).

BMS does all its work, except for initial interviews and periodic consultations, off barristers' premises, since work space there is usually at a premium.

Services provided by BMS include:

- Preparing memo of fees.
- Following up all outstanding fees.
- Monitoring and reporting on cash flow and profitability.
- Reconciling and analysing chequebooks, bank accounts and credit cards accounts.
- Recording and controlling expenses.
- Paying accounts.
- Preparing tax records for accountants' purposes and helping maximise potential tax savings.

BMS offers a free initial one-hour consultation, in which an analysis of the barrister's administrative needs is carried out. ❑

Elegy in a Courtroom

"In New South Wales the village sexton has been replaced by the undertaker who conducts burials and cremations in approved areas in accordance with Ordinance 68 under Part XIX of the *Local Government Act*, 1919. Whatever the executors right in the corpse of the deceased may be, the exigencies of public health require that burial take place long before probate vests the estate in the executor pursuant to s.61 of the *Wills Probate & Administration Act*, 189, leaving the executor or relatives to incur personal liability unless the undertaker is content to take his chance on the grant of probate.

Notwithstanding the financial problems, the selling of funerals and cremations is a flourishing business, although the living do not show the same enthusiasm for visiting undertakers as they do for going to supermarkets. In fact the old comfortable association with death exemplified in *Gray's Elegy* and in some parts of Europe finds a cold response amongst many engaged in "life's walking shadow".

So it was that when the appellants made application to the respondent for development approval for alterations and additions to a terrace building at No. 354 South Dowling Street, Paddington, near the Hospice for the Dying, and for the use of the ground floor of those premises as a funeral sales office, local residents objected." ❑

Gregory and Carr Pty Limited v The Council of the City of Sydney, Bannon J, April 1992

Advocacy Workshop

On 24 and 25 April the Bar Association held an Advocacy Workshop in which participants competed with their egos in the presentation of a model case before a number of their colleagues. The Workshop procedure was that 6 or 7 barristers were allotted to each group, each of which had two "instructors". One of these "acted" as a judge, and one examined the group member's presentation. There were four segments during the course of the Workshop, a jury opening, leading of evidence in chief from the party, leading of evidence in chief from an expert and cross-examination. Each segment was videotaped and the video tape was given to the participant for analysis in one of the small rooms adjacent to the courts on the 7th floor of the Supreme Court Building.

A great benefit from the Workshop was an opportunity to see ourselves as others see us. For some it was a bitter experience, for others there was a feeling of relief - "it didn't look as bad as I thought it would".

Some of the instructors had themselves recently participated in a workshop at the new Australian Advocacy Centre in Melbourne. The instructors in the group with which I worked had that experience and were able to pass on a great deal of useful information to me.

One of the major benefits of participation was an opportunity to step back from the day to day hurly burly of presentation of cases where frequently there is no time to examine the method and style of presentation and actually look at how I appeared. This opportunity only arises where a workshop of this nature is available. A second benefit was the model case which involved a great deal of complexity and raised a number of difficult issues. It was not the "infants" type of model case which may sometimes be used elsewhere; this one had the complexities of the real thing including even difficulty in reading the handwriting in hospital notes which could have involved entries on which success or failure turned. Those who drafted the model case are to be greatly commended for their care and imagination.

In addition to the participation there were 2 model cross-examinations. Both of these involved Barret as the victim witness and he was subjected to searching cross-examination from O'Keefe QC and later from Walker. While each of us may not have used the style of the particular cross-examiner it was a great opportunity to see, both in the demonstration cross-examination and in the group participation cross-examination, the techniques and tricks used by our colleagues. They were made available to us in a situation which condensed all of these techniques into a short period of time.

In addition for my part I found it a thoroughly enjoyable experience and, putting the ego aside, I did not look as bad as I thought that I would.

After the Workshop a survey took place and the comments from the participants show the benefits which flowed from it. All the comments received were very favourable. One senior junior described the Workshop as "excellent, should be held at least every six months". Another participant said that the most useful aspects of the Workshop were "video replay" and "no holes barred criticism by (name of instructor)". I note that I myself at the time wrote: "Very, very helpful and creative. It is important to stand back and see where you are at and revise your techniques."

A more junior member of the Bar said of it: "Very helpful to watch it being done properly and then having a go at it yourself straightaway. Good to have the opportunity of working with your peers. Helpful to be a "witness" to see how it looks from that point of view. Great idea. I also enjoyed the opportunity to have lunch and socialise with the "top" of the Bar.

The Workshop was appropriate for all members of the Bar at whatever level. I noted at the time that there is always more than we can learn. The workshop is appropriate for greater participation from the senior Bar as I am sure that we, and those junior to us would learn a great deal. ❑

Brian Donovan QC

The NRMA's Mediation Scheme for Personal Injury Claims

In late April 1992, the NRMA announced that it was creating a voluntary mediation program for all third party personal injury claims in which it is the defendant's insurer. According to press accounts, the NRMA now has about 30 per cent of the "Green Slip" market in NSW and receives about 5,000 personal injury claims per year. The NRMA expects that several hundred claims will be mediated each year. Mediation will apparently be available once the plaintiff's injuries have stabilised and will be offered not only for minor injuries, but also for major ones such as brain damage and paraplegia.

The mediation program will be provided through the Australian Commercial Disputes Centre ("ACDC"), a non-profit independent organisation established by the NSW State Government in 1986. Participation by plaintiffs in the program is voluntary; both the plaintiff and the NRMA must agree to mediation. The parties then sign a mediation agreement and select a mediator from a panel of independent mediators maintained by ACDC.

The NRMA has agreed to pay the mediator's fees and ACDC's fees, no matter what the outcome of the mediation. Plaintiffs participating will have to bear the costs of their own professional advisors, and recovery of such costs will no doubt be a matter for negotiation as part of any settlement achieved at the mediation.

The NRMA's aim in creating the scheme is to bring about early settlement of personal injuries claims. As noted elsewhere in this issue (see page13), a majority of "Green Slip" insurers are participating, through ACDC, in similar schemes. A number of cases have already been settled through mediation.

The NRMA has a useful brochure on its program that will be helpful to barristers and their solicitors and clients. Contact The Senior Manager, CTP Claims, on (02) 229 3820. ❑

Robert S. Angyal

Restaurant Review

The Biter Bit, One Way or the Other

The problem with recession at the Bar is that it provides time for lunching. There are deals at some very good restaurants (Chez Oz for one) but mostly prices remain high.

Meares QC reminisces of the early 30s *"Whoever had the Official Receiver's brief for the day bought the gin, the rest bought the tonic, and we ate pies"*. We must be nearly there!

