

# Bar News

*The journal of the NSW Bar Association*

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*John Hubert Plunkett Q.C.*

**"LEARNED IN THE LAW"**  
*- The Tradition Continues*



*The last Queen's Counsel*



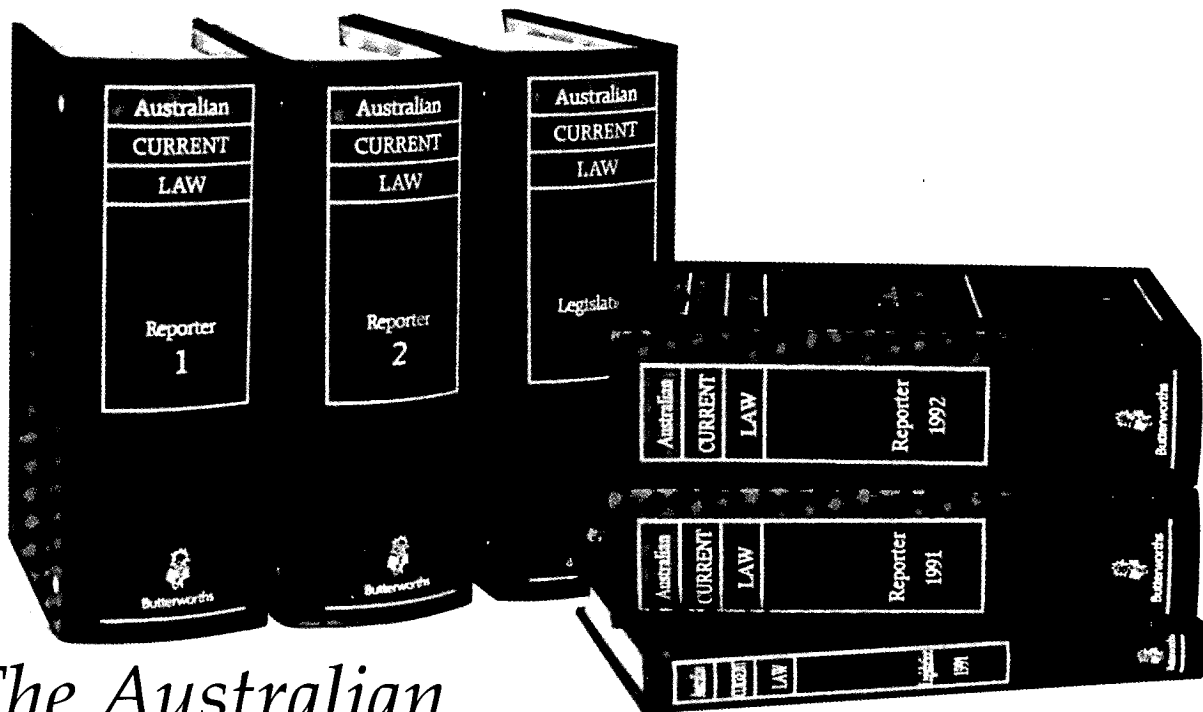
*The first Senior Counsel*

*Also inside this edition ...*

*The Spedley Mediation from the Inside  
Of What is Past, or Passing, or To Come  
Meaghertyrdom*

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*1993 Edition*



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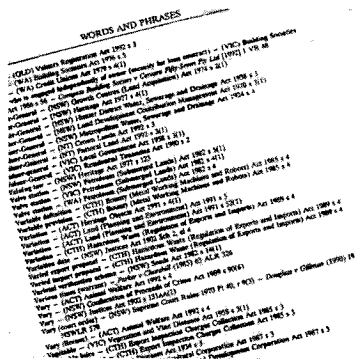
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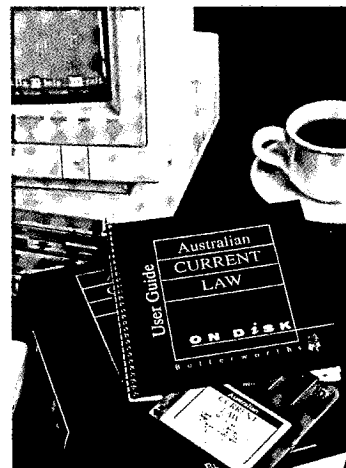
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one of the first members of the New South  
Wales Inner Bar (by permission of the  
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the 1992 and 1993 Silks (photographs kindly  
provided by the President of the Court of  
Appeal, Mr Justice Kirby A.C., C.M.G.)

Views expressed by contributors to Bar News  
are not necessarily those of the Bar  
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Contributions are welcome, and should be  
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Barristers wishing to join the Editorial  
Committee are invited to write to the Editor  
indicating the areas in which they would be  
interested in assisting.

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## Senior Counsel for 1993

On 22 November the President, John Coombs QC, has announced the appointment of the following persons as Senior Counsel, effective 1 December 1993.

1. Richard Ross TRACEY (Victoria)
2. Peter Richard DUTNEY (Queensland)
3. John Victor KAUFMAN (Victoria)
4. Margaret Anne WILSON (Queensland)
5. Henry JOLSON (Victoria)
6. Anthony John MORRIS (Queensland)
7. Hugh Barron FRASER (Queensland)
8. Thomas Andrew GRAY (South Australia)
9. Shane Edward HERBERT (Queensland)
10. Ross Campbell MACAW (Victoria)
11. Richard John STANLEY (Victoria)
12. Michael John SWEENEY
13. Geoffrey Alan FLICK
14. Andrew Stewart MORRISON
15. Jeffrey Steven HILTON
16. Clive STEIRN
17. John Charles KELLY
18. Peter William TAYLOR
19. Bret William WALKER
20. John Neil GALLAGHER
21. Steven David RARES

## Failure of Counsel to Make Proper Arrangements to Attend at Court

Recently the Bar Council dealt with a matter which involved the failure of counsel to attend at Court or to make proper arrangements with his opponent to adjourn the matter.

In this case, counsel found that he was running late on the morning the motion was listed for hearing, he having other commitments elsewhere. The counsel requested his secretary to inquire who had carriage of the matter on the other side so that he could ask for indulgence. The secretary was unable to ascertain that information and at the barrister's request contacted the Judge's Associate to ask that the matter be held in the list for 45 minutes. It is not known whether that message reached his Honour.

When counsel arrived in court the matter had been disposed of.

The Bar Council was of the view that it was imprudent of the counsel merely to rely upon a telephonic communication between third parties as it was likely that some form of failure of communication could result. The Council was further of the view that in any event it would not be sufficient to rely upon a trial judge, even if that judge had received the message, to act upon it.

In this particular case, as the barrister's client did not seek an order for compensation the Council took the view that the matter was deserving of reprimand.

Members are reminded that it is essential to ensure that proper arrangements are put in place in such circumstances as arise above. □

## Election of Members of the Bar Council for the Year 1994

The following have been elected as members of the Council for the New South Wales Bar Association for the year 1994.

### INNER BAR

Tobias QC	Donovan QC
Burbidge QC	Bellanto QC
Bennett QC	Poulos QC
Barker QC	
Hely QC	
Adams QC	

### OUTER BAR

- (a) Three members of less than five years standing-  
Loukas Needham Gleeson
- (b) Members of any length of standing

Hoeben	Toner
Harrison	Street
Walker	Bergin
Katzmann	Gormly
McColl	

On 25 November 1993 the Council elected the following Office Bearers.

President: M H Tobias QC  
Senior Vice President: D M J Bennett QC  
Junior Vice President: P G Hely QC  
Honorary Treasurer: R J Burbidge QC  
Honorary Secretary: R S McColl

## 1993 Silks Gift to the Bar Association

It is usual for Silks to give the Bar Association a gift upon their appointment.

The Silks appointed in 1991 and 1992 donated two pulse oximeters to the Royal Children's Hospital, Camperdown on behalf of the Bar Association as their gift.

The Association is extremely grateful. □

## Many Happy Returns

T E F Hughes QC AO turned 70 on 26 November 1993. He has had a new bar jacket made. □

# From the President

## Legal Profession Reform Bill 1993 (No 2)

The Legal Profession Reform Bill 1993 (No 2) passed through both chambers of the Parliament on Friday 19 November last. Its various provisions will become law on dates to be proclaimed.

The Legal Profession Bill (No 1) was first introduced into the Legislative Council by the Attorney-General on 16 September 1993. After the Attorney-General's speech, consideration of the Bill was adjourned and it did not return to the Council until 27 October 1993.

Between the dates referred to, and as a consequence of further consultation between the Bar Association, the Law Society and the Attorney-General, some sixty amendments were introduced into the Bill. Accordingly, a revamped Bill was introduced into the Council by the Attorney on 27 October 1993 as the Legal Profession Reform Bill (No 2).

Apart from some amendments proposed by the Bar Association which the Attorney accepted and which were incorporated into the No 2 Bill, there were six further amendments sought by the Association but which the Attorney-General rejected. In proposing those amendments, the concern was to limit them to what was the minimum necessary to protect the public interest and to ensure that a fair system was incorporated into the Bill with respect to the review of professional rules. In summary, the amendments proposed (and rejected) were as follows:

1. The co-advocacy provision (Section 38M) was to be amended by a requirement that it should not operate unless and until joint rules were in place so as to ensure that it was not misused or abused by some solicitors who might regard its passing as being for their own (as distinct from their clients) financial benefit;
2. The power of the Attorney-General to disallow professional rules on the basis that they imposed restrictive or anti-competitive practices which were not in the public interest (Section 57(I)) was to be amended by providing for a full right of appeal to the Supreme Court;
3. The constitution of the Advisory Council (Section 58(3)) was to be amended so as to provide for the Chief Justice or his nominee to be the Chairperson and the lay members of the Council to be appointed by the Chief Justice and the selection of the nominees of the professional bodies being the sole prerogative of those bodies rather than of the Attorney, chosen from a panel of five nominated by those bodies;

4. Section 37 was to be amended by reinstating the power which currently exists under the Legal Profession Act of the Bar Council to refuse, suspend or cancel a practising certificate to any person who does not intend to or is not practising as a barrister during the period covered by the certificate;
5. The Legal Practitioners Admission Board (Section 10) was to be amended so as to ensure that the judges constituted a majority of its members (as is the present case with each of the Barristers' and Solicitors' Admissions Boards);
6. The right to form a partnership with a person who is neither a barrister nor a solicitor (that is, with anyone), (Section 48G), was to be deleted upon the basis that such



partnerships would increase costs and/or would entitle a legal practitioner to be in partnership with a person who was not subject to the same professional rules or disciplinary regime as that practitioner. Apart from the foregoing, the Bar Council was prepared to accept the Bill in the form presented. The Bill has been shaped as a consequence of extensive negotiations and consultation between representatives of the Bar Council and representatives of the Attorney-General including, from time to time, the Attorney-General himself.

A Position Paper was prepared by the Bar Council with respect to the six amendments to the Bill sought by the Bar Association which included the precise form of the amendments sought.

Sadly, these amendments were not supported by the Law Society.

The Position Paper was presented to the shadow Attorney-General, each of the Independents in the Legislative Assembly, each of the Democrats and the Reverend Fred Nile in the Legislative Council. It was also provided to Mr Gerry Peacocke MP and Mr Joe Shipp MP, who had indicated support for the Bar's proposals. The matters in the Position Paper were addressed by the Council's representatives at length in numerous conferences with those politicians in order that there was a full and complete understanding of the purpose of the proposed amendments. Regrettably, our amendments failed to obtain decisive support in either House of Parliament. Amendment number 5 *supra* (Legal Admissions Board) was moved in the Legislative Council and defeated on the casting vote of the presiding Officer. Amendments 2 and 3 *supra* were moved by Mr Nile and defeated by Government members. Opposition members abstained after the amendment on the Legal Admissions Board was defeated.

None of the Bar's amendments were taken up in the Legislative Assembly, either by the Opposition or the

Independents. The Bill, with minor amendments from passage through the Council, was moved in the Assembly by the Premier. The Opposition and the Independents submitted amendments. The Bar provided a detailed response to an Opposition amendment which sought to apply, without any relevant modification, the provisions of the Trade Practices Act to the legal profession.

This amendment was also opposed by the Government and on 12 November the Attorney wrote to all members to that effect. The Law Society also strongly opposed this amendment. The Labor Council and several major unions also recorded their concerns about the ramifications of this proposal.

Our response made the point that while some of the anti-competitive prohibitions contained within the Trade Practices Act could be applied to the legal profession, to apply the whole of the provisions of that Act without adaptation and without consultation was both inappropriate and bad government. This position was strongly and publicly supported by the Chief Justice of New South Wales, the Solicitor-General of New South Wales, the President of the Law Council of Australia and the Law Society of New South Wales.

Our representations to MPs highlighted that this amendment would preempt one of the major tasks of the recently appointed Sackville Committee, which is to determine the extent and manner of application of the Trade Practices Act to the legal profession.

On 18 November, the Government circulated its own trade practices type provision which was more appropriately drafted than the earlier version. At about this time, Parliament was awash with rumours that, following negotiations with the Independents, the Bar and the Law Society had agreed to support the initial trade practices amendment. Shortly after midnight on 19 November, the Premier was informed that any such rumour was entirely wrong. At that point, the Premier advised the Senior Vice-President that the Government would not now support the trade practices amendment they had circulated or the earlier version.

The Premier indicated that he hoped to have the support of the Independents for the withdrawal of the amendment if the Government and the professional bodies agreed to co-operate in preparing a set of trade practices type provisions for insertion in the Act in the New Year. This proposal was accepted and confirmed in writing to the Premier on the morning of 19 November. The proposal was also accepted by the Law Society.

This proposal, however, found no favour with the Independents. The Government sponsored amendment was moved by Mr Hatton with the support of the other Independents and the Opposition. Other amendments moved by the Independents and the Opposition were also passed, including a provision which subjects Supreme Court practice notes to disallowance by either House of Parliament. Neither the Supreme Court nor the legal profession were favoured with notice of this proposal.