If you are recession-proof, a visit to Peter Damien's new *Papillon* is well worth while. It is in the old *Balthazar* York Street location: spacious and elegant.

The service is attentive, even brisk: your coat is hung up and a drink is in your hand before the unpunctual are even in King Street.

I had a Caesar Salad, correctly warm with fine morsels of ham, anchovy, raw egg, three lettuces, croutons, garlic, oil and lightly vinegared. It was the special entrée of the day and I loved it.

Next, veal kidneys with beetroot sauce. A pre-cooked small beetroot was finely chopped with onion and garlic and lightly fried to sweat point. White wine and stock were added and the lot reduced to a concentrated sauce. The kidneys were cut small, sautéed very fast separately and the sauce was added and the whole finished with cream. Fantastic.

One beer, one glass of Dawson's Chardonnay and a glass of house Shiraz made it all very relaxed and easy. Fifty dollars a head plus tip got us out.

My brother Jim chose a much more ideologically sound venue for lunch last week when his trial was not reached for the second time. *Casa Juanita* (423 Pitt Street) is Spanish for the Spanish. They understand *"in a hurry"*, they understand fresh good quality ingredients, but the key to it is garlic with everything and fresh chilli with almost everything.

I had garlic champignons, nice button mushrooms in a ramekin, blazing hot, barely cooked and bursting with garlic and chilli. The others all had garlic prawns which were the same only prawns (Oslington style).

Next I had garlic quail. Two tender quail, beautifully cooked with garlic and chilli.

A huge plate of vegetables and rice and bread galore. The others had garlic chicken which was ...

The paella was off but people say it is good.

Very tasty, very authentic, very cheap. $18 including booze!! If you don't like it hot, speak up! ❑ John Coombs

The Registrar
The New South Wales Bar Association
DX 1204 SYDNEY

Dear Sir,

RE: LIQUOR BAR ACCOUNTS OUTSTANDING

Things are tough, times are hard.
Here's my cheque to pay the bar.
It weren't the booze that stopped me payin',
It were the fees for which I'm prayin'.

Solicitors owe me lots of loot,
The Council doesn't give a hoot.
If I could be as tough with them,
You wouldn't have your right - in rem?

Nine dollars eighty don't seem a lot,
A person's copybook to blot.
The bar must be in dire straits,
And so its plight I must abate.

I note you've cut off all my credit,
I couldn't believe it when I read it.
Now that I have squared my bill,
Oh please restore me at the till.

❑ Philip Gerber

The New Zealand Bar Association Wellington Seminar November 1991

The New Zealand Bar Association came to life in 1989. Its first President was Ted Thomas QC, now Mr Justice Thomas of the High Court of New Zealand. The Association has strengthened over the last two years, and in Wellington on Saturday 9 November, 1991, held its first formal Bench and Bar Dinner at the Park Royal Hotel, Wellington. It was preceded by an all-day seminar. I attended as a member of the Association, and found myself to be the only Australian present amongst about 80 Kiwis.

Since its inception, the NZ Bar Association has held a number of seminars in various parts of the country. The Wellington seminar was the most successful yet, and these seminars seem set to become regular bi-annual events.

The first session in Wellington was entitled "Advocacy and Arbitration". Mr Justice McKay, recently appointed to the Court of Appeal, reflected upon a career of some 35 years in arbitration, both as an advocate and as an arbitrator. In New Zealand, it is quite common for members of the Bar to sit as arbitrators in substantial commercial arbitrations. He was followed by Mr T Kennedy-Grant, a member of the Auckland Bar, who delivered a fine paper on commercial arbitration practice. A discussion session followed.

The second session was entitled "Appellate Advocacy". The first speaker was Sir Robin Cooke, President of the Court of Appeal. He opened by enjoining all those present not to repeat his comments. I may therefore only say that he reflected and reminisced for about an hour on appellate advocacy before the Privy Council over the last 40 years, both as an advocate and as a member of the Board. It was a privilege to be amongst the audience. He concluded with some favourable comments on American appellate advocacy as an observer before the Fifth Circuit Court of Appeals in Washington, and then asked for comments from the floor on whether appellate practice in New Zealand should be changed to introduce an abbreviated form of the American appellate brief. Debate on this topic was adjourned until after lunch.

The afternoon session continued on the theme of appellate advocacy with David Williams QC of the Auckland Bar describing the New York litigation which followed the New Zealand America's Cup challenge. He circulated copies of the written briefs which had been filed by Mercury Bay both in the Appellate division of the New York Supreme Court and the New York Court of Appeals. The New York Court of Appeals is televised on cable television in New York, and Mr Williams was able to show us a videotape of the entire final hearing. He stopped the tape at various points for comments and questions. The standard of argument in the face of the 30 minute per side time limit and at times hostile questioning from the Bench was quite extraordinary.

This exercise generated a long debate on the merits of written submissions. The feeling of those present, predictably, seemed to be that an exchange of outline submissions of fact and law prior to the hearing of an appeal was desirable, but full-length written submissions were to be avoided as it would be necessary to impose an arbitrary limit on length - in New York it is fifty pages - and the natural tendency of writers tis o overstate their case and to say excessive things which would be quickly rejected in oral argument. In short, the oral development of argument was seen as fundamental to the New Zealand appellate system where the present practice is for counsel to hand to the Court on the hearing of the appeal both a synopsis of argument and a list of authorities. The President's proposal seemed to me to envisage no more than what is required by our own Practice Note 64.

The day concluded with a "hypothetical" conducted by Julian Miles QC and a panel of eight practitioners from around the country on the topic of "Practical Ethics". The New Zealanders found this to be the most interesting and useful session of the day, and this was understandable given that the Bar in New Zealand is only about 200 strong, is scattered throughout the country and has yet to promulgate its own set of rules.

The dinner was attended by numerous Judges including the Chief Justice and the President of the Court of Appeal. All present went out of their way to make the sole Australian welcome. The guest speaker was David Lange, New Zealand's former Prime Minister. He delivered an entertaining and thoughtful speech on the relationship between the media, particularly television, and the courts. A topical subject on both sides of the Tasman.

On this side of the Tasman, as we all are well aware, barristers are under scrutiny and to some extent attack. It was therefore refreshing to meet for a short time and to enjoy the company of members of the youngest Bar Association in our region, one which has come into existence to satisfy a perceived need for a divided profession. New Zealand is only a small country, but it has an interesting history, and one which is substantially different to our own. Juridically, it is developing in some directions quite differently to Australia. It has no written constitution, but a treaty signed in 1840 - the Treaty of Waitangi - is rapidly becoming, through the influence of the Court of Appeal, a constitutional document. New Zealand's ultimate Court of Appeal remains, and shall remain for the foreseeable future, the Privy Council. It is a jurisdiction worth watching both for its similarities to Australia and to its differences. We can learn a lot from each other.