Following the Report of the Sackville Committee in

March 1994, it is highly probable that uniform national provisions for the application of the Trade Practices Act to the legal profession will be implemented. The Bar, in co-operation with the Law Society, will make submissions to the Sackville Committee and the New South Wales Government on the issues stated in the letter to the Premier on 19 November. In this way, the unintentional consequences and other anomalies contrary to the public interest may be erased from the present legislation.

A comprehensive overview of the new legislation is in course of preparation and will be distributed to all members as soon as it is available.

The Bar will submit its rules which are in the process of being revamped in light of the new Act, to the Advisory Council as provided for in the new legislation. We will also seek to make a full presentation about these rules to the Advisory Council when that Council begins its deliberations. The Bar Council, as with the Association's membership, firmly believes that, subject to some updating and codification, the present Bar Rules as to practice are not contrary to any anti-competitive principles and are not contrary to the public interest. Our rules promote an efficient legal profession centrally focused on the administration of justice and the protection of client's interests. The integrity and independence of Barristers, as "Servants of all, yet of none", is critical to freedom and justice in our community, and shall remain our fundamental commitment. □ M H Tobias QC

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# From the Immediate Past President

I have just received the Terms of Reference for the work of the "Access to Justice Advisory Committee" recently announced by the Commonwealth Minister for Justice, The Hon Duncan Kerr MP and the Attorney General, the Hon Michael Lavarch.

A particular function of this Committee is to review and draw upon the recommendations of recent Federal and State reports into the justice and legal system with a view to identifying those proposals for reform to which the Commonwealth should afford priority.

The Committee is also to advise on, inter alia, Legislative initiatives which the Commonwealth could take to make the justice system fairer, simpler and more affordable, and in particular (for example) the creation of an integrated national legal profession to the extent that such can be fostered within Commonwealth power and the removal of anti-competitive restrictions upon practice by lawyers in federal areas of jurisdiction.

As well, it will consider issues where the Commonwealth should co-operate with the States and Territories on joint initiatives to make the justice system fairer, simpler and more affordable, including the extension of the *Trade Practices Act* to the legal profession and the formation of Multi-Professional Practices.

The Reports to be reviewed include:

- Report of the Senate Standing Committee on Legal and Constitutional Affairs: *The Cost of Justice - Foundations for Reform*
- Trade Practices Commission: *Study of the Professions - Legal*
- New South Wales Law Reform Commission's Reports on the legal profession
- Victorian Law Reform Commission Reports on Access to the Law
- Legal Profession Reform Bill 1993 (NSW)
- The Law Society of New South Wales: *Summary of Proceedings and Selected Papers: Accessible Justice Summit*.

I know that the Committee's Chairman, Ron Sackville QC, will be rigorous. He will need to be. The Victorian Law Reform Commission's *Report on Restrictions on Legal Practice* was based on a report by the Tasman Institute, itself commissioned as a result of criticisms levelled at the lack of economic analysis and empirical evidence in the Victorian Law Reform Commission's initial proposals.

The Tasman Institute defined its task as "to ascertain whether the Commission's proposals will lead to a decrease in the price of services provided by barristers". The Institute said that it would carry out its task by undertaking the following exercises: first, an empirical analysis of the cost of certain legal services in Victoria by comparison of the cost of those same services in a jurisdiction where a fused profession exists,

such as Western Australia; secondly, an examination of the US research on the effects that deregulation has had on the cost and quality of legal services in that country; and thirdly, an application of some aspects of the theory of regulation and competition policy to the Commission's proposals.

The Institute did report to the Commission on 25 March 1992. Its report contained no empirical analysis of the cost of legal services in Victoria by comparison with the cost of the same services in a jurisdiction where a fused profession exists. It did contain, in one paragraph, a reference to a 1984 US Trade Commission Report which presumably stood as the research in that country on the effects that deregulation has had on the

cost and quality of legal services in that country.

It did venture into the theoretical areas of regulation and competition policy. In that respect the Report was subsequently criticised by Dr Ian McEwin, who was engaged by the Bar to make an assessment of the Report. The only empirical research which, according to the report itself, was carried out by the Tasman Institute consisted of enquiries made of 10 solicitors as to whether certain simple Magistrates' Court policy matters could be conducted more cheaply by the solicitors themselves than would be the case if barristers were briefed. Whether or not this research was reliable and/or accurate, it demonstrates at best what is possible, and what regularly happens, under present arrangements and was,

accordingly, of little value as a test of the proposals for change made by the Commission.

For the most part, however, the Tasman Institute Report amounted to little more than a regurgitation of the propositions originally put by the Commission in its Issues Paper, together with some fairly desultory historical observations concerning the origins and culture of the Bar (about which the Institute had not been asked to enquire and as to which it could scarcely claim to be an international authority).

The Report was released on about 28 April 1992. On that day its authors, Dr Moran and Dr Barns, spoke about the Report on no less than 5 separate radio programs. This was a remarkable feat of organisation on someone's part.

From the above short history of the involvement of the Tasman Institute in the reform of the Bar in Victoria, the following conclusions may be drawn:

1. The Law Reform Commission never had any evidence that the current rules and methods of the Victorian Bar added to the cost of legal services.
2. Although this was probably the most obvious investigation to make in response to the reference by the Attorney General, the Commission carried out all its work, and prepared a draft Final Report, without making that investigation.
3. When eventually the nature of the investigation to be made was identified, either the investigation was not made at all or the results of the investigation did not



- warrant inclusion in the report of the Tasman Institute.
4. In its own Final Report, the Commission mentioned neither the fact that it had attempted to obtain empirical evidence on the relevant matter, nor the failure or the inability of the Tasman Institute to produce such evidence.

The Tasman Report itself, and Dr McEwin's criticisms of it, are available through the Bar Association's office for anyone who wishes to peruse them. Any barrister who thinks the Report inconsequential (however much its substantive content may justify such a conclusion) should realise that it is part of a much broader canvas. It was bound into a nice little booklet (in which it occupied 23 pages, including bibliography) and no doubt had wide distribution. It very soon found its way into the footnotes of the Trade Practices Commission's own Issues Paper with respect to its study of the legal profession. There is a substantial risk that, notwithstanding the failure of its authors to produce empirical evidence on the matters to which their attention was directed, its conclusions and recommendations (which were, coincidentally, largely the same as those published 18 months previously in the Commission's own Discussion Paper) may become indelibly engraved within the pages of the social engineers' handbook."

By the time you read this, the Legal Profession Reform Bill (No 2) will probably be law<sup>2</sup>. It has no more empirical a base than the Tasman Report. The Trade Practices Commission Report, described by Professor Fels as "establishing" things refers to none, despite its two years in gestation.

We must keep up the work of writing submissions and making representations, but with a clear-eyed cynicism: no-one is interested in the facts or the evidence. Populism rules, OK.

I firmly believe that separate Bars perform vitally important roles in the interests of justice: that they are efficient and economic. We, as members of the Bar, have an obligation to preserve what is good and in the public interest.

No-one can force us into partnerships, multi-disciplinary or otherwise, nor to accept instructions direct from the lay public. We can continue to insist upon proper training for barristers and upon the highest ethical and professional standards.

Our rules, unless disallowed, will reflect that. Our ways should continue to reflect our ideals whatever the politicians do. The Victorian Bar survived the 1890s and prospered by delivering quality at competitive prices, and also at least in part by stubborn, even obdurate, disregard of the wishes of politicians, who have no agenda but re-election and who, after all, are but temporary players.

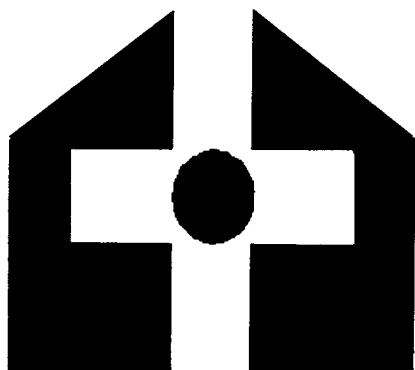
We must do the same for the sake of the great institutions which constitute the cement which gives our society order: the rule of law, the independent judiciary, and an independent profession.

I leave the Presidency with my belief in, respect for, and commitment to the Bar totally intact. I also leave it with an heightened respect for my fellow barristers who have struggled through the most difficult time the Bar has seen since the Great Depression.

I owe gratitude to so many, barristers and others: my sincere thanks to all who have helped me in the work. □

John Coombs QC

1. I quote from a critique by Dr Chris Jessup QC, immediate past Chairman of the Victorian Bar.
2. At the time this article was written the Trade Practices Commission amendments to the Bill had not been mooted.



**Enquiries : Richard Cogswell**  
**285 8813 (W)**  
**810 2448 (H)**

Two ecumenical Christian Meditation groups meet in the crypt of St James' Church at the top of King Street in the city.

One meets on Wednesday mornings at 7.45 am and concludes at 8.30 am. The other meets on Fridays at 12.15 pm, concluding at 1.00 pm.

The groups follow the method and teaching on Christian Meditation of Benedictine Monk John Main and are affiliated with a network of similar groups.

Anyone who already meditates, or who is interested in starting to meditate is welcome.

# CCH UPDATE



STANLEY LEAVER  
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The industrial tribunals have, over the years, in fact facilitated enterprise bargaining by conciliation and by formalising consent awards ... and more recently the Commission has tried to encourage a form of enterprise bargaining.

So, although the path that future legislation might take isn't precisely mapped out at the present, the situation is (as indeed it has been for some years) that enterprise bargaining is here to stay.

And, as an indication of our belief that practitioners should now be gearing up for the future, we've published an electronic product as a companion to our *Australian Enterprise Bargaining Manual*.

So that subscribers to our *Australian Enterprise Bargaining Manual* can have available to them (accessible through their pcs) the sample clauses set out in print in the Manual, we've published those sample agreements and clauses on disk.

That disk contains a set of files which can be loaded on to a word processor. Each category of clause has a discrete file, from which the user can simply delete the unwanted clauses and print out those clauses that are needed ... all available in IBM compatible format.

It's hardly necessary to point out that having these sample clauses on disk makes it just that much easier and quicker to prepare enterprise agreement documents.

What happens when the law or practice changes? you ask. It's easy to keep the loose-leaf Manual up to date (as we've been proving for 20 years), but what about the disk?

Our plan is to issue the disk in updated form at regular intervals, so the disk will stay abreast of the loose-leaf updates.

In his book *Understanding Media*, in which Marshall McLuhan gave us "The medium is the message", he also noted that "The naming of a man is a numbing blow from which he never recovers".

Which raises an interesting thought apropos a decision recently reported in our *Family Law News*.<sup>1</sup> It concerned the Family Court's approval of the use of a hyphenated surname, comprising wife's surname and husband's surname, for their child.

The child had been registered under the father's surname, but after separation the mother used her family name for herself and the child.

The husband asked the court to ensure the use of his surname, but the wife's eminently practical suggestion of the hyphenated name was accepted mainly because a number of benefits could be expected, one being the recognition by others of the child's life circumstances.

The term enterprise bargaining, simply defined, describes the process of direct negotiation in a particular enterprise between the employer and employees — or more usually their union ... with, however, notable instances where employers and employees have bypassed, or a legislation provision has been made for them to bypass, normal union representation.

Although it's seen as a new term, in substance it's not. In its simplest form, enterprise bargaining explains much of the growth of over-award payments which has occurred since the 1940s, generally reflecting market pressures rather than increased productivity and efficiency in the workplace.

That well-known US jurist Learned Hand, referring to Samuel Goldfish's name change to Samuel Goldwyn, commented "A self-made man may prefer a self-made name".

Which, of course, reminds one of John Bright's description of Disraeli as a self-made man who worships his creator.

In the opening tab of *The Directors Manual*, we note that "A company must operate as a responsible citizen. The fact that a company, because of its artificial nature, can itself have no conscience means that there is an increased responsibility on those living persons who direct its mind and will, through their minds and will, to be alert to this need for civic responsibility".

It's nice, therefore, to be able to report that we try to take our own advice, and in recent times (ie over the last two years) we've been wrapping our reports for mailing in special biodegradable plastic.

What happens? That plastic's no longer available.

As an alternative we're now using a plastic made from remilled waste offcuts ... which means that in turn this plastic is able to be remilled and recycled. The point is that it's the most environmentally friendly plastic we can find here. It also shows that it's not always easy to be a responsible citizen, but one tries.

In the same tab in *The Directors Manual*, Dr Simon Longstaff makes the like observation: "It is a common observation that ethics is better taught by example than precept."

Extract from transcript:

At an Eskimo trial, counsel asked: "Where were you on the night of October 11 to April 3?"

Recorded here as a touch of epistemophilia (ie an abnormal preoccupation with useless knowledge) is the tax case with an almost Biblical ring to it, reported in a September issue of *Taxes The Weekly Tax News* (a service published by CCH in the UK):

The Court of Justice of the European Communities has ruled that Spanish local tax collectors, who had to provide a security to the local authority for which they worked, were remunerated in the form of a percentage of taxes collected and surcharges levied and who had their own offices and auxiliary staff, were self-employed for the purposes of the sixth VAT directive.

And finally a comment by Jonathan Swift on Wisdom:

"When a true genius appears in the world you may know him by this sign, that the dunces are all in confederacy against him."

1. The summary that accompanied the loose-leaf report No 321 to our *Australian Family Law & Practice*.

*Stanley Leaver*

If you're interested in seeing any of the publications noted on this page — or indeed any publication from the CCH group — contact CCH Australia Limited ACN 000 630 197 • Sydney (Head Office) 888 2555 • Sydney (City Sales) 261 5906.

# Letters to the Editor

## Researching American Authorities Corrections

The very interesting and informative article by Robert Angyal in the Spring/Summer 1992 issue of *Bar News* pp.23-25 contained a number of comments in relation to the "Supreme Court Library" which may mislead potential researchers of American material. To avoid eligible users paying our "notorious" access charges under a misconception, we thought we should alert your readers to those which are inaccurate or no longer apply.

Incidentally, in 1977 the "Supreme Court Library" in Sydney was absorbed into the "Law Courts Library" Sydney, which was established to provide a service to both the Commonwealth and State Courts in this building.

Unfortunately rising subscription costs, currency fluctuations and static budgets required substantial library subscription cancellations in 1992. To a large extent the titles to suffer have been the looseleaf services, which we will acquire from time to time as funds permit in the future rather than on a continuing basis. Readers are warned to check the "date the service was last updated" notices on the books themselves and to use the digests to update to the date relevant for their matter.

The Law Courts Library has cancelled its subscriptions to the following titles referred to in the article.

- . Biotechnology and the Law
- . Bromberg Securities Law Fraud
- . Dictionary of Medicine (Schmidt)
- . Epstein Modern Intellectual Property
- . Frumer Products Liability
- . Long Law of Liability Insurance
- . Milgrim Trade Secrets
- . Powell On Real Property
- . Schwartz Trial of Automobile Accident Cases
- . Traumatic Surgery for the Attorney

Our subscriptions to *Standard Federal Tax Reporter*, the *Trade Regulation Reporter* and *West's Bankruptcy Reporter* have been converted to bound volume only services.

We do not have a subscription to *Federal Securities Law Reporter* and the set we hold was a donation. It is current only to December 1988.

Incidentally, the Law Courts Library subscribes to the draft *Restatements of the Law* in addition to the *Restatements* themselves. We also hold both the *American Law Reports* and *American Law Reports Federal Series*.

We will shepardise citations for members of the legal profession on LEXIS for a flat fee of \$50 per citation. We find it more satisfactory to rely on LEXIS for this service as shipping delays meant that our hard copy subscription was always out of date and the subscriptions were costing us over \$US20,000 per annum.

Our subscription to the *West Federal Practice* CD-ROM service provides our users with many of the benefits of searching WESTLAW without the costs. The Library now provides a wide variety of CD-ROM and on-line data bases for registered users. A list of these is available on request from our Systems Librarian, Mary Conyngham on (02) 230 8660.

*Bar News* should be congratulated on its attempts to lift the veil on American legal research and Law Courts Library staff will do their best to help registered users when they use this material for the first time. □

Lynn Pollack  
Librarian in Charge  
Law Courts Library

## FAREWELL RUMBLE

On 27th November 1992 the members of the 9th floor, Wentworth Chambers, held a black tie dinner at the Park Lane Hotel for E R (Ted) Rumble, who was retiring as Clerk to the floor after 16 years.

Those attending included a number of past members, including some now occupying judicial office, the Floor's new Clerk, Paul Johnson, as well as some of Rumble's many mates among the Clerks, viz Isaac, O'Brien, Bannon, McMahon, Tiffen and Horne (see photo).

In addition, Ted's son Paul travelled up from Canberra for the occasion. The affection and pride between father and son was apparent to all and was a highlight of the evening.

The present members of the 9th Floor presented Ted with a new hi-fi system upon which to play his beloved opera, and the former members, ably led by Odling and Callaghan, also presented Ted with gifts.

The evening was a great success and a measure of the regard with which Rumble is held by those for whom he has clerked over the years. □ G M Gregg



(L to R) Front Row: Bill McMahon, Nick Tiffen, Greg Isaacs, Les O'Brien, Paul Johnson, Brian Bannon  
Back Row: Ted Rumble, Bob Horne

# "Learned in the Law" - The Transition from Queen's Counsel to Senior Counsel

Between November 1992 and November 1993 the New South Wales Bar developed its own system of recognising eminent counsel from among its junior ranks to be acknowledged as worthy of appointment to the Inner Bar following the demise of the system whereby the Governor, on the advice of the Executive Council, appointed Queen's Counsel in and for the State of New South Wales. This change was brought about by the decision of the New South Wales Government in late 1992 that the Executive Council would no longer participate in a system of appointment Queen's Counsel. In this article Ruth McColl traces the steps which led to the evolution of the new system.

"Greetings -

We, confiding in your knowledge, experience, prudence, ability and integrity do, with the advice of the Executive Council of our Colony of New South Wales by these presents nominate, constitute and appoint you the said John Fletcher Hargrave to be one of Our Counsel learned in the law for Our said Colony for and during Our pleasure to take rank precedence and preaudience in all Our Courts of Justice next after Alfred James Peter Leetwyche Esquire and you are to discharge the trust hereby reposed in you with a due respect to all Our rights and prerogatives and the good of Our Subjects according to law - "

By the above words the Governor in Chief of New South Wales, Sir John Young, appointed John Fletcher Hargrave Queen's Counsel in and for the Colony of New South Wales in 1863<sup>1</sup>, one of the earliest members of the Inner Bar in New South Wales.

In his work on the History of the New South Wales Bar which Mr Bennett edited for the New South Wales Bar Association, he set out (in Chapter 3) the history of the Inner Bar in New South Wales. As he points out, while in 1835 "W C Wentworth was authorised by the Supreme Court to wear a silk gown as a 'patent of precedent'", it appears most certain that the first barrister admitted to the Inner Bar was John Bayley Darvall who was so admitted in 1853.<sup>2</sup> John Hubert Plunkett (see cover) was appointed to the Inner Bar on 15 May 1856.<sup>3</sup>

Historically, the Governor-in-Council exercised the Crown's prerogative in the appointment and control of the Inner Bar.<sup>4</sup> However, by 1956 the Attorney-General "indicated that he would be pleased to accept assistance from the Council of the Bar Association as to the suitability of applicants for silk".<sup>5</sup> The Council adopted (inter alia) a rule which required the President of the Council, upon becoming aware of an application for appointment to the Inner Bar, to:

"... after consultation with the Councillors who are not members of the Inner Bar and Councillors who are of not

less than 10 years' standing at the Bar, tender to the Attorney-General all available information as to the professional qualities and eminence of such applicant."<sup>6</sup>

By the time of the decision by the Government in November 1992 that the Executive Council would no longer participate in the appointment of Queen's Counsel, the latter rule had been further modified so that the range of people who the President of the Council consulted included not only Councillors but a wide variety of members of the Bar and Judges of the Federal Court, the Family Court, the Supreme and District Courts in New South Wales as well as the Magistrates sitting in the Local Courts.

In November 1992 the Honourable J P Hannaford MLC, Attorney-General in and for the State of New South Wales, distributed an Issues Paper on The Structure and Regulation of the Legal Profession. One of the issues raised by that Paper (at p 34) was:

"Should the title of Queen's Counsel be retained? If so, should the range of person (sic) appointed be extended to lawyers other than practising barristers."

Almost contemporaneously with the distribution of the Issues Paper the Premier, the Honourable John Fahey MP, announced that the Government would no longer make recommendations for the appointment of Queen's Counsel.

This announcement came as a surprise to the New South Wales Bar, particularly bearing in mind the fact that, having regard to the Issues Paper, the issue raised and set out above was still regarded as ripe for discussion.

The Governor-in-Council did appoint Queen's Counsel in 1992. They were:

RATTRAY Peter (Victoria)  
KELLAM Murray Byron (Victoria)  
MIDDLETON John Eric (Victoria)  
BARR Graham Russell (NSW)  
SEMMLER Peter Clement Bronner (NSW)  
BASTEN John (NSW)  
SLATER Anthony Hugh (NSW)  
STEELE John Joseph (NSW)  
HASTINGS Peter Selby (NSW)  
BARRY Christopher Thomas (NSW)  
ROBB Stephen David (NSW)  
SLATTERY Michael John (NSW)  
CATTERNS David Kenneth (NSW)  
LITTLEMORE Stuart Meredith (NSW)  
JACOBSON Peter Michael (NSW)

1 JM Bennett, BA, LL M, *A History of the New South Wales Bar*, The Law Book Company Limited, 1969 at pp. 237 and facing p.241.

2. *Ibid* at 236-237.

3. *Ibid* at 237.

4. *Ibid* at 239-240.

5. *Ibid* at 241.

6. *Ibid* at 241.

These appointments were the last such to be made by the Governor-in-Council in the State of New South Wales.

On 10 December 1992 the 1992 Queen's Counsel attended to make their bows before the Supreme Court of New South Wales sitting in banc. Members of the New South Wales Bar filled almost every seat in the Banco Court and many stood in the aisles while others were unable to fit into the packed Court.

Chief Justice Gleeson delivered the following address:

"The Court has assembled in banc to receive your announcements of appointment to the rank of Queen's Counsel.

The office which you hold has been described by the Privy Council as an office under the Crown which is "a mark and recognition by the Sovereign of the professional eminence of counsel upon whom it is conferred". You have attained that rank in your capacity as barristers of the Supreme Court of New South Wales.

Your appointment has been accompanied by a number of assertions, not all of them entirely consistent, as to the future of the office. Your presence this morning demonstrates that rumours of your abolition are exaggerated. A more circumspect statement was issued by the Council of Australian Governments in Perth last Monday. That statement said that most Heads of Government endorsed a proposal to remove the role of Executive Government in the appointment of Queen's Counsel, but that four governments have not concluded their consideration of the matter.

This is an appropriate occasion to consider how the Executive Government came to have a role in the appointment of Queen's Counsel. The answer lies in an understanding of constitutional and legal history, of the governmental role of the courts, and of the relationship between the courts and the barristers and solicitors who are officers of those courts. This Court was established by royal prerogative, not by an Act of Parliament. The term "court" itself, which originally meant the Sovereign's palace, and has as an extended meaning the place where justice is administered, is eloquent on the subject of the association between the Sovereign and the administration of justice.<sup>2</sup>

The emergence of an organised legal profession in England was a process that was intimately connected with the courts and the persons to whom the courts granted rights of audience.

In medieval times literacy was largely confined to the clergy, and clerics acted in the administration of civil justice. The first organised body of lay practitioners was the order of serjeants-at-law established at about the time of King Edward I. The Church forbade clerics to appear as advocates in the secular courts and there then emerged a class of lay advocates.<sup>3</sup> The Court of Common Pleas was for a substantial period the dominant court in England, and the serjeants-at-law had an exclusive right of audience in that court. As the practice of appointing ecclesiastics and public officials to the bench was abandoned, the judges themselves were recruited from the ranks of serjeants.<sup>4</sup>

Another class of professional lay advocates, with a right of audience in the Court of Kings Bench and the Exchequer,

later grew up. These advocates, called barristers, were organised in Inns of Court. They came to be divided into inner barristers and outer barristers. By the end of the sixteenth century there had been established a practice of the appointment by the Sovereign, by letters patent, of King's Counsel from amongst the ranks of barristers. The first King's Counsel was Francis Bacon.<sup>5</sup> Inner barristers are to this day heard in England from within the bar of the court.

King's Counsel were originally appointed to assist, where necessary and when called upon to do so, the Attorney General and Solicitor General, the first and second law officers of the Crown. In addition, up until the early part of this century they required a dispensation to appear against the Crown.<sup>6</sup> Subject to those matters, the primary significance of the office was that they constituted a group of barristers recognised by the Sovereign as being of special eminence.

In 1670, during the reign of King Charles II, the Privy Council declared that King's Counsel took precedence over the serjeants-at-law.<sup>7</sup> This decision resulted in the gradual decline of the order of serjeants. It is of some interest to reflect that it was this assertion of the Sovereign's prerogative, giving precedence to King's Counsel appointed by the Executive Government, which led to their dominance in the profession and to their ascendancy over the serjeants, who were appointed by the judiciary. Would it not be curious if the wheel is about to turn full circle? Perhaps one of your number will in future years become part of legal folklore in the same manner as Serjeant Sullivan, often regarded as the last survivor of that order.<sup>8</sup> Perhaps it will be the aptly named Mr Barr QC.

When the legal profession was established in the various Australian colonies the usage and practices of the profession in England and Ireland were taken up. A member of the Inner Temple who visited Sydney in the 1850s wrote: "The Sydney Bar is highly respectable in character and is certainly the most numerous and perhaps, taken as a whole, the best Bar out of England".<sup>9</sup> The Governor-in-Council appointed King's Counsel following the English and Irish tradition.

Over the years there developed a variance between the practice in New South Wales and that in other States in relation to the selection of appointees. The appointments were, of course, everywhere made by the Executive Council, but in New South Wales the function of making the nominations

1. *AG for Canada v AG for Ontario* [1898] AC 247 at 252 per Lord Watson.
2. Jacob, *Law Dictionary*, quoted in *Halsbury's Laws of England*, 4th ed., vol. 10, para 701.
3. W J V Windeyer, *Legal History*, 2nd ed., p139
4. Windeyer, op cit, p140.
5. *Halsbury's Laws of England*, 4th ed., vol 3(1) para 359.
6. Halsbury, op cit, para 433.
7. Halsbury, op cit, para 359.
8. He was, in truth, not a member of the English order, but was the last survivor of the King's Serjeants in Ireland. (Baker, *An Introduction to English Legal History*, p182.)
9. Quoted in J M Bennett, *A History of the New South Wales Bar*, p77.

rests with the Attorney General who, by convention, is advised by the President of the Bar Association. The President of the Bar Association, after engaging in appropriate consultation, recommends certain practitioners. The recommendation may or may not be accepted by the Attorney General. Ordinarily it is, but this has not always been so. Frequently, in years past, the Attorney General has added to the list certain officers of the Executive Government, such as Crown Prosecutors or Public Defenders. This was regarded as an important power reposed in the Attorney General. In other States it has been the Chief Justice who is the effective source of nominations to the Executive Council.

The announcement that in New South Wales it is proposed to remove the role of Executive Government in the appointment of senior counsel is of great interest, and may give rise to differing opinions. I do not intend on this occasion to express any view on the matter, although I would observe that there is a body of opinion that the removal or restriction of the role of the Executive Government in relation to other matters concerning the administration of justice is also a subject that is ripe for consideration.

Whether this is an historic occasion only time will tell. For each of you individually, however, it must be an occasion for pride and satisfaction. You carry a mark and recognition of professional eminence which has a long and distinguished history. The judges of the Court congratulate you and wish you well."