The next seminar is likely to be held during the ski season in 1992. Before I left Wellington I tentatively mentioned that I thought a few members of the New South Wales Bar (at least) might be interested in attending. That idea found favour, and I shall publish advance warning when the dates are known. ❑

T J Hancock

Barbytes

The assertion that there was only one software accounting programme designed for barristers elicited an enthusiastic response from the computer industry. As will be seen from the articles below (and the letter on page 8) there is a variety of programmes on the market.

In the Summer 1991 edition of *Bar News* an article about a new barrister's computerised billing system, written by Paul Blacket, appeared. I would like to point out that Mr Blacket is incorrect when he states that the programme he mentioned was the only software programme in either the IBM or Apple environment that has been tailored specifically for the needs of the barristers.

Some 6 years ago we wrote a Barrister's Accounting System (Version 1) for the IBM platform. There are over 20 copies of this programme installed. In the past year this programme was completely rewritten using Foxpro2 (a database which in July will be marketed by MicroSoft under their own brand name). At present the Barrister's Accounting System (*BAS*) is available for the DOS platform, but by the end of the year there will also be a Mac and Windows version. Version 2 of this programme contains many enhancements over Version 1, most of the extra features being the result of suggestions made by barristers who have used the earlier version. This system allows a barrister to keep track of both fees and outgoing expenses. The operator can use either keyboard "hot keys" or a mouse to operate system and entry to the programme can be restricted if the barrister chooses to install a password.

Features-Memorandum of Fees Section (Accounts Receivable)

1. A list of solicitors is added to system
2. Matters when received are entered into system
3. Diary details are entered
4. Details are entered for Memo of Fees
5. Receipts are entered

Entries are assisted by picklists. For example, when adding a Memo of Fees, click or press A to activate the "Add" button and a list of matters appears on screen. Type first character of matter and list scrolls to the first occurrence of that character. Use down key to find relevant matter, press ENTER and all details for this matter (including solicitor id, address, parties, etc.) are automatically inserted. Data entered can then be formatted into reports that are viewed on screen or printed:

Print/View up to date list of solicitors, including contacts, address, phone, fax.
Print/View complete summary of all transactions for each solicitor
Print/View Reminder letters to solicitors showing details of outstanding fees*
Print/View Up-to-Date Register of Matters, including report on Briefs not Returned
Print/View Diary showing hearing dates, court, time, etc.
Print/View Memorandum of Fees, including provision for legal aid discount, etc.*

Memo of fees can be forwarded at end of brief or daily, weekly, monthly, etc. There is no limit to the number of items entered on each Memo

Print/View Report showing total fees billed for any specified period
Print/View Memoranda of Fees Summary*
Print/View Report showing total receipts from solicitors
Print/View Receipt - shows outstanding balance for forwarding to solicitor*

Function keys are used to automatically insert often used memo items, e.g. press F6 and "Draft Statement of Claim" is automatically inserted into Memorandum of Fees.

* Option to print either envelopes or labels to solicitors. Letterhead is generated by system, no need for preprinted forms - phone, fax number, address, etc. is customised by operator.

Features-Expenses (Accounts Payable)

Enter all payments made by barrister from cheque book and bank statement. Provision also exists to itemise payments made for personal investments, e.g. rented properties, farm, etc.

Print/View Expenses ledger - shows details/totals for each expense item for any specified period, includes grand totals
Print/View cheque list for any specified period
Print/View non-cheque list (bank debits, periodical payments, etc) for any period.

At financial year end, print a summary of all income and expenses and hand to Accountant.

BAS Version 2 is written for an IBM or compatible computer and is priced at $1200. It is recommended that the computer used should have an 80386 processor. Whilst this system will run on an XT with 640K RAM the speed drops considerably and is therefore not recommended. A late model Hewlett Packard laser printer (or compatible) which uses a 12 pitch internal font is recommended, otherwise a customisation fee applies.

We hope you will appreciate that this system has certainly been designed for barristers. It is well documented and is supplied with a very comprehensive manual, as well as a Function Key Template, sample envelopes and labels for use with this system. If you would like a demonstration of this programme, please contact me and I'd be happy to arrange this.

❑ Cook's Computer Service

New Financial Management Software for Barristers

On Friday 5 June, a new and exciting piece of computer software designed specifically for barristers called *Counsel's Companion* was launched at Blackstone Chambers. This is the first professionally designed and produced software for barristers which will run on either the Apple Macintosh or IBM and compatible computers running Microsoft Windows. Priced at $1450, it represents good value for money. Attractively packaged with a comprehensive manual, *Counsel's Companion* is customised for each purchaser.

Whilst there are one or two other programs available which attempt to manage barristers fees, they depend upon a product called "Filemaker Pro" which is a "flat-file" general purpose database program which only runs on the Apple Macintosh. *Counsel's Companion*, however, has been written using the much more powerful "relational" database language called "Omnis 5". Consequently, it is a totally integrated "stand-alone" program for both Macintosh and IBM PC computers, and incorporates many features that are not available on programs which depend upon "Filemaker Pro".

Because it takes full advantage of the pull-down menus, and "point-and-click" techniques available on both the Macintosh and under Windows, *Counsel's Companion* can easily be used by either the barrister personally or his or her secretary. It would be ideal if used on either an IBM PC based 386 notebook computer or a Macintosh PowerBook. A laser or ink-jet printer will produce the best printing results.

Counsel's Companion has been designed to remove a substantial part of the burden of managing the financial side of a barrister's practice. Barristers practising in New South Wales, and in those states which do not have the advantage of a centralised clerking system, have long had to undertake the billing and collection of their own fees. Those who do not employ a full-time secretary find their evenings and week-ends consumed by the frustrating task of writing up fee books, dictating memoranda of fees and following up unpaid accounts. Enquiries from solicitors about fees unrendered and unpaid often interrupt conferences or chamber work and can often not be answered on the spot. The result is that a barrister's cash flow, although intermittent by nature, is often seriously disrupted whilst good financial management is difficult if not impossible. Barristers who do employ a secretary find that much expensive secretarial time is consumed by these tasks, at the expense of productive work. Also the tracking of expenditure is usually left to the end of the financial year and then passed to accountants to sort out with consequential costs.