The President of the Court of Appeal, Mr Justice Kirby, was unable to be present during the ceremony on 10 December 1992. On 14 December 1992 the new Queen's Counsel made their bows before the Court of Appeal presided over by the President, who sat with Mr Justice Sheller and Mr Justice Cripps. The President made the following statement:

"Sadly, gentlemen (and there are no ladies at the table today) I missed the ceremony in the Banco Court on Thursday last when you were welcomed by the Supreme Court sitting in an extraordinary session in banc.

It is perhaps a symbol of my life that I was already committed that morning to open a computer security conference. That obligation, in turn, arose out of a function which I had as chairman of an OECD expert group on data security. This led to a decision of the Council of the OECD last month to recommend to the various member countries certain

principles of data security which it is hoped will influence local law. I was telling local organisations of this development. That is why I was not in the Banco Court on your notable occasion.

I have heard, and read in the media, that the Chief Justice's remarks on that occasion were regarded by some as a little Delphic, even uncharacteristically so. Let me therefore say directly what I would wish to say to you on an occasion such as this.

It has been said that counsel at the table before this Court today will be the last persons appointed as Her Majesty's Counsel in this State. That statement arises out of an announcement by the Premier (the Hon John Fahey MP) that the Government would be making no such recommendations for appointments next year.



*The last Queen's Counsel for New South Wales - 1992 Queen's Counsel with the President of the Court of Appeal, his Honour Mr Justice Kirby A.C., C.M.G., Mr Justice Sheller and Mr Justice Cripps. (L to R) S M Littlemeore Q.C., D K Catterns Q.C., P C B Semmler Q.C., G R Barr Q.C., J J Steele Q.C., A H Slater Q.C., J Basten Q.C., Mr Justice Kirby, S D Robb Q.C., Mr Justice Sheller, P S Hastings Q.C., C T Barry Q.C. and P M Jacobson Q.C.*

I hope that the Executive Government of the State will reconsider that decision, if such it be. The Premier is a thoughtful and intelligent man. He is himself a member of the legal profession. I would hope that he would reflect again upon the decision. It was announced on the very day on which I, and other judges, received a discussion paper issued by the Attorney-General which raised, amongst others, a question for our comment as to whether the office of Queen's Counsel should be abolished. If the

Government, Parliament and people are still interested in receiving the opinions of the judges on that matter, such opinions will in due course be expressed. It was, to say the least, a little surprising that, on the very day of receipt of the consultation paper, a decision was unilaterally announced. At the least, it is undesirable that such a decision should be made unilaterally for this State only. It disadvantages those counsel who have a natural expectation that they would move through the profession to the rank which the new appointees before us have now attained.

There is no doubt that an increased demand will arise for Australian legal services in Asia and elsewhere in the years ahead. The appointment to the rank of Queen's Counsel is an important and professionally valuable step in the life of a barrister. Appointment to a new rank, differently styled and differently chosen, of senior counsel would not carry the same respect, at least until it earned it. That would take time.

There is also no doubt that there would always remain in the legal profession a position of senior advocate. In many of the countries of the Commonwealth which are now republics there are appointments of senior counsel, so styled (SC). In Sri

Lanka, counsel appointed to the Inner Bar are appointed as President's Counsel (PC). In Nigeria, senior counsel are appointed as Senior Advocates of Nigeria (SAN). There is therefore little doubt that, in time, some such ranking would emerge from the profession in this State if the rank of Queen's Counsel were abolished.

What, then, will we have achieved by the abolition of the appointment of Queen's Counsel? We will have removed the Queen's name from the warrant by which the leaders of the Bar are appointed. And we will have removed the role of the Executive Government in the appointment of those leaders.

So far as the removal of the Queen is concerned, it seems to me that, whilst we remain a constitutional monarchy, that ought not to happen. Behind the rank of Queen's Counsel lie four centuries of service of distinguished leaders of our profession. Such a ranking should not be set aside, at least without careful consultation with the judges, the profession, and the community. Certainly, in my respectful opinion, it should not be a decision made by an unexpected announcement on an afternoon when, as I understand it, the

Attorney-General of the State was outside the State and on the very day that a consultation paper, including a question on the very issue, was distributed to the judges and to others.

So far as the involvement of the New South Wales Executive Council in the appointment is concerned, I have to say that, although views differ, I unequivocally support that involvement. First, it has tended to leaven the appointments which would otherwise come from within the profession alone. The profession's choices of its leaders may not necessarily always be the best cross-section of those who should be appointed to lead the legal profession at the Bar. In my view, it is useful to have the leavening which arises from the involvement of the Executive Government. For my own part, I would dissent from the notion that judges, or even the Chief Justice - any Chief Justice - should effectively have such appointments to himself or themselves. For myself, I think it is important that we should have more academics, government lawyers, parliamentary counsel, more women and others, in the senior ranking of the profession. That is much more likely to happen, as it seems to me, if the rank of Queen's Counsel is appointed with an involvement of the Executive Government of the day than if it is left to the profession alone.

Secondly, to those who say the Executive Government should step out of this appointment it ought perhaps to be said

that they have not reflected enough on the role which the Inner Bar plays in the work of fashioning and developing the law. At least they do so in this courtroom - and in the other appellate courts. The Executive Government plays a part in such appointments because, in a real sense, the leaders of the Inner Bar are co-workers with the judges in fashioning the principles of the common law and in the interpretation of the Acts of Parliament and other legislation. That is why they have a special rank and why they hold a public office. They are, as Justice Brennan once said, ministers of justice, with the judges, in fashioning and developing our law.



*The first Senior Counsel for New South Wales - 1993 Senior Counsel with the President of the Court of Appeal, his Honour Mr Justice Kirby A.C., C.M.G. (L to R) B W Walker S.C., M J Sweeney S.C., A S Morrison S.C., P W Taylor S.C., J C Kelly S.C., Mr Justice Kirby, S D Rares S.C., C Steirn S.C., J N Gallagher S.C., G A Flick, S.C. (J S Hilton S.C. was unable to be present).*

I feel I am entitled to make these remarks which, of course, are simply my personal views. I can do so because I do not think it can be said of me that I am an opponent of reform of the legal profession. I am a supporter of such reform. But I do not believe that the abolition of the rank of Queen's Counsel is a useful reform. I do not believe that it attacks either of the twin causes of legitimate concern of the Government and the community, about the delivery of legal services, which are costs and delay.

I do not believe that the decision was made in a well thought out way. Such a decision, affecting a tradition of four centuries, should certainly be made very carefully. Things so long settled may sometimes have good reasons to support them. Particularly where, as announced, it affects only New South Wales: the State which is the most important in terms of the quantity, variety and significance of litigation, the announcement seems to inflict an unnecessary wound on the legal profession of the Premier's own State. We will be bound by legislation to recognise Queen's Counsel of other States of Australia. The beneficial creation of a truly national legal profession will be set back.

My hope is that wiser thoughts will ultimately prevail. When the time comes around next November for the consideration of further applications, which I hope will go forward in the usual way, I trust that the Executive Government will think twice about the decision. And that we will see before us this time next year, or a little earlier, the appointees who come forward with their famous commission to announce their appointment to the Court and, through the Court, to the community.

I once again congratulate you all and send you forth to your work. I trust that there is no history in this ceremony - merely the continuation of a great tradition, at once of service

and leadership, to which you are but the latest heirs."

The President's hope that the Government would reconsider its decision was shared by the Bar. However, following the public announcements made in late 1992, which appeared to commit the Executive Council to not again recommending to the Governor that anyone be appointed as Queen's Counsel, the Bar Council consulted the Attorney-General as to the way forward. He informed the Bar Council on 28 January 1993 that he would support the profession devising a replacement for the previous system as long as the replacement did not involve the Executive Government in any way.

The Bar Council then appointed a committee chaired by Sackar QC, and consisting of him, Nicholas QC, BW Walker and AJ Meagher to consider the question of how the custom of the Crown appointing Queen's Counsel might be replaced. That Committee reported to the Bar Council on 12 February 1993. A portion of its paper is set out below.

#### **"Replacement of the Rank of Queen's Counsel in New South Wales after 1992"**

Justification for the designation of eminent counsel as such, formerly as Queen's Counsel and in the future by some new description, should provide some guidance as to the ideals which a replacement system should embody, and also some guidance as to the means by which it should operate.

The Bar is not the only group where designation of eminence has been accorded, over and above the certification of the basic qualifications to practise or work. Many professions and occupations mark eminence or degrees of responsibility by explicit designations of rank or quality. In some of them, the executive government continues to make the appointments - eg the armed forces and the public service. Designations of eminence are also accorded within professions and occupations which do not directly serve the Crown - eg academics, medical practitioners, the merchant marine and certificated tradesmen and machine operators. The common effect of these rankings is to identify persons, both within the group and to the public, who have achieved and are regarded likely to be able to continue a certain higher standard or greater experience in the area of work in question. The rank of Queen's Counsel was not the result of a quaint anomaly whereby only barristers could attain official designation of eminence. A replacement rank for eminent counsel would equally be merely one of many examples where eminence at work is recognised by explicit designation.

This is not the time or place to argue that designation by the Crown of eminent counsel as Queen's Counsel appropriately recognised the integral role of advocates in the administration of justice, and their place as officers of the Court, and thereby in a sense part of one of the arms of government. Arguments in this vein justify retention of the role of the Executive Council, but we are reporting on the basis that its role will not be restored.

However, the fact that all advocates are, by statute,

officers of the Court, and that their role is integral to the administration of justice, leads to consideration of the public interest which may be served by a system for designating eminent counsel. The public interest to which we refer goes beyond the ordinary (albeit important) public interest which is served by information being available concerning the merits of anybody who offers his or her services in any profession or occupation to the public. In the case of advocates, the public interest is specifically focussed on the fundamental social and political importance of an energetic administration of justice and insistence on the rule of law.

The public interest in a healthy and vigorous system of justice, under the rule of law, places a premium on certain qualities apart from the necessary technical skills and linguistic ability.

First, and particularly in a common law system where case-law continues to govern many areas of disputation, and continues to assist in the application of statute law, it is in the public interest that advocates are learned, not merely in the academic sense but also in their practical knowledge and deployment of principle and authorities, in day-to-day forensic contests. The law cannot be developed or refined as well as it should be in a sophisticated society without advocates, at their best, having much more than a modicum of such learning.

Second, advocates should act with integrity and honesty. They represent contestants in an arena where, however artificially, the truth is the ultimate goal in fact finding. The requirements of impartiality and fairness in an acceptable system of justice necessitate mutual trust between contesting lawyers that there will be no illegitimate concealment, sharp dealing or knowing misrepresentation. Sufficient integrity is required to prevent resort to means which may assure victory by misleading or tricking the Court.

Third, the profession of advocacy, unlike many other professions or occupations, imposes on its practitioners a duty over and above the duties of loyalty to and diligence for one's own client. One sense in which advocates must be independent is in the observance of that paramount duty, usually expressed to be owed to the Court, but obviously being a duty to serve a higher public interest than merely the representation of a client's individual cause. As the High Court has observed, that paramount duty can require an advocate to act contrary to the express instructions of his or her client. The public interest served by this duty to the Court has been expressed as a duty to assist in the advancement of the administration of efficient justice.

It is to be hoped that the possession of these qualities to an acceptable degree is not the sole preserve of Queen's Counsel or whatever designation replaces that rank. It is self-evident from explanation of those qualities that they should represent the ideals of all counsel, however junior. It is equally obvious that many juniors display these qualities to a commendable extent. No-one could suggest that some magical transformation strengthens these qualities in persons who have attained the rank of Queen's Counsel. For a start, the former custom and any replacement system should aim to designate eminent counsel only if those qualities are already

sufficiently displayed by them as juniors.

The real distinction between juniors and silk, which should be preserved in a replacement system, is experience. It has a double aspect. First, it is undeniable that experience is necessary for the development, testing and improvement of each of the qualities discussed above - even integrity, which must survive actual temptations. Second, the experience of others participating with counsel in the administration of justice and observing individual counsel at work supplies the essential quality of substantiated reputation without which a system for designating eminent counsel would lack a proper foundation.

The prime justification for a system of designating eminent counsel is, therefore, to mark the acceptance by qualified observers that an individual has developed and displayed these necessary qualities to an extent which renders him or her eminent as an advocate.

The public marking of eminent counsel provides clear information to those interested to know - principally prospective clients and instructing solicitors - concerning the identity of those regarded as such by the serious opinions of well qualified observers. It stands in contrast against self-promotion by way of individual advertisement. It should be as close as possible to an objective assessment, in the sense of an assessment which draws from a pool of individual opinions rather than merely reflecting the advocate's own opinion or hopes. As a badge of eminence, the designation of eminent counsel also serves a subsidiary purpose of readily distinguishing those counsel who will restrict themselves to certain forms of advice and advocacy work, or to cases of more than usual difficulty or consequence.

We consider that an important secondary justification, or alternatively a highly beneficial consequence, of a system for designating eminent counsel is that it provides an overt and institutional standard to be emulated. It is important that the ambition which probably characterises virtually all advocates should not be dominated by financial calculation. The approval by one's peers and betters signified by the rank of Queen's Counsel or some replacement designation provides a powerful incentive to achieve and maintain high standards. The frankly idealistic ethos which should be the explicit basis of a system for designating eminent counsel is also a significant spur to encourage a concern for the values of justice over the desire for personal wealth. "

The Committee recommended a replacement system for the appointment of Senior Counsel. The paper was considered by the Bar Council and the substance of its recommendation adopted.

On 26 August 1993 the Bar Council approved a Protocol for the appointment of Senior Counsel. One of the recommendations of the Committee was that "whatever procedures are adopted should be made known formally in a document available to anyone". This was done and the Protocol was circulated to the New South Wales Bar. The Protocol provides:

A.

The principles governing the selection and appointment of those to be designated as Senior Counsel by the President of the Bar Association are as follows:-

1. The designation as Senior Counsel of certain practising barristers by the President of the Bar Association, in accordance with the following principles and under the following system, is intended to serve the public interest.
2. The designation of Senior Counsel provides a public marking of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding service as advocates and advisers, to the good of the administration of justice.
3. As an accolade awarded on the basis of the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.
4. Appointment as Senior Counsel should be restricted to practising barristers, with acknowledgement of the importance of the work performed by way of giving advice as well as appearances in courts or other tribunals.
5. The qualities required to a high degree before appointment as Senior Counsel are skill and learning, integrity and honesty, independence, diligence, and experience.
  - (a) Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
  - (b) Senior Counsel must be skilled in the presentation and testing of litigants' cases so as to enhance the likelihood of just outcomes in adversary proceedings.
  - (c) Senior Counsel must be worthy of complete and implicit trust by the judiciary and their colleagues, at all times, so as to advance the open, fair and efficient administration of justice.
  - (d) Senior Counsel must be committed to the discharge of counsel's paramount duty to the Court, that is the administration of justice, especially in cases where that duty may conflict with clients' interests.
  - (e) Senior Counsel who are in private practice must honour the letter and spirit of the cab-rank rules.
  - (f) Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of their clients' interests.
  - (g) Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.
  - (h) In order for the foregoing qualities to have been properly developed and tested, it is expected that applicants for appointment as Senior Counsel should have practised for a considerable time.

6. The system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose sufficient achievement of the foregoing qualities displays and promises their ability to provide exceptional service as advocates and advisers in the administration of justice.

B.

The system for the selection and appointment of those to be designated as Senior Counsel is to be conducted as follows:

1. All steps towards selection of appointees are to be conducted by the President of the New South Wales Bar Association.
2. The Bar Council, as such, is to have no role in any of the steps towards selection of appointees. Individual members of the Bar Council may be consulted, as individuals, in accordance with the following procedures.
3. The Bar Council is to ensure that the President is provided with all administrative, clerical and other assistance reasonably necessary for the discharge of his or her responsibilities for the selection and appointment of Senior Counsel.
4. Each year, and before applications for appointment are received, the President shall, by invitation, choose at least 20 Senior Counsel, at most 5 junior counsel (if any), and at least 5 solicitors specialising and experienced in the conduct of litigation, for the purpose of mandatory consultation with the profession for the selection of appointees.
5. On or after 1 August, applications may be made in writing to the President by junior counsel who are members of the Association with full practising certificates and who wish to be considered for appointment as Senior Counsel.
6. No application will be considered for appointment which is received later than 31 August (or the first working day thereafter if it is not a working day), except in cases of accident or other special circumstances, in the discretion of the President.
7. The President must seek comments on all applicants from each of the persons chosen for the purpose of mandatory consultation with the profession, to the extent to which those members of the profession are able to provide comments.
8. The President may, but only after taking into account all comments received, determine that any application which the President is satisfied does not warrant further consideration should be rejected, in a preliminary selection.
9. The President must seek comments on each applicant whose application has not been rejected in the preliminary selection from the following members of the judiciary, namely:-
  - (a) the Chief Justice of New South Wales;
  - (b) the President of the Court of Appeal;

- (c) the Chief Judge of each Division of the Supreme Court;
- (d) the Chief Judge or most senior member of at least one of any other courts or tribunals of New South Wales in which the President considers the applicant to have practised to a substantial extent;
- (e) the Chief Justice of the Federal Court of Australia;
- (f) The Chief Justice of the Family Court of Australia and at least one other Judge of the Family Court in which the President considers the applicant to have practised to a substantial extent;
- (g) at least 2 other Judges of Appeal or Judges in any Division of the Supreme Court in which the President considers the applicant to have practised to a substantial extent; and
- (h) at least 2 other Judges or members of at least one of any of the courts or tribunals of the Commonwealth in which the President considers the applicant to have practised to a substantial extent.

10. The President may, in his or her discretion, consult with as many other legal practitioners or members of the judiciary as he or she considers may be of assistance in consideration of the applications, apart from the persons from whom comments must be sought, with respect to all or any of the applications.
11. The President may, in his or her discretion, consult with any of the persons from whom comments have already been received, for the purposes of further discussion, clarification or other assistance in the President's consideration of the applications.
12. The President shall, but only after taking into account all comments received, make his or her final selection of the proposed appointees.
13. The President shall inform the Chief Justice of New South Wales of the President's final selection and seek the views of the Chief Justice on those proposed appointees.
14. The President shall not appoint any applicant included in the President's final selection whose appointment the Chief Justice opposes.
15. The process of selection must be completed so as to permit public announcements of the successful applications on the first Friday in November, when the President shall publish the names of the successful applicants for appointment as Senior Counsel for that year, in order of intended seniority.

C.

Conditions of appointment as Senior Counsel include the following:-

1. Subject to the approval of the Chief Justice of New South Wales, and subject to the requirements and permission of particular courts, tribunals and other jurisdictions, appointees as Senior Counsel shall wear the court dress worn by Queen's Counsel.

2. Appointees as Senior Counsel shall be entitled to described themselves as "Senior Counsel".
3. Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they remain practising barristers in private practice or retained under statute by the Crown, or during temporary appointments in a legal capacity to a court, tribunal or statutory body, or in retirement from legal practice, or while they are members of the judiciary or Members of Parliament. The President may revoke the appointment of Senior Counsel for breach of this undertaking."

On 22 November 1993 the President of the Bar Association announced the appointment of Senior Counsel each of whose appointment was effective from 1 December 1993. They were:

1. Richard Ross TRACEY (Victoria)
2. Peter Richard DUTNEY (Queensland)
3. John Victor KAUFMAN (Victoria)
4. Margaret Anne WILSON (Queensland)
5. Henry JOLSON (Victoria)
6. Anthony John MORRIS (Queensland)
7. Hugh Barron FRASER (Queensland)
8. Thomas Andrew GRAY (South Australia)
9. Shane Edward HERBERT (Queensland)
10. Ross Campbell MACAW (Victoria)
11. Richard John STANLEY (Victoria)
12. Michael John SWEENEY
13. Geoffrey Alan FLICK
14. Andrew Stewart MORRISON
15. Jeffrey Steven HILTON
16. Clive STEIRN
17. John Charles KELLY
18. Peter William TAYLOR
19. Bret William WALKER
20. John Neil GALLAGHER
21. Steven David RARES

It has been confirmed that all the courts in New South Wales will recognise the title of Senior Counsel. The title will also be recognised by the High Court and the Federal Court of Australia. The Chief Justices of the Supreme Courts of all other States and Territories will recognise the title of Senior Counsel from New South Wales for the purposes of appointing Queen's Counsel in their jurisdictions in the same way as they hitherto from New South Wales recognised the title of Queen's Counsel.

On 1 December 1993 the new Senior Counsel who practice substantially in New South Wales were presented with their Scrolls of Appointment by Chief Justice Gleeson in a short ceremony in the Bar Association Common Room.

On 3 December 1993 those Senior Counsel made their bows before the Court of Appeal presided over by Chief Justice Gleeson. On that occasion his Honour made the

following speech:

"On my own behalf, and on behalf of all the Judges of the Court, I congratulate you all on your appointment as Senior Counsel, and thank you for your courtesy in attending this morning to make a formal announcement of that appointment in the manner that has been customary when barristers have been appointed Queen's Counsel.

It is the policy of the Government of New South Wales, a policy that has been confirmed by recent legislation, to discontinue the ancient practice according to which the Executive Government has appointed barristers to the rank of Queen's Counsel. It is, of course, quite wrong to say that the office of Queen's Counsel has been abolished. There are many persons in this State, including approximately 200 practising barristers, who hold the rank of Queen's Counsel, and in the ordinary course of things it might be expected that there will still be practising Queen's Counsel in New South Wales in 30 years' time. The office has not been abolished. What has been decided is that no more people will be appointed to it.

The response of the New South Wales Bar was predictable, and was undoubtedly foreseen by the Government. As in other countries where, for one reason or another, the practice of appointing barristers as Queen's Counsel was abandoned, that office has been replaced by the office of Senior Counsel. The expression "senior counsel" has, for a long time by custom, in New South Wales and elsewhere, been used as a description of Queen's Counsel. Such persons have commonly been referred to as senior counsel, all other barristers being referred to as junior counsel. The post-nominals SC are used in a number of countries in place of the post-nominals QC or KC, and the rank of senior counsel is one which enjoys international recognition. The New South Wales Bar has now established its own procedure for the appointment of eminent barristers as Senior Counsel. There is a protocol governing such appointment. Appointments are made by the President of the New South Wales Bar Association after obligatory consultation with a range of people, including judges and legal practitioners. The Chief Justice of New South Wales has the power to veto any appointment. I am delighted to say that it did not even cross my mind as a serious possibility that I should exercise such a power in any of your cases. I would hope that the occasion for the exercise of the power will never arise. It may be expected that its mere existence would operate as a restraining influence in the unlikely event that such influence was necessary. It is, however, of some significance, because in other States of Australia the practical power of recommending persons for appointment as Queen's Counsel rests with the Chief Justice of the State. Naturally, when Senior Counsel from New South Wales come to seek in other States the same recognition as was, in the past, accorded to Queen's Counsel from New South Wales, the Chief Justices of those other States will want to be assured that no-one will be appointed Senior Counsel who would not previously have been appointed Queen's Counsel. The existence of the power of veto in the Chief Justice of this State will contribute to that assurance.

It would be inappropriate for me on this occasion to comment on the merit of the political decision to make no more appointments to the rank of Queen's Counsel. The Government has made its decision, and it has been endorsed by Parliament. The profession, in turn, has made its response. The decision of the Executive Government to withdraw from this field will be regarded by some lawyers as surprising, but not unwelcome. The surrender of power by the Executive Government occurs only rarely, and when it does, it is not necessarily an occasion for regret. Oddly enough, in this instance it has taken place at the same time as various moves in the opposite direction.

The truth is that there is currently a great deal of confusion as to what people expect of the legal profession. There is fundamental uncertainty as to what professions are, and ought to be. In the case of the legal profession people within the profession and outside it seem to want, at one and the same time, regulation and de-regulation, commercialism and professionalism, free competition and price control. Some people want lawyers to become more like merchant bankers; others want them to become more like social workers. Some people want legal costs to be governed by fee scales or benchmarks; others want the Trade Practices Act to apply. There are even some who seem to think it is possible to have both, although a closer acquaintance with the Trade Practices Act should disabuse them of that idea. It seems to be overlooked that, in the world of free and unrestricted price competition, provided they obey the law people may charge whatever the traffic will bear. That is a world which some lawyers will find very congenial.

However, in relation to the appointment of Senior Counsel at least, the Government has chosen de-regulation, and although many regret that choice, it has some advantages.

Under the protocol which governs the appointment of Senior Counsel, the members of the legal profession and the public may be assured of the professional eminence of all appointees. They may be assured of your eminence.

You are all to be congratulated. Your appointments have resulted from the profession's recognition of your learning, skill and ability. As the first persons appointed to the rank of Senior Counsel in the history of New South Wales, you are entitled to take great pride in your achievement.

I wish you every success in your professional future."

The appointment of Senior Counsel was, in all respects, made in precisely the same way as the appointment of Queen's Counsel, save that no member of the Government played any part in it.

The Scroll of Appointment handed to the Senior Counsel by the Chief Justice recited:

"Greeting:

I, John Sebastian Coombs QC, being the President of the New South Wales Bar Association having confidence in your knowledge, experience, prudence, ability and integrity, do hereby nominate, constitute and appoint you the said (name of barrister) to be Senior Counsel learned in the law for the State of New South Wales, to take rank precedence and preaudience in all the State's Courts of Justice next after (name of barrister) one of our Senior Counsel for the State aforesaid, and you are to discharge the Trust hereby reposed in you with a due respect to the law and usages of the State and for the benefit of the citizens of the said State according to the law, this appointment to take effect from the first day of December ..."

The tradition continues. □

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*From the Keynote Speech given by The Hon. Justice Michael Kirby AC CMG at the launch of The Laws of Australia in Melbourne, 4 August 1993.*

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# Why Are Cases Taking Longer Nowadays? \_\_\_\_\_

*Being the concluding oration to the 21st Queensland Bar Practice Course given by R V Gyles QC on 28 July 1993*

At a ceremony upon his retirement, Mr Justice Rogers, former Chief Judge of the Commercial Division of the Supreme Court of New South Wales, in the course of calling for a fundamental review of the process of litigation, said:

"It is only thirteen years ago that I came to the Bench of this Court, and at that time the average case took one or two days. Any case scheduled to last for a week was regarded as being long, and anything longer was a rarity."

The position in our Courts is quite different today, and I am sure that you are experiencing the same phenomenon in this State.

You will observe that the title of this address concentrates upon causes rather than effects or remedies. If I can to some extent illuminate causes, then I believe a sounder judgment can be made as to the other issues.

Before proceeding, may I make several points.

Firstly, I do not mean to imply that long cases are necessarily a bad thing. Justice often requires that they take place. If a complex dispute has to be litigated, the apparently long route of trial is often the shortest way home.

Secondly, I will be concentrating on ordinary civil proceedings, rather than criminal proceedings or specialised Courts or Tribunals, although I believe that much of what I say will be applicable to all of these.

Thirdly, I am relying upon my own experience rather than reporting upon any statistics or systematic research.

Fourthly, it should not be assumed that I am critical of the factors which I identify which contribute to making cases longer, or of those responsible for those factors. I aim to analyse rather than judge.

Fifthly, I do not endeavour to rank or assess the relative contribution of these factors amongst themselves, or deal with them in order of ranking.

## Uncertainty in the Law

Changes to the substance of the law since I was admitted to practise as a solicitor in 1961 have been considerable, and these changes have gathered particular pace over the last decade or so as a result of both legislation and judicial decision. Continual change breeds its own climate of uncertainty. Where the trend of change is towards broadly defined standards rather than a set of rules, towards the exercise of discretion to give effect to the merits of individual cases seen by the individual judge rather than the application of general rules to the facts of the particular case, and towards social policy rather than legal logic, then the uncertainty is greatly exacerbated. This is, in turn, compounded if the legislation or landmark judicial decision is expressed in complex or opaque language, or, in the case of judicial decision, is such that no clear ratio can be safely deduced by practitioners and trial judges.