Counsel's Companion has been designed and produced with the object of removing these difficulties by replacing the traditional manual fee books, card indexes, ledgers and piles of paper, with an integrated and easy-to-use software package. When a brief is received, the relevant information about it, including the solicitor's name, direct telephone number and the firm's accounting reference, is entered immediately. Then, as work is done, fees are entered in a Fee Book and may be billed at any convenient time. *Counsel's Companion* creates a fee memorandum in traditional format, and then keeps track of it until it is paid.

All of the relevant information about a brief, including fee memoranda outstanding receipts and unbilled fees, is available from one window simply by clicking on the relevant items. Responses to enquiries from solicitors can therefore be instantaneous. (Fig 1)

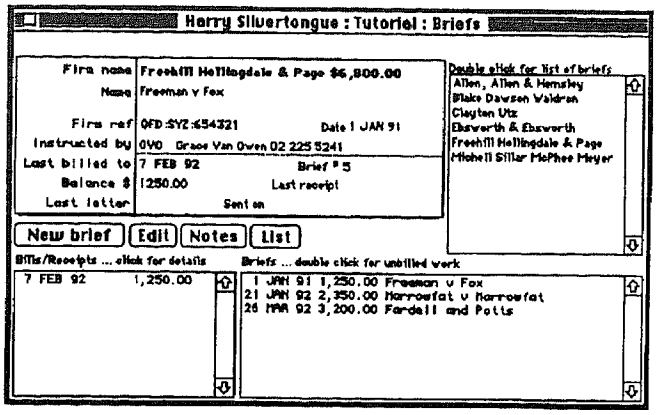
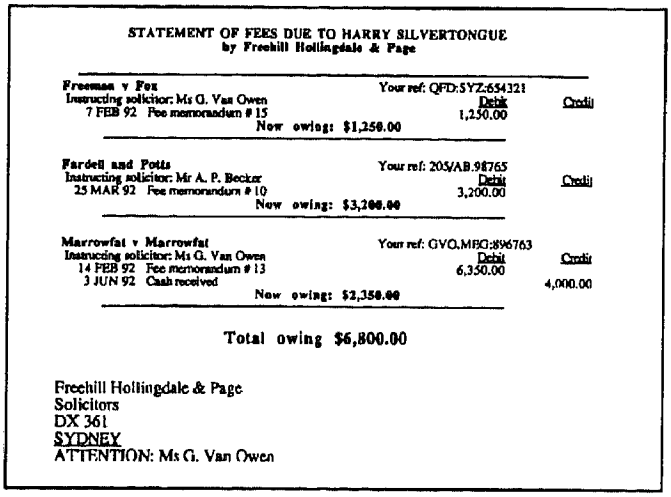


Fig 1

Perhaps the most ingenious and powerful feature of the program is the debt collection facility. With a couple of mouse clicks, a barrister can create a statement, either on the screen or printed, showing all fee memoranda for any firm or any particular solicitor within that firm. Gone forever are the hours wasted preparing "accounts rendered". Reports of unpaid fee memoranda by age or amount can also be produced at the click of a button (Fig. 2), and the program even prints two reminder letters (the second more harsh than the first) upon request.



STATEMENT OF FEES DUE TO HARRY SILVERTONGUE
by Freehill Hollingdale & Page

Freeman v Fox — Your ref: QFD:SYZ:654321

	Debit	Credit
Instructing solicitor: Ms G. Van Owen		
7 FEB 92 Fee memorandum # 15	1,250.00	
Now owing: $1,250.00		

Fardell and Potts — Your ref: 205/AB.98765

	Debit	Credit
Instructing solicitor: Mr A. P. Becker		
25 MAR 92 Fee memorandum # 10	3,200.00	
Now owing: $3,200.00		

Narrowfat v Narrowfat — Your ref: GVO.MEG:896763

	Debit	Credit
Instructing solicitor: Ms G. Van Owen		
14 FEB 92 Fee memorandum # 13	6,350.00	
3 JUN 92 Cash received		4,000.00
Now owing: $2,350.00		

Total owing $6,800.00

Freehill Hollingdale & Page
Solicitors
DX 361
SYDNEY
ATTENTION: Ms G. Van Owen

Counsel's Companion also incorporates an "expenses" feature which allows a barrister to set up a chart of accounts and then keep track of all expenses. Income and expenditure reports are available for any period, so all information necessary for the preparation of a tax return can be produced at the end of the financial year, printed and sent to the barrister's accountant. Reports of fees (billed or unbilled) are available by matter or by day, so a barrister can constantly monitor his or her performance against budget. The time and cost savings which will be generated by this program in a barristers's practice are potentially substantial. Its effect upon a barrister's income ought to be equally favourable through its ability to enable the prompt billing of fees and the constant monitoring of unpaid accounts.

Counsel's Companion is available from DLA Software, 22 Crown Street, Woolloomooloo (02-357 4777). Demonstrations are available upon request. ❑

Book Reviews

Dispute Resolution in Australia

(298 pages plus appendices, bibliography and index)
Hilary Astor and Christine M Chinkin
Butterworths 1992 RRP $55.00

French medical personnel near the front lines during the First World War, faced with appalling casualties as a result of the carnage wrought by trench warfare, were faced with the problem of how to treat very large numbers of wounded men with quite inadequate medical resources. To solve this problem, they developed a technique which came to be called "triage". They divided the wounded men brought to them into three categories. Those so seriously wounded that even the most heroic application of medical resources would not have prevented death were made as comfortable as possible and left to die in peace. Those who clearly were going to survive their wounds without medical attention were sent to hospitals behind the lines. To the third category of wounded men - where the application of the medical resources they had could mean the difference between life and death - they devoted their full resources.

Deciding whether using an alternative dispute resolution ("ADR") technique such as mediation to attempt to resolve a particular dispute calls for a legal judgment of the same sort as the medical judgment required by triage. Some cases will probably settle, whatever the parties' legal advisers do. Other cases probably will never settle, whatever the parties' legal advisers do. There remains a third category of cases - those where the application of an ADR technique is likely to make a difference.

But how is a lawyer to decide which cases fall into this category? This is perhaps the most difficult judgment that lawyers considering using ADR may have to make.

Dispute Resolution in Australia will be of substantial assistance to them in making that decision. The authors, both senior lecturers at Sydney University Law School, aimed in writing this book to provide a university text presenting an accessible, coherent and critical description of dispute resolution in Australia. They have more than achieved that goal.