The effect of this uncertainty upon litigation should not be underestimated. It is becoming increasingly difficult to advise a client as to the likely result of the trial of a civil case - either as plaintiff or defendant. Then there is the appellate process. The change in the attitude of the High Court justices to development of the law has been the subject of much recent analysis and I will do little more than give examples of the radical change in the law which has been effected by decisions of that Court over the last decade or so. It has also been my observation that a permanent Court of Appeal, particularly when drawn from those who have not been trial judges, is likely to be more adventurous in expanding the law, and the role of the appellate Court compared to the trial Court, than a rotating Full Bench system. I will be surprised if you do not observe this in your Supreme Court. I predict the same thing will happen if and when the Federal Court and the Victorian Supreme Court ultimately reorganise their appellate work in that fashion.

When it is not possible to confidently predict the outcome of a claim or defence, either as to success or as to the ultimate remedy, and it is thus not possible to describe a client's case or defence as hopeless, the great tendency, particularly where substantial sums are at stake, is to *give it a run*. This not only increases the number of cases which are litigated, it makes settlement very difficult.

Furthermore, this uncertainty as to substance, and as to a possible interventionist approach by the appellate Courts, makes many trial judges timorous in exercising their role in controlling a trial. Where discretionary or normative judgments are to be made, or where there is no confidence that the goalposts will not be moved on appeal, trial judges simply do not, and in some cases cannot, reject evidence, and feel obliged to deliver over-elaborate summings up to juries and to make unnecessary findings of fact and law in judgments.

Let me proceed to remind you of some of the significant developments in the law. In the interests of economy, I have concentrated upon decisions of the High Court, but the same tendencies are undoubtedly at work at the intermediate appellate level, particularly now that Special Leave is required for appeal to the High Court. Incidentally, I believe that this requirement has played no small part in making the High Court perceived to be more radical than hitherto. It is inevitable that under this system the justices will choose cases which provide a vehicle for developing the law as they would wish it developed. It is said that Courts have no agenda. In a narrow political sense this may be correct. However, the selection by the Court of points to be argued necessarily sets the agenda for change. Furthermore, in my view, a disproportionate percentage of cases selected by this method will be those with interesting unresolved pure questions of law at the edges of the mainstream of the law rather than those representative of the issues which arise at trial level.

One of the most fertile areas for change in the landscape has been the margin between contract and equity. The High

Court has forever changed the basis upon which contract cases are now fought.

We have seen the remarkable development of estoppel through *Legione v Hately* 152 CLR 406; *Waltons Stores Limited v Maher* 164 CLR 387; and *Commonwealth v Verwayen* 170 CLR 394. Unconscionable conduct has been put on the agenda by *Commonwealth Bank of Australia v Amadio* 151 CLR 447 and *Louth v Diprose* 175 CLR 621. *Taylor v Johnson* 151 CLR 422 can be seen as either an example of unconscionable conduct or as an expansion of the doctrine of mistake. The areas of constructive trusts and unjust enrichment have been developed in a series of decisions, including *Muschinski v Dodds* 160 CLR 583, *Pavey & Matthews Pty Limited v Paul* 162 CLR 221, *Baumgartner v Baumgartner* 164 CLR 137, *ANZ Bank v Westpac* 164 CLR 662 and *David Securities v Commonwealth Bank of Australia* 175 CLR 353, which have radically altered the law.

Fiduciary duties have been explored in *Chan v Zacharia* 154 CLR 178 and *United Dominions v Brian* 157 CLR 1. It can fairly confidently be predicted that *Hospital Products v US Surgical Corporation* 156 CLR 41 would not represent the views of the current High Court as to fiduciary relationships in a contractual setting.

Various aspects of breach are dealt with in *Anka Pty Limited v National Westminster Bank* 162 CLR 549, *Sunbird Plaza Pty Limited v Maloney* 166 CLR 245 and *Foran v Wight* 168 CLR 385. The principles behind penalties are elucidated in *Acron Pacific v Offshore Oil* 157 CLR 514 and *Amev-UDC v Austin* 162 CLR 170.

At the same time, the new remedy of Mareva injunction has been sanctioned in *Jackson v Sterling Industries* 162 CLR 612, relief against forfeiture is reviewed in *Stern v McArthur* 165 CLR 489, and the rights of third parties to the contract have been expanded in *Trident General Insurance v McNiece Bros* 165 CLR 107. To these should be added the implication of terms (*Codelfa Construction Pty Limited v State Rail Authority of New South Wales* 149 CLR 337) and rectification of contract without a concluded antecedent contract and without outward expression of continuing common intention (*Pukallus v Cameron* 56 ALJR 907).

I should also add a reference to the various statutory provisions which affect contracts. In the Commonwealth, the Trade Practices Act, the Insurance Act and the Racial Discrimination Act are examples, and each State has its own cluster of such legislation. In New South Wales, the Fair Trading Act, the Contracts Review Act and the Industrial Relations Act S.275 (formerly Industrial Arbitration Act S.88F) are among them.

Section 52 of the Trade Practices Act in particular now has a pervasive influence on civil litigation, and the profession now seems to have awakened to the significance of Sections 45-50 in relation to many commercial arrangements.

I think you will agree that it is a very dull lawyer who cannot find various defences and cross claims which might be available to what appears to be a simple breach of contract case.

Developments in the law of tort have been no less

significant.

Perhaps most notably the High Court has rewritten the elements of the law of negligence by reference to a relationship of proximity, a concept which is both broad and imprecise - *Jaensch v Coffey* 155 CLR 549; *Cook v Cook* 162 CLR 376. At the same time, the growing and controversial fields of negligent mis-statement, recovery of economic loss, and the duty of care of public authorities were explored in decisions such as *Shaddock & Associates v Parramatta Council* 150 CLR 225, *Sutherland Shire Council v Heyman* 157 CLR 425, *San Sebastian v The Minister* 162 CLR 340 and *Hawkins v Clayton* 164 CLR 539. Then there was the abandonment of the traditional rules in relation to occupier's liability in favour of a general duty of care - see *Hackshaw v Shaw* 155 CLR 614, *Papatonakis v Australian Telecommunications Commission* 156 CLR 7 and *Australian Safeway Stores Pty Limited v Zaluzna* 162 CLR 479 - and the boundaries of medical (and other professional) negligence were widened in *Rogers v Whitaker* 175 CLR 479, in which established English authority was not followed.

The way in which the Court has been moving in relation both to equity and contract on the one hand and negligence on the other, whilst in one sense simplifying the law by creating broad criteria, has significantly increased uncertainty of result.

Vicarious liability was revisited in *Oceanic Crest Shipping v Pilbara Harbour Services* 160 CLR 626; questions involving independent contractors were dealt with in *Kondos v State Transport* 154 CLR 672 and *Stevens v Brodribb Sawmilling* 160 CLR 16; causation was reconsidered in *March v Stramare Pty Limited* 171 CLR 506; the consequences of joint illegal activity upon the duty of care dealt with in the difficult case of *Gala v Preston* 172 CLR 243; and systems of work examined in *McLean v Tedman* 155 CLR 306 and *Bankstown Foundry v Braistina* 160 CLR 301.

The arcane field of interstate torts was re-examined in *Breavington v Godleman* 169 CLR 41, *McKain v R W Miller* 174 CLR 1 and *Stevens v Head* 112 ALR 7. Wider conflict of laws questions were dealt with in *Voth v Manildra Flour Mills* 171 CLR 538 and *Oceanic Sunline Special Shipping v Fay* 165 CLR 197.

Some novel questions of damages have been considered or developed in cases such as *Gould v Vaggelas* 157 CLR 215, *Commonwealth v Amman* 175 CLR 64, *Gates v City Mutual* 160 CLR 1, *Van Gervan v Stenton* 175 CLR 327, *Hungerfords v Walker* 171 CLR 125 and *Baltic Shipping v Dillon* 111 ALR 289.

Decisions such as *re Cram ex parte New South Wales Colliery Proprietors* 163 CLR 117 and *re AMWU ex parte Shell* 174 CLR 345 have greatly expanded the reach of industrial tribunals into the ordinary commercial management of business in a way which is often overlooked.

The Court has had to grapple with the application of intellectual property rights to computers in *Computer Edge v Apple Computers* 161 CLR 171 and *Autodesk v Dyason* 173 CLR 330.

The Court has also clarified and extended the reach of administrative law, overruling previous High Court authority

in the process, in a series of cases including *R v Toohey* 151 CLR 170, *Kioa v West* 159 CLR 550, *BHP v NCSC* 160 CLR 492, *Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24, *ABT v Bond* 170 CLR 321, *Annetts v McCann* 170 CLR 596 and *Ainsworth v CJC* 175 CLR 564.

Some important and difficult questions of indefeasibility of Torrens title were examined in *Bahr v Nicolay (No 2)* 164 CLR 604.

No reference to the recent history of the High Court can ignore important constitutional developments such as the use of the external affairs power (and other powers) in *Commonwealth v Tasmania* 158 CLR 1 (the Dams case); the application of S.117 of the Constitution in *Street v Queensland Bar Association* 168 CLR 461; the rethinking of S.92 which has taken place in *Cole v Whitfield* 165 CLR 360 and *The Barley Marketing Board (New South Wales) v Norman* 171 CLR 182; and the implied guarantees found in *Australian Capital Television Pty Limited v Commonwealth (No 2)* 66 ALJR 695.

Last, but not least, is the decision in *Mabo (No 2)* 175 CLR 1. The shockwaves emanating from this decision were entirely predictable. Regardless of the persuasiveness or otherwise of the reasoning of the various justices, the actual decision reverses the common understanding of lawyers and laymen alike since well before Federation on a topic of paramount political, social and economic importance, extending well beyond the bounds of constitutional law and history. Whilst some exaggerated claims have been made as to its likely effect, the protestations of those who claim that it is of marginal significance are equally indefensible. Concern on the part of the mining and pastoral industries can hardly be regarded as unfounded. For better or worse, this decision, taken with *Australian Capital Television*, will stamp the High Court as it is presently constituted as a radical institution in the public mind and will undoubtedly affect the perception of the Court by litigants and their lawyers for some years.

Of course, I do not suggest that all of the foregoing judgments are revolutionary, involve broad and imprecise criteria, are concerned with social policy, or are difficult to understand and apply. I do suggest that, taken together, they bear out the thesis that there is justifiable uncertainty on the part of practitioners and trial judges - both as to the present content of the law and as to what might happen on appeal.

When comparing his time as a judge with that of his father, our Chief Judge in Equity, Mr Justice McLelland, recently said (on being sworn in as Chief Judge of the Equity Division):

"A significant and worrying change has been a major increase in the level of uncertainty of the law. In many kinds of situation it is now much harder for people to find out where they stand legally without first having to endure the strain, delay and expense of a Court case and lawyers have to spend much of their time doing the professional equivalent of gazing into a cloudy crystal ball. One reason for this is the developing tendency for lawmakers to give to Courts wide powers to override established rules of law on grounds which are either

unstated or stated only in the vaguest way. No doubt this fashion reflects a worthy desire to achieve something approaching perfect fairness in the resolution of every legal dispute. I wonder, however, whether the community can afford the cost of such a luxury and whether it may seriously damage public confidence in the objectivity of the justice system and the rule of law. This movement from principle to palm tree is a leading contributor to the twin evils of high legal costs and lengthy court delays."

I take His Honour's reference to lawmakers to include appellate Judges as well as Parliamentarians.

### The Stakes Are Higher

Ten years ago, verdicts exceeding \$10m were extremely rare. Nowadays, it is by no means unusual to have \$100m or more at stake in a case. This reflects more than inflation. During the 1980s the size of commercial transactions in Australia took a quantum leap, and the size of transactions is a good indicator of the amount at stake in litigation. As is perhaps inevitable at a time of boom then bust, the unorthodox nature of some of the boom transactions, and the unhappy results of them in the bust, predispose to litigation.

Litigation over deals of \$100m need not be more complex than over deals of \$10m. However, many of the transactions over the last decade were complicated - not always for worthy reasons. Furthermore, the collapse of commercial morality in both private and public enterprises over the period has meant that many business relationships went sour, and sorting out the pieces after the breakdown of such a relationship, which may have gone on for months and years, is difficult and time-consuming.

The real point, however unfashionable it may be to make it, is that legal costs have not risen proportionately to the amounts at stake in cases, and it is thus relatively cheaper to litigate now than ever before.

Several years ago, the Registrar of the High Court demonstrated in a paper he published that counsel's fees had steadily fallen against other relevant indicia since the early days of the century, and I believe that that trend has continued since that paper was written. There is no question but that the fees customarily charged by leading counsel when I came to the Bar were higher than the fees charged by equivalent counsel now when inflation is taken into account.

The costs of litigation are part of the cost/benefit equation involved in decision-making, and if it is relatively cheaper to litigate than it used to be, there will be more litigation and it will be more thoroughly prepared and fought longer and harder than hitherto. This practical reality appears to escape the attention of so many who like to pontificate on the evils of the law in general and the legal profession in particular.

### The Litigant

Another reality which often seems to escape the attention of the would-be reformer of Court lists is the fact that, by and

large, defendants (including governments) do not wish to pay out money unless and until they are obliged to do so, and quite a few cannot. This tendency is stronger in times of high interest rates. No amount of judicial cajoling or exhortation will alter it. The days when commercial litigation was conducted between solvent gentlemen genuinely wanting a quick decision by a neutral umpire, if they ever existed, are long since gone. This explains why many cases have been fought to an exhausting finish with all points being taken in recent years. Another contributing factor is that some plaintiffs can hold their financiers at bay as long as litigation continues with the promise of a pot of gold at the end of the rainbow.

I believe that a related factor is the growth of litigation by and against government instrumentalities and qangos of one sort or another. Governments, particularly the Commonwealth, have always been difficult to persuade to settle even hopeless cases or defences. The position is becoming worse. The trend towards corporatisation and the freeing of these authorities from central Public Service controls, allied to the apparently inexorable growth of the public sector, means that more and more public sector litigants are running their own litigation with public money, with precious little knowledge or experience of doing so and with no incentive to settle. One of our most experienced (and persuasive) mediators told me recently that he had the utmost difficulty in convincing the head of a large instrumentality that it was proper for such a body to settle a case without it going to verdict.

Another growing phenomenon is the use of litigation as a quasi social or political statement by special interest groups. Environmental, health, welfare, ethnic and women's lobby groups are adept users of legislation and litigation to make a point. These cases have similarities with actual or de facto class actions (such as test cases) which are also increasing in frequency, and the trend is likely to continue. Product liability, consumer protection and shareholders action come to mind. Again, because of their very nature, these cases are unlikely to settle, particularly where legal aid, pooled resources or speculative costs arrangements muffle the risks to any individual.

### Some Procedural Aspects

It is ironic that the increasing length of commercial cases, noted by Rogers J, has taken place during a period of increasingly intense management of these cases by the Courts. Whilst I do not doubt that case management has its advantages, there are some consequences which I suspect are not well understood, even by the judges. The effect of it has been to significantly *front-end load* preparation of the case. The practise of having evidence reduced to written form by way of affidavit, statement or expert report; the heavy concentration on having all interlocutory aspects exhaustively sorted out before the hearing, and the numerous appearances at various types of interlocutory hearing which are entailed at which the barrister or solicitor is supposed to have an intimate knowledge of the relevant facts and law all involve considerable costs. Furthermore, my experience has been that the affidavits, statements and expert reports are often longer than is necessary,

canvass much of marginal, if any, real relevance, and too often contain inadmissible and frankly prejudicial material. The other side then feels compelled to answer all of this in kind, and to raise its own rabbits out of the hat. These documents also owe as much (if not more) to lawyers as to the witness.

This has coincided with the discovery of litigation preparation as a profit centre by the larger firms of solicitors; the introduction of litigation support services by accountancy firms and others; the availability of experts in all subjects for all occasions; payment for preparation by the hour; and the development of technology such as the photocopier, the facsimile machine, the word processor and computers in all manner of applications. Briefs are now delivered by trolley.

I would suggest that in many cases the result is to involve pre-trial costs on a scale which would exceed the cost of preparation and final determination of a case of equal complexity listed for hearing on oral evidence in the normal way in ordinary Common Law list without case management. One consequence of this is that by the time of trial each side has so much invested in sunk pre-trial costs that the costs of hearing are not the incentive to the parties to settle that they once were. Another is that the process tends to lock parties and their advisers into positions taken during the case management phase.

Another procedural issue which has contributed greatly to the length of cases has been the ethos which has prevailed for many years that to actually reject inadmissible evidence or to enforce the rules of practice, procedure and pleading is out of step with modern progressive thinking. This was largely the result of the intervention of appellate Courts. One example was the view that all amendments at all stages should be permitted as adjournment and costs could cure all prejudice to the other party. The fallacies lying behind that view were exposed by Lord Griffiths in *Ketteman v Hansel Properties* [1987] 1 AC 189, and, after some hesitation, the pendulum in Australia appears to be swinging back towards finality of litigation rather than a perfect result in every case in the long run. For example, this tendency can be seen in the High Court decision in *Coulton v Holcombe* 162 CLR 1, the New South Wales Court of Appeal decisions in *Holcombe v Coulton* 17 NSWLR 71 (particularly per McHugh JA (as he then was) at 77 EG), and *SPCC v Australian Iron & Steel (No 2)* 75 LGRA 327, 28 FCR 451, and in the recent High Court decision in *Autodesk v Dyason (No 2)* 67 ALJR 270, particularly per Brennan J at 275. It is now commonly applied by judges of the Commercial Division of our Supreme Court.

### Conclusion

I should repeat that, in this perhaps idiosyncratic account, I have concentrated my attention upon one consequence of the various matters to which I referred - namely, the effect upon the length of cases. I do not argue that this issue should override all others, or that the clock either can or should necessarily be turned back. I do argue that this consequence should not be overlooked or ignored either by those involved in day to day decisions affecting the process or by those who may be undertaking a more fundamental review of the process. □

# *The Spedley Mediation from the Inside*

*Bar News invited MJ Slattery QC to write this article to give the Bar a bird's eye view of the mediation process.*

The fatal step in mediation is to say "yes" to the idea in the first place. Mere participation in the process works insidiously over time to suspend, then overcome, much of the detachment of lawyers and the cynicism of their clients. Once hours, days or even months have been spent mediating in a structured environment, human reactions attempt to give all this activity some purpose. The motivation to settle then appears. This was my experience of the Spedley Mediation. Here is how it happened, but first, a little background is necessary.

## **The Background**

The Spedley litigation was three cases being heard together. The principal proceedings were brought by the liquidator of Spedley Securities Limited ("Spedley") against its former directors and ANI ("the main proceedings"). There were also proceedings brought by Standard Chartered Bank of the U.K. and GPI Leisure Corporation Ltd against Spedley and some of its directors ("the Standard Chartered proceedings"). The third set of proceedings were brought by the Spedley liquidator against Priestley & Morris, the auditors of Spedley ("the auditors' proceedings").

This raft of litigation arose out of the sudden collapse in January 1989 of Spedley and its parent, Spedley Holdings Limited. In the main proceedings, the case presented by the Spedley liquidator was that in the years leading up to and after the stockmarket crash Spedley had been a major player in a game of musical balance sheets with, among others, the then high flying Bond Corporation Limited and the merchant bank, Rothwells Limited. It was alleged that Spedley had lubricated a merry-go-round of asset transfers, window dressing and artificial cross balance date transactions to keep some very sick corporations looking stable and profitable. In the main proceedings, the Spedley liquidator was suing Spedley's former managing director Mr Brian Yuill and its three non-executive directors, Messrs Jones, Maher and Gray to recover compensation and damages for breach of fiduciary and statutory duties as directors and for negligence. Mr David Gray, who had also been the Chairman of Spedley during this period, was my client. The allegations against Mr Yuill were considerably wider than those against the non-executive directors.

Spedley also sued Australian National Industries ("ANI") which was said to be vicariously liable for the actions of its full time employees, Messrs Jones and Maher, as directors of Spedley. These two directors had been appointed to the board of Spedley by ANI which held 45% of the shares in Spedley Holdings Limited. Spedley further alleged that by reason of the way ANI had acted in relation to the affairs of Spedley, it should be deemed to be a director of Spedley under s.5 of the Companies Code and liable as such for misfeasance.

In the Standard Chartered proceedings GPI Leisure Corporation Limited (Receiver and Manager Appointed) ("GPIL") and Standard Chartered Bank ("Standard Chartered") were suing ANI, Spedley, Spedley Holdings, Maher and Jones

seeking to recover \$100 million advanced by Standard Chartered to GPIL early in 1988 to enable GPIL to acquire convertible cumulative redeemable preference shares in Spedley Holdings. GPIL and Standard Chartered alleged that the defendants to those proceedings were guilty of breach of fiduciary duty, fraudulent misrepresentation, misleading and deceptive conduct and breaches of trust.

In the auditors' proceedings, Spedley's liquidator alleged that Priestley and Morris were negligent and in breach of their statutory duties as auditors in approving accounts for the 1983 and 1987 financial years and also in failing to detect or act upon signals as to the poor financial state of Spedley.

The directors, ANI and the auditors denied liability for this phalanx of claims.

After a number of controversial applications to disqualify the judicial officers appointed to hear the proceedings, the three cases were eventually listed to commence before Mr Justice Rolfe on 9 June 1992 in Court 11A. Macfarlan QC opened for the Spedley liquidators. The defendants and assembled journalists drew breath at his \$750 million quantification of the total claim. This was made up of some \$360 million of losses which principally related to irrecoverable loans made by Spedley at the instance of Mr Yuill. Simple interest brought that sum to \$600 million and compound interest to \$710 million. An additional claim based on an alleged put and call agreement said to have been executed by some of the directors of Spedley and ANI and dated 30 November 1987, brought the total to about \$750 million. The claim against the auditors was a little higher. This was not a claim for the faint-hearted. Until that time it was the largest ever made in the Supreme Court of New South Wales.

Even Court 11A had received a facelift for this gala event. The Bar table had been re-engineered into two rows. The occupants of each became known to the Press and to each other as "the first eleven" and "the second eleven". Once one had mastered the niceties of directing submissions into the backs of one's opponents, the most comfortable place to be was in the back row with the "second eleven". The proceedings were in fact seeking a massive transfer of wealth from the "second eleven" to the "first eleven". Not unnaturally, this fostered a certain defensive camaraderie among the "second eleven".

## **Conception of the Idea**

Necessity is ever the mother of invention in litigation. The idea of referring the proceedings out for mediation really arose by accident in the quest for an early exit from the proceedings for my client. The case had the potential to cause him financial harm long before the end of the hearing. Alone among the defendants he was uninsured and drawing upon his private financial resources to meet legal expenses. Spedley was relying upon a series of alleged acts of negligence, success on only one of which could have exposed him and all the other

directors to crippling liabilities of between \$5 million and \$50 million.

It appeared to us that the financial consequences for my client would merely be seen as "collateral damage" by the major combatants. For Spedley, the evidence of the three ex-directors Jones, Maher and Gray was chiefly a means of access into the corporate treasury of ANI. If the directors got hurt in the process that was just bad luck. The other directors, Jones and Maher, had limited protection against this through indemnity agreements with ANI. Gray though had left ANI too early to receive such a benefit. He and they faced this litigious armageddon together.

The conviction that my client would be damaged merely by his presence on this battlefield brought with it the conclusion that the war somehow must be brought to a halt. Speeding up the processes of settlement and specifically the use of mediation was the only ready solution. The specific idea of actually moving the Court for mediation emerged in discussion with my instructing solicitor, David Hill of Minter Ellison Morris Fletcher and our client after about a fortnight of hearing.

### The Power to Order Mediation

To lawyers and clients the mere advancing of a proposal for mediation can often suggest weakness. However, as a small party with nothing to lose we felt no psychological qualms about advancing the idea. The initial obstacle however, was formulating an argument to the conclusion that the Court had the power to order mediation.

The then current folklore surrounding the recent decision of Mr Justice Rogers in *AWA Limited v Daniels & Ors*, 24 February 1992 (unreported) was that the Court did have power to order mediation. However, actual scrutiny of the judgment revealed in it the following uncomfortable passage for any proponent of Court-ordered mediation:

"Ultimately when the question was submitted to serious debate all parties agreed that there is power in a Judge of the Supreme Court of New South Wales to order them to mediation even over the objection of a party. In the light of this concession it is unnecessary for me to examine that question for myself and it may be left to another day should it ever arise."

A combination of ss.23 and 76A of the *Supreme Court Act* together with the inherent power of the Court permitted Mr Justice Rogers on that occasion to act on the concession so made by the parties.

AWA was only one part of a very clouded picture. Only two months previously Mr Justice Giles in *Hooper Bailie Associated Limited v Natcon Group Pty Limited* (1992) 28 NSWLR 194 had looked at AWA and confirmed its limitations. *Hooper Bailie* was, though, a positive pointer to a mediation-rich future, as it affirmed the enforceability of precisely drawn mediation clauses. However, neither AWA nor *Hooper Bailie* were express authority for a compulsive power to order mediation.

Mr Justice Rolfe was understandably cautious about the

great leap forward for which we would be contending. At the time that the motion was first discussed in Court on 29 June 1992, His Honour said:

"If there is not consent to the proceedings being adjourned to enable the parties to undertake some external method of dispute resolution, I will need to be satisfied that I have jurisdiction to make a direction in terms of paragraph 1 of the Notice of Motion."

This was a sobering warning. It was time for the advocates of mediation to face up to the power question. There was no explicit power to mandate mediation. In most jurisdictions, where Court ordered mediation flourished, explicit power had been sought and obtained by legislative amendment.

The way forward was not to look for a black letter head of power but to point to the fact that for years the Court had in fact exercised jurisdiction to promote the settlement of disputes by a variety of means, including the granting of adjournments. The ends of Court administered justice are as much served in facilitating settlement as they are in bringing proceedings on for early hearing. The Court of Appeal had recognised this in *John Fairfax & Sons Limited v Foord* (1988) 12 NSWLR 706 at 712 per Mahoney JA, where the purposes of case management were described as including, "... the achievement of early resolution of (the proceedings)".

### The Motion

The directions and orders sought in the motion for mediation were simple. The motion was filed in the main proceedings and requested the following together with ancillary orders:

- "1. Direct that the parties to each of proceedings numbered 50190 of 1991, 50182 of 1991 and 50467 of 1991 undertake mediation with a view to resolution of all proceedings with the assistance of a mediator to be agreed upon among them.
2. Order that these proceedings be adjourned for a period of three days to permit the mediation directed in accordance with direction 1 to take place."

The motion was framed in this manner to focus on the Court's undoubted power to adjourn proceedings as and when it saw fit and to present the issue to the Court as a request for a procedural direction incidental to the granting of such an adjournment.

Finding a mediator was the next step. Sir Laurence Street's stature in the field made him the obvious choice. We ascertained his availability. A range of possible dates for the mediation, together with a short description of the mediation process was included in the affidavit in support of the motion.

The motion was handed out on the afternoon of Friday 26 June, by Helen Brennan of Minter Ellison Morris Fletcher, who instructed me in Court daily. During the proceedings Court 11A was often occupied with single issue debates which concerned only few of the parties. This made for some languid afternoons, made all the more hypnotic by the schools of

electronic fish swimming endlessly on the screen of Bennett QC's portable computer. Friday 26 June was such an afternoon.