At a time when even practitioners active in the field have difficulty keeping up with all the developments in Australia, the authors (who have taught an elective course on dispute resolution to final year law students since 1989) have made the enormous literature on ADR accessible to the student and to the legal practitioner. They compare litigation and alternative methods. They describe in detail ADR techniques such as negotiation, mediation, expert appraisal and others, as well as hybrid processes. They describe the attempts within Australia and the United States to annex ADR processes to courts, a matter of particular relevance in New South Wales given the recent proposal by the Supreme Court of New South Wales for a court-annexed mediation pilot project (described in detail in this journal at p 9).

The legal practitioner applying the technique of triage will find particular assistance from chapter 9, which deals with selecting the appropriate dispute resolution process. No doubt some practitioners will prefer to develop their own checklists of the factors tending to indicate that a dispute is either suitable or not for the application of ADR techniques. Computer buffs will readily recognise the potential for the use of an expert system to guide practitioners through the many factors that have to be considered. (An expert system is already available in the United States for negotiation - "Negotiator Pro" manufactured by Beacon Expert Systems, Inc.) Eventually a practitioner's text for ADR will emerge to satisfy some of these needs.

In the meantime, *Dispute Resolution in Australia* is by far the most comprehensive source of material on ADR in Australia. Particularly helpful are its appendices, containing dispute resolution clauses; suggested rules for an expert determination process; and the guidelines for solicitors who act as mediators promulgated by the Law Society of New South Wales. ❑

Robert S Angyal

Plain Language for Lawyers

Michele M Asprey The Federation Press 1991
R.R.P. Paperback $25.00 Hard Cover $40.00

This book is about taking a different approach to drafting with the aim of communicating better. Few members of the Bar doubt the importance of good drafting and still fewer practise it. It is not uncommon to read a definition followed by "hereafter referred to as ...": a dreary prospect indeed and one which might discourage the subject from the society of the definer.

The author refers to most of the major works of contemporary value. She traces the self-imposed and statutory developments in Australia and overseas on the subject of plain language in the law. The chapter entitled "Legal Affectations and Other Nasty Habits" provides examples that are read and heard every day in court. The author is not merely critical: she provides arguments that compel their abandonment for alternatives in the book. The "Plain Language Vocabulary" is a sufficient incentive to buy this book.

I criticise the author's treatment of recitals. She doubts the value of background facts and prefers their insertion in operative provisions or omission altogether. The effect of s.53 of the *Conveyancing Act 1919* (which deals with recitals that are 20 years old) is ignored. In commercial drafting, the practical value of identifying common assumptions and objectives seems to emerge in litigation later on when the parties have adopted stances that give no clue to their original objectives.

This is a forthright book and it deserves such a review. It is a well written and witty book, which argues the case for clear expression forcefully, and provides practical illustrations of plain language at work. It is not a book that may be dismissed as directed to solicitors: it is valuable for anyone who seeks to improve skills in communicating in writing or speech. It is a good book for barristers and at $25.00 is good value. ❑

P M Donohoe

Travel and Tourism Law in Australia and New Zealand

Gary N. Heilbronn. The Federation Press 1992
Hard Cover $125.00

This book deals with a subject close to the hearts of many lawyers, however it is only in recent times that travel and tourism has emerged as a discrete topic in legal literature.

The development of Travel and Tourism Law as an area of practice provokes bemused comment from some quarters, but it is really not surprising that legal issues as they arise peculiarly in a particular industry should be collected together in a work such as this. The insurance industry, mining industry, media and advertising industry are just a few examples where specialisation has evolved in legal literature and practice. Given the twentieth century boom in travel and tourism it is only natural that a sustainable legal speciality should arise to service that industry.

In this publication, the author has broken up the subject into five major areas:

. Part 1 sets the background by looking at travel, and travel and tourism law, in both the historical and modern context.

. Part 2 deals with personal restrictions on travel covering such matters as passports, entry and exit controls and financial implications.

. Part 3 looks at regulation and administration of travel and tourism focusing on the key elements of accommodation and transportation (both air and surface).

. Part 4 contains a useful treatment of a peculiar feature of the travel and tourism industry, the role of intermediaries such as travel agents and tour operators.

. Part 5 addresses the issue of liability for accidents and injury on the part of both travel agents and suppliers of services. Again, accommodation, air and surface travel are specifically dealt with.

The publication concludes with a series of annexures which are referred to in each part eg. OECD Decision - Resolution on International Tourism Policy 1985; WTO Manila Declaration on World Tourism 1980 and Acapulco Document; IATA ticketing documentation; TPC Travel Advertising Guidelines.

The book is far and away the most comprehensive and up-to-date offering in the area, and the most suitable for the practitioner. Of other publications, *Australian Travel and Tourism Law Handbook* by Cordato (Butterworths, 1988) is written rather more for the student or travel agent and *The Law of Travel and Tourism* by Pengilley is a more limited though specialised text dealing mainly with aspects of Trade Practices Law in their application to travel and tourism.

An inadequacy in the publication is in its treatment of the EEC Directive of 13th June 1990 on package travel, package holidays and package tours. Whilst Parts 3 and 5 refer to the Directive, noting that it is aimed at formalising tour contract provisions in EEC countries, the text of the Directive is not reproduced in the Annexures. Perhaps this is because tour operator liability will be implemented through legislation adopted by each member State, the date for compliance is not until 1993 and it is not strictly Australian or New Zealand law. However, as is pointed out by the author, Australian and New Zealand travellers often take package tours in or organised from an EEC country. In addition, the EEC Directive and legislation based upon it may well provide a precedent for law reform in Australia as has been the case in other areas eg. product liability. It is to be hoped, therefore, that future editions will go further in keeping Australasian practitioners up to date with this emerging area of law.

This criticism in no way detracts from the extremely detailed analysis the present edition provides of matters of more direct relevance to Australian and New Zealand Travel and Tourism Law. Those with an interest in the area would do well to obtain a copy of this invaluable compendium of references and otherwise difficult to obtain materials on the subject. ❑

Neil Francey

Motions and Mentions

Law and Literature Association of Australia - Annual Conference

The Annual Conference of the Law and Literature Association of Australia will take place at the University of Sydney on 17-19 July 1992. The conference will feature papers given by distinguished lawyers, authors and academics on a variety of topics related to literature and the law. A paper delivered by his Honour Mr Justice Peter Heery of the Federal Court on "Literary Criticism and the Law of Defamation" at the Association's 1991 Conference in Melbourne appeared in the last issue of *Bar News*.

The principal speaker at this year's conference will be James Boyd White, Professor of Law, Professor of English Language and Literature and Adjunct Professor of Classical Studies at the University of Michigan. Professor White's major publications include *The Legal Imagination: Studies in the Nature of Legal Thought and Expression; Heracles' Bow: Essays on the Rhetoric and Poetics of Law* and *Justice as Translation: An Essay in Cultural and Legal Criticism.* The Conference will also feature a forum entitled *Women's Judgments: Can they make a Difference?* to be chaired by Mahla Pearlman with presentations by women judges, barristers and legal academics. The first day of the conference will offer a workshop and a continuing legal education session on current issues in contract law, particularly the interpretation of contracts.

Information about the conference and membership of the Association may be obtained from Francois Kunc, Secretary, Law and Literature Association of Australia, Eleventh Floor, Selborne Chambers, DX 377 Sydney. ❑

1992 AIJA Eleventh Annual Conference

The Annual Conference of the Australian Institute of Judicial Administration (AIJA) is to be held on 22-23 August 1992, at The Banco Court, Law Courts Building, George Street, Brisbane.

Information about the Conference can be obtained from Mrs Margaret McHutchison at the AIJA Secretariat, 95 Barry Street, Carlton South, Telephone (02) 347 6815/18.

Conference programmes have been ent to AIJA members and are available from the Secretariat to anyone who is interested.

Unreported Authorities

The Bar Council has approved the following Rule for addition to the Rules of the Bar Association.

Where a barrister proposes to cite to the court an unreported authority, that barrister shall either:-

a) provide a copy to his or her opponent at or prior to the time of citing it; or
b) if the authority is one which can readily be obtained, provide to his or her opponent sufficient notice to enable him or her to obtain it. ❑

Settlement Week 1992

On 23 March 1992, the Law Society of New South Wales announced Settlement Week 1992. Like Settlement Week 1991 (described in *Bar News*, Summer 1991), this year's Settlement Week will involve the voluntary submission to mediation in mid-October of up to 300 pending Supreme Court cases. But this year, District Court and Family Court cases will also be brought into Settlement Week - up to 300 from each jurisdiction. Thus, as many as 900 matters could be mediated during Settlement Week 1992 (which will occur between October 12 and 30 - "week" having become a term of art!)

If Settlement Week 1991 is any guide, a substantial number of barristers will be briefed to appear at the mediations, and some will act as mediators. It may well be that before Settlement Week 1992 mediations begin, there will be available to New South Wales barristers training courses giving grounding in the mediation process, which will be tailored specifically to the needs of barristers seeking a better understanding of how best to represent a client at a mediation. ❑

Tongue-Tied

In *Nguyen v Taylor* (CA, unreported, 29/5/92) Meagher JA at 6-7 said:

> "Certainly both the correspondence and the oral evidence on the point disclose considerable linguistic confusion, but no more than one might expect from an estate agent who was unfamiliar with the real estate concepts, a solicitor who was nonchalant about the legal effect of options, and a client who could not understand the English language." ❑

In Passing

The report in *The Times* of the farewell to Lord Lane LCJ contains a reference by the Master of the Rolls to one of Lord Lane's puns which was that "Audi alterem partem" was legal Latin for "foreign cars need other parts". ❑

This Sporting Life

Cricket

NSW Bar v Queensland Bar

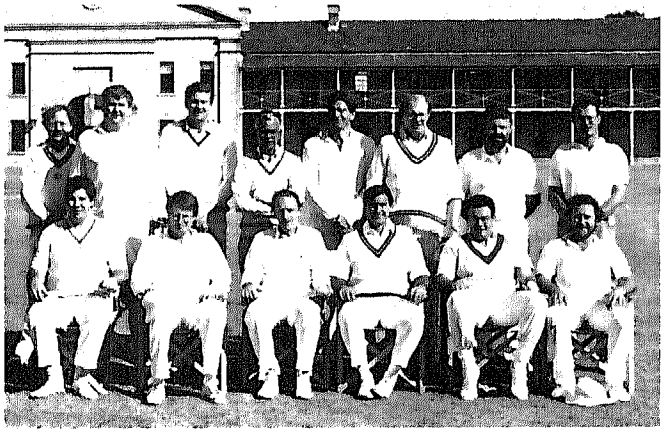
The game against the Queensland Bar was held in Sydney at Victoria Barracks on Saturday 11 April, 1992 resulting in a comfortable win to New South Wales. Despite Queensland winning the toss and sending NSW into bat on a wet wicket, NSW was able to score 159 from 42 overs with Hamman dominating with a fine 73. No one else passed 20 but enough batsmen got a few to accumulate a competitive total.

Queensland never really threatened the NSW total in the face of our customary impeccable, even if not dangerous, bowling and excellent fielding. King (1/18) and Naughtin (1/24) with 10 tight overs, each made Queensland earn every run and then Lachlan Gyles and Connor kept the pressure on with the visitors finally accumulating a modest total of 115. Again, classy catching was a feature of the NSW performance.

Later, a large contingent of players, wives and acquaintances gathered at a function at Dimitris organised by Maiden and Laughton, and then showed considerable stamina by backing up for lunch on Sunday.

The occasion marked the 19th match between the two Bars and advance notice is given that Gyles QC intends to muster a team from the many past players in these fixtures to travel to Brisbane next year to play a reunion event at the same time as the 20th annual game. ❑ Peter Hastings

Hamman dominates at Victoria Barracks



The Winners - NSW Bar v Queensland Bar
(L to R - Back row) Laughton, Ireland QC, Harris, Sandrasegara, Maddox, King, Benson, Maiden
(L to R - Front row) Levick, Connor, Hastings (Capt.) Hamman, Gyles Jnr., Naughtin

NSW Bar v ACT Lawyers

The inaugural cricket match between the Bar and a team of ACT lawyers was held at Mittagong on 29 February 1992. The Bar team was led by a distinguished group of Queen's Counsel, Holmes, Poulos, Stevens and Sullivan. Unfortunately, Her Majesty's presence in the country nearby at the time failed to inspire her Counsel and the ACT lawyers won by 30 runs.

The ACT batted first and were difficult to dislodge, finally scoring 7-133 off their 40 overs. Stevens (1/21) Hastings (1/16) Sullivan (1/15) and Luckman (1/25) were the only wicket takers. Sandrasegara bowled well but without luck taking 0/14 from his 6 overs. Luckman and Pritchard got the Bar off to a reasonable start, but thereafter only Peter Maiden with 39 was able to threaten the ACT total. Cato (19) and Hastings (18) provided some assistance, but the final total was 8-143 off the allotted overs.

NSW Bar v NSW Solicitors

The Bar played the Solicitors at Graham Reserve, Manly on 8 March, 1992 and lost after successive victories in this fixture on the preceding two years. The Solicitors scored 159 off their 35 overs despite tight bowling from Naughtin (1/18) Parker (1/24) and Lachlan Gyles (2/25) off 7 overs each and some good fielding and catching, but the batsmen never got going apart from Harris with 38 and the total was a sad 113. Only Hastings (5 n.o.) and Lachlan Gyles (11) also reached double figures.

NSW Bar v Victorian Bar

The tenth annual game against the Victorian Bar was held at Brighton Oval in Melbourne on Saturday 28 March, 1992. A small but determined group travelled to Melbourne for revenge for a narrow loss last year against the traditional rivals.

Good fortune determined that steady rain on the previous day held off but sufficiently dampened the wicket such that when NSW won the toss, Victoria were asked to bat first on a difficult wicket. Victoria duly struggled against steady bowling. Naughtin led the way with 4/20 from 8 overs, with Hastings (2/15) Stevens (1/33) Laughton (1/11) and Levick (1/17) also taking wickets. Maiden kept wickets well and Hamman and Harris took good catches to round off a disciplined effort. Harris (24) and later Laughton (21) laid a good foundation in the NSW innings until three quick wickets caused a few frowns of consternation. However, Hamman, relishing the prospect of defeating the old foe, took control and finished with a masterly 58 not out to ensure that the Victorian total of 131 from 40 overs was passed with 4 wickets to spare and 4 overs remaining. Maiden, whose future at the NSW Bar was under a cloud after assisting Victoria to win last year, showed that his rehabilitation was complete by staying with Hamman to score a valuable 12 not out at the end. The Victorian Captain, Gillard QC, later reluctantly restored "The Sub-Standard Trophy" to NSW during a pleasant function at Fitzsimmons Restaurant on Saturday evening.

Eleventh Floor Wentworth & Selborne v Tenth Floor Wentworth & Selborne

On Sunday 29th March 1992 light north-easterly breeze and clearing cloud cover commenced the day. The track was sticky with a heavy outfield and long grass in readiness for the impending football season.

The Eleventh Floor team consisted of Allsop, Donohoe QC, Durack (de facto Captain), Foster, Gageler, Gleeson (Jacqui), Holmes QC (Captain), Meagher, Poulos QC, Sullivan QC, Weber and Delaney (part-time).

The combined Tenth Floor team which, like the two Irelands only seems to unite in the interests of sport, consisted of Austins (Stephen & son Sam), Connor, Darke, Douglas QC, (part-time), Gleeson (Julian), King (Captain), Hutley (part-time), Pritchard, J Sexton, B Sullivan and Webb QC (calling wides).

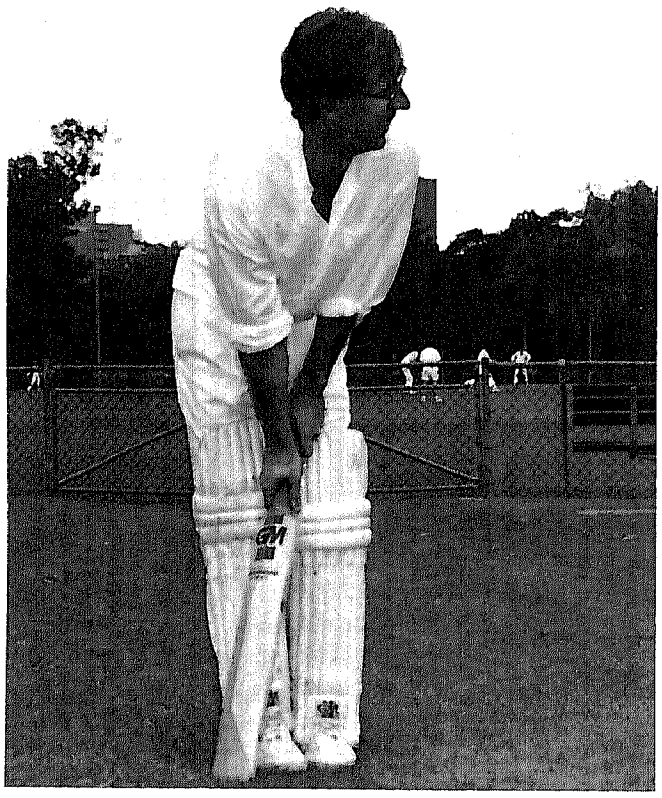
Highlights of the day were Sullivan tearing his trousers (see inset) and Douglas being bowled by Poulos and maiden appearances by Gleeson (a maiden) and Donohoe (not a maiden). The day was catered for by John Close and was marked by uncharacteristic sobriety attributable in part to the Sydney Harbour Bridge being closed for its 60th birthday. By contrast the only two spectators were a man and his female friend who occupied the back benches sound asleep until lunch was served. John Close served the lunch rather too near this couple and King bustled it away from their hungry clutches.

The final scores were:

11th Floor - 153 runs off 45 overs;

10th Floor - 176 runs in 45 overs.

No individual performances of note were recorded. ❑



Hutley pads up...

Bench and Senior Bar v Junior Bar Golf Match Tuesday 21st April 1992

Seventeen members played at Pymble on the Tuesday after Easter in the annual Bench and Senior Bar v Junior Bar Golf Match.

The low numbers are almost certainly due to the fact that none of the Courts now observe the Tuesday after Easter as a holiday; it is probable that another day for this enjoyable and valuable contact between the Junior Bar and the Bench and Senior Bar will have to be found. Many thanks to all of those who supported the day, and in particular Chief Judge Staunton QC.

Three matches only were able to be played: Chief Judge Staunton QC and Gyles QC (45 points) defeated Luckman and Cummings (39 points); O'Connor QC and Donohoe QC (33 points) were despatched by Donohoe and O'Dowd (45 points); Hewitt and Steele (46 points) defeated McGill and Wynyard (33 points).

Puckeridge QC and Hartigan played together (but without opponents) and scored a creditable 40 points.

Crimmins, Roberts and Swan (of the prosecutorial kind) played as a three ball with Roberts as the "swinger" but refused to return their scores!

Puckeridge QC organised the start on short notice and thanks go to him for so doing.

If anyone has any ideas for an alternative date, please contact me. ❑ John Maconachie QC

Great Bar Squash Competition

The 1991 Great Bar Squash Competition was organised in sterling fashion by Greenwood. The competition got underway in the Law School Squash Courts (an ordeal in themselves) on Thursday the 28th November in which the 43 Edmund Barton Team were victorious over 7 Windeyer, and 10 Selborne over 8 Garfield Barwick. On the 2nd December 8 Garfield Barwick defeated 7 Windeyer and 10 Selborne defeated 8 Wentworth. The next day, the 3rd December, 8 Wentworth were similarly defeated by 43 Edmund Barton. Thus, at 6 pm on the 4th December, the final was played between 43 Edmund Barton and 10 Selborne.

Wynyard for 43 Edmund Barton had a quietly confident warm up with Darke for 10 Selborne who thereupon caused great consternation by thrashing Wynyard 9-0, 9-7. This caused an anxious second game to be played between Elkaim of 43 Edmund Barton and King of 10 Selborne. This was probably the match of the competition in which both players showed consummate skill and surprising agility and from which Elkaim emerged triumphant 2-0. One game to each team with the decider to be played between Pearce for 43 Edmund Barton and Sexton for 10 Selborne. 10 Selborne tested the nerve of 43 Edmund Barton by cunningly arranging for Sexton to arrive well after the completion of the first two matches. The tension was as taut as a bow string when the two players finally entered court. However 43 Edmund Barton's own secret weapon was Pearce himself, now known as "Cannon Shot" Pearce. Sexton thought he was getting along fine in the warm up until Pearce, with a cry of fury leapt upon the ball and hit it so hard that the observers were temporarily deafened by the sound it made as it blurred off the front wall at the speed of light. Pearce 9-0, 9-0.

Congratulations to Greenwood upon his organisation and to the winning team, 43 Edmund Barton, now the proud owners of the Judge McCredie Cup.* It is to be noted that the winning team has become somewhat smug and Greenwood would appreciate it very much if other squash players out there would lend their services next year to cutting them down to size. ❑

John Wynyard

*Elkaim walked off with the Bar Association's Best and Fairest Trophy simply because he never conceded a game in the whole tournament.

Elkaim, Wynyard (Cpt.) and Pearce receive the winners trophy from Judge McCredit.

Visit by Bench and Bar from Belfast

A number of members of the Bench and Bar of Northern Ireland will be in Sydney from 16th July to 22nd July.

The Ulstermen will take part in the annual Bench and Bar v Services golf match on 17th July 1992.

This year, that very popular event will be played over Bonnie Doon golf course at Banks Avenue, Pagewood. Players will hit off between 11.00 am and 12.15 pm from two tees, ensuring a comfortable round which will finish well before the light fades.

The traditional post match black tie/mess dress dinner will be held, this year in the Bar Association dining room and the Ulstermen, who all have masters degrees in "having a good time", will also be taking part in that.

A number of our members toured Scotland and Ireland in 1990 and the high point of that trip was dinner in the Supreme Court at Belfast with the Ulstermen - that memorable night promises to be repeated in our dining room this year.

If you play golf at any level of competence you will be more than welcome to join the Services (always great company) and the Ulstermen at Bonnie Doon, which is presently in glorious condition, for the modest cost of $30.

John Close, our resident caterer, is organising what promises to be an excellent meal - even if you don't play golf, come to dinner; $40 including good wine with the meal is all it will cost.

The annual golf match against the Services, and the dinner, is always an extremely enjoyable and convivial occasion - it promises to be even more so this year with the visit of the high-spirited and friendly Ulstermen.

Numbers will be limited - Eva in the Bar Association office (232 4055) or your Clerk can provide details and a form to reserve your place. Any enquiries should be directed to John Maconachie (231 4461). ❑

"I know I should find out more about computers, but I never do."

Whenever the subject of computerisation comes up among lawyers, someone is bound to say it. "I know I should find out more about computers," one barrister will always admit, "but I never do."

To Christoph Schnelle of Scantext, New South Wales' largest provider of computer-based litigation support, the reason is simple. "Working with paper is an extremely inefficient process," he says, "but, still, a good barrister is utterly brilliant at it. And the ordinary computer-based application simply isn't anywhere near as good."

Why? These days, when a computer can supervise a 2,000 km optic fibre submarine system on the floor of the Tasman Sea, why can't it satisfy the needs of a busy barrister?

First of all, Schnelle says, most members of the legal profession experience a compromise in going from paper to computer. "Paper provides the possibility of things like tables of contents, indices, summaries and cross references," he notes. "There is a tactile feel about paper, and if too much of this is lost with a computer system, it becomes unfamiliar territory.

"And the second consideration is context. Take a totally featureless transcript, like 14 volumes of 400 pages each, and try to look for a particular reference. A normal person would be lost, but a lawyer, particularly a senior lawyer, will be able to find what he or she is looking for, and find it quickly. There's no such thing as a QC with a bad memory. They can remember small things, little identifying features — like the length of a line or the position of a hyphen or a pithy remark at the top of a page. This is an inefficient process that is done extremely well by lawyers."

An additional consideration, Schnelle believes, is that laywers are used to dealing with fellow experts. With computers companies, unfortunately, they find themselves talking to sales personnel or technical reps.

Yes, computers can lift productivity, most lawyers will admit, often reluctantly. But still there is resistance.

Then, is there a way for lawyers to achieve these productivity gains and, at the same time, actually *enjoy* using computers?

Most computer companies and consultants will propose one of two solutions: either a complex $100,000-plus solution or an off-the-shelf package hyped for its ease of use and power that, with its limitations, will bore any barrister in half an hour.

But not his Scantext system, Schnelle promises. Not the leading edge *Folio Views* solution. "In a few minutes I can demonstrate to a laywer how a litigation team's preparation productivity can be increased by 33%," he states.

"Providing instant access to large volumes of text in a way that makes senior lawyers look forward to using the software is a complex undertaking — for the system provider," he continues. "But it must not be complex for the lawyer. Powerful, yes; complex no." *Folio Views*, he says, is just that.

As an example, Schnelle puts forward the hypothetical case of a lawyer needing to locate what a Mr R H Blake had to say about the principal character, a Mr Davis, in a large insurance case.

"Within seconds, the computer will pinpoint all references to the word 'Davis' and link it to any witness named Blake. Then, with another keystroke, we find what we're looking for: that on day six of the trial, on the nineteenth of August in the morning, R H Blake — not just Blake — was cross-examined by Finkelstein. It will also tell us we're at the fourth paragraph on page 723 of a 5600-page transcript, and that Blake has been testifying since page 715.

"The attitude of those who wrote the software was that users should be able to do what they could without a computer — all of it — and that the software should then add something special to it," Schnelle says. "It should add magic, just like a good word processing system adds magic to a typewriter.

"And Scantext can show any lawyer how to add that magic to litigation support. All that's needed is a five-minute investment."

Jack Allanach

Jack Allanach is a Sydney-based writer, specialising in information technology and communications. He has written on computing for *Computerworld*, *Computing*, *Australian Computing*, IBM's *Quarterly* and *Focus* magazines, and the *Law Society Journal of New South Wales*.