The motion was distributed about the two Bar tables in the manner of all the motions, letters and supplementary statements that flowed throughout the Courtroom with the regularity of the daily tides. The reaction was instantaneous. Some of the first eleven turned around and shook their heads in disbelief. Others quietly laughed. Hely QC sent me a note saying: "How much are you putting in?" Bennett QC's fish stopped swimming. The other Spedley directors were delighted and gallantly said, "Great idea. You go first and we'll support you". By Monday 29 June the Plaintiff had expressed its opposition to an adjournment for mediation but most parties required more time to seek instructions. ANI restated the position that it had maintained up until then. Its view was that a formal mediation was unnecessary as negotiations were continuing between the parties in parallel with the hearing. ANI, though, said that it needed further time to get instructions. The motion was adjourned to Friday 3 July for hearing and then, at the request of ANI, until 10 July.

### The Argument

Friday 10 July at 10.00am was appointed for argument on the motion. ANI's attitude to mediation was becoming critical to the outcome. In AWA Mr Justice Rogers had identified that the number of parties who, to paraphrase John Lennon, wished to "... give mediation a chance" was an important discretionary consideration in the allowing of an adjournment to permit the mediation to occur. All the directors were strongly in favour of mediation. The auditors were willing to participate. Spedley did not consent to an adjournment. GPIL and SCB were neutral at best. Without ANI's support, the numbers were probably not there to carry the day on discretionary grounds.

There was no current signal from ANI. Its last reported position had been opposition. Silence had then descended. It was, however, quietly charting a fresh course. Lack of progress in the other out-of-Court negotiations had forced upon it the conclusion that a mediation may have some value.

At 9.50am outside Court 11A Bennett QC, with unflappable chutzpah, produced to me two utterly inconsistent sets of written submissions. One set supported the power to order mediation and the other denied it. He declared, "Presently, our instructions are to oppose mediation and to argue that the orders you seek are beyond power. We may be able to change our position shortly though. Will you agree to stand the matter down for a short while, so that we can get final instructions to switch sides and support you?" How could we say no? The Court adjourned temporarily. Then the Allen Allen and Hemsley mobile telephones outside the Courtroom scoured the globe to find the final ANI director, whose consent to the change of instructions was necessary. After about an hour he was found, it was said, "on a beach" in Hawaii. Instructions were given and ANI's "volte face" was complete. The pro-mediation forces now had the numbers.

The Judge though had his own surprise in store for the parties. Upon resumption, and before any substantial argument took place, His Honour executed a graceful diplomatic pirouette by announcing that he would temporarily adjourn the proceedings at the conclusion of the Plaintiffs' case, without deciding the power question. After giving some background to the present stage of the litigation, in a short judgment, His Honour wished the parties well. He did so in words that were soon to be echoed by Sir Laurence:

"It would be a bold person who would give a definite opinion, against the background of the considerations to which I have referred, of the outcome of this complex litigation. It is, of course, for men of commerce to weigh their legal advice against the cost, not only to themselves, but to companies for the control of which they are responsible and to the shareholders and creditors of which they owe a very real duty.

Nothing I have said is novel. It is well recognised that the Courts have often, in encouraging settlement, made reference to some or all of these matters. Mediation provides another dimension in that it is presided over, not in a judicial sense, but rather in a manner calculated to allow the parties to consider the matters to which I have referred in a meaningful way, by a trained mediator. In the present case the mediator suggested is Sir Laurence Street, a former Chief Justice of this Court, whose skill in this field is well recognised.

I have previously stated that I will grant a short adjournment, if all the parties agree, to enable the mediation process to be explored and mediation undertaken or for the parties to undertake any settlement negotiations they may wish outside mediation. Thus, I am prepared, if the parties consent, to allow them to mediate or do whatever they wish in seeking to reach an out of court settlement.

In this case I think it appropriate to adjourn the proceedings for a short period at the conclusion of SSL's case or at 4pm on Thursday 16 July 1992, whichever should first occur, to allow the parties to consider settlement whether through mediation or otherwise. I appreciate SSL does not consent to an adjournment. Notwithstanding its absence of consent I propose to take the course to which I have referred."

It worked. Spedley was temporarily deprived of a hearing. At the close of its case there was nothing else to do but to accept the parties' invitation to come to the mediation ball. All the major players now had their entree cards and were ready to have Sir Laurence's magic worked upon them.

### The Reaction

The next day, *The Weekend Australian* rather cutely reported the event as though cumulative lawyers' fees had exhausted available client reserves and led to this result. Under the headline "Main Spedley Case Goes to Mediation - Overwhelming Costs Bring Move" Sir Laurence's photograph

looked out from the text. In a pose reminiscent of Rodin's "Le Penseur", Sir Laurence appeared to be contemplating an abstract and elusive Spedley consensus.

The following Monday, July 13, the stockmarket's judgment was decisive. Negative sentiment forced ANI's share price down sharply. This, though, was not a disaster for ANI. Its shares had been meandering north and south like a drunken sailor ever since the name "Spedley" first became synonymous with corporate misfortune. Now the market seemed to draw the simple bearish conclusion that anything taking place behind closed doors, like mediation, was bound to be bad for ANI. Before this there had been security from the very public battle taking place in Court 11A, where ANI was saying "never say die" through its indefatigable champion, Hughes QC. As usual though, the market had overreacted. Much of ANI's lost value soon reappeared, once financial journalists returned to their routine preoccupation with the balance of payments and national debt.

### The Preliminaries

Sir Laurence Street moved swiftly after 10 July to set the processes of the mediation in train and to raise expectations of a positive outcome.

At an informal meeting with him early in the following week representatives of the parties were requested to produce their "best case" and "worst case" scenarios for the final outcome of the litigation. They were also asked to identify any obstacles they perceived to settlement of their part in the case.

Friday 17 July was devoted to a series of conclaves held between Sir Laurence, each of the parties and their legal representatives. These gatherings had an air of clerical mystery to them. Indeed, upon his release that afternoon from the ANI conclave, Hughes QC was overhead to say, "I feel like I've just been to confession". Whatever corporate or individual sins Sir Laurence heard and even absolved have ever since remained under the seal of his confessional. Under the same seal of confidentiality though, each party was encouraged to name the issues or persons who were perceived to be creating obstacles to the settlement process. The parties spoke freely. By the following morning Sir Laurence had a grasp of what, and particularly who, would be (in mediationspeak) the "dealbreakers".

### The First Plenary Session

The mediation opened on Saturday 18 July in the Allens boardroom with the customary plenary session and individual statements of position.

Sir Laurence's opening statement went straight for the jugular. Friday's confessions had no doubt convinced him that the main obstacles to an early resolution of the proceedings came dressed as lawyers. Reaching out to parties directly was the only solution. He did more than that. He drove a subtle wedge of self interest directly between client and lawyer. Delivered with appropriate judicial gravitas, this is a paraphrase of what he said:

"From all my experience in the law I am certain that this litigation will settle at some time rather than be finally determined by a Court. That settlement may happen in three months or three years but it will happen. It may be after a first instance hearing, a Court of Appeal or a High Court hearing or a retrial, but the case will settle. There is so much at stake that no one party can afford to lose. Granted that, we might as well take advantage of the present mediation, grasp the inevitable and save the prodigious direct and indirect cost of further running this case."

The subsequent making of the parties' well-rehearsed position statements showed no immediate recognition of the mediator's wise counsel. In fact, all the posturing, grimacing and growling which followed would have done the All Blacks proud as the "Haka" before a Bledisloe Cup rugby international. The general theme of each party's presentation was, "We are terrific. You have underestimated us. Your case is misconceived. We will win".

The three most contentious issues between Spedley and ANI were covered by their position statements: the nature, if any, of ANI's vicarious liability for its employee-directors of Spedley; whether any contributory negligence of Spedley was a defence available to ANI; and whether Spedley's damages claim of \$700 million involved double counting.

At the end of all this machismo Sir Laurence was breathless with dismay. To the mirth of the assembly he could only observe, in understatement, that he had just heard "an interesting diversity of views". He then again stretched out directly to the clients. Reminding them of their hip pockets, he said in paraphrase:

"I am amazed that such confident advice could be given. It is impossible that all these contradictory lawyers' views can be correct. One of them will be proven wrong and some client unfortunately will pay for it."

The first plenary session then broke up for the individual negotiations to start. If expectations were initially high they rapidly descended. Each party was allocated a room at Allens. There we waited and waited and waited whilst nothing happened, or so it seemed.

### Dressed to Mediate

Perhaps the most revealing indication of the parties' attitudes on the day of the plenary session was the way that they and their lawyers dressed. Out of the rigid confines of Court dress, and on a sunny Saturday morning, one would have expected a degree of sartorial diversity to break out. Not so. Dress was stern and in most cases semi-formal. Here was a sign of the generalised angst felt by all about the negotiations.

With two exceptions among the major players, no one wished to be caught looking any more informal or relaxed about the mediation than anyone else. The two principal exceptions were Bennett QC and Peter Allen, the Spedley liquidator. With a certain studied nonchalance Bennett QC

turned up in an open necked shirt. He was clearly the lawyer most philosophically committed to mediation and his shirt said so. Perhaps though, the greatest surprise to the assembly was presented by Peter Allen who came dressed in a bright checked flannel shirt, looking for all the world like a Canadian lumberjack. Although he did not have his axe with him, the cutting implications of his dress were not lost upon his opponents.

During the conduct of the proceedings in court more than one woman in a flight of fancy had used the sobriquet "Placido" to describe Mr John Harkness, the other Spedley liquidator. This was no doubt because of his uncanny resemblance to a certain handsome tenor. He surprised us that Saturday by arriving clothed like all the other mere mortals. Expectations of Placido coming dressed as Otello, Macbeth or a gondolier were dashed.

At the centre of the melee but dressed to differ, Sir Laurence maintained his clerical theme in a charcoal suit. Though too Saville Row to be convincingly clerical, it continued to complement the mediator's role of inspiring trust and confidence.

Interestingly, the women present that day adapted far more quickly to the informality of mediation than the men. Chanel suits, shoulder pads, high heels and all the other accoutrements of "power dressing" were left at home. The look was distinctly "Country Road". The men, in contrast, looked as though they had started to dress for Court but became confused in the process.

This was the pinnacle of the mediation's dress formality. Fear of underdressing soon disappeared. As negotiations progressed over the next ten weeks, the parties and their representatives slowly relaxed with one another and peeled off the extra layers of defensive clothing. Out came the Lacoste and the Ralph Lauren. At the end, negotiations were being conducted in a dress more appropriate for an Australian backyard barbeque.

Although "recession dressing" never appeared there were occasional touches of what could only be described as "grunge". On the final day one member of the junior bar, in as much an act of defiance as anything else, turned up in a T-shirt and football shorts. No doubt this helped to achieve a better price for his client.

### The First Week

In retrospect, the expectations of that first weekend were inflated. It took everyone a long time to appreciate that this congress of parties would not follow the normal conventions of mediation. The standard formula of negotiating continuously until a deal is done or is ruled out, was impossible in Spedley. The issues were too complex, the parties too diverse and the numbers too big.

By the end of the first weekend, ANI and the Spedley liquidators had been locked in a room for two days trying to reach the core of a settlement, whilst the other parties waited. Sir Laurence explained to us impatient outsiders that once a basic number had been struck between ANI and the Spedley

liquidator, we would be approached for our contribution.

No approach was made to us that weekend. In fact, after the plenary session, the only excitement for the small parties in the whole two days was a fireworks display over Darling Harbour on the Sunday evening. It would have been a relief to have had our arms twisted and asked for some money then and there but instead we just waited.

The Court was due to resume on Wednesday 22 July. When that date arrived the Spedley liquidators and ANI were still number crunching without apparent agreement. The Spedley lawyers applied to go on in Court. The defendants resisted. Another adjournment of a few days was allowed.

In the absence of any positive news from the mediation no further adjournments were possible. The proceedings then cranked back into life.

### Progress of the Mediation

For the next six weeks the parties led a Jekyll and Hyde existence. By day we fought. At night we mediated. After the resumption in Court, confidence in a settlement all but disappeared. The second eleven became depressed. We had Sir Laurence's assurance that it was "looking good" but it certainly did not feel that way. When we asked him how we could keep settlement hopes alive when in Court, Sir Laurence rather quaintly said "Try not to be too controversial". That did not come easily to any of us.

Within about ten days of the resumption, the first major bloodletting of the case began. The Second Defendant, Mr Neil Jones, decided to give evidence. Jones had been Chairman of ANI at the time in question as well as a director of Spedley. He admitted to Hughes QC in cross-examination that through his non-disclosure of material facts to the Board of ANI, approval had been procured for substantial advances by ANI to Spedley. Further, to answer the Plaintiffs' case he adopted a novel defence. He denied being able to read a balance sheet and professed not to know what bills of exchange or options were. The cross-examiners pounded away at Jones for about two weeks. Each day, as a result, the Plaintiffs' cases advanced a little.

There was also a growing prospect before the case reached a long-scheduled three week adjournment starting on 31 August, that the Third Defendant, Mr John Maher, might give evidence. As ANI's financial controller at the relevant time, his evidence would be crucial for Plaintiffs and Defendants. A certain greater urgency crept into the work of the negotiator.

In this atmosphere confidence in settlement was scarce. Sir Laurence's task was daunting. How could he possibly convince the smaller parties such as my client that settlement was on the cards, when the major parties were still negotiating privately, not yet asking us for money and trying to destroy us in Court.

Sir Laurence's solution was to feed the parties with a judiciously mixed cocktail of early morning meetings and discreetly placed information. Rumour and exaggeration which spread rapidly among the parties did the rest.

Suddenly, about mid-August, a draft deed recording a consensus between some of the major parties was mysteriously distributed to the negotiators. Produced on the Allen's word processor, it was first hand evidence of a deal between the majors. The effect was electric. Confidence immediately rose. The smaller Defendants began to speculate about the unspeakably large demands that were bound to be made by the Plaintiffs. We were not disappointed. The real argy-bargy sessions with individual small Defendants began.

By 31 August, when the pre-scheduled break in the proceedings began, John Maher had not been called and the draft settlement deed had already gone through a few editions. A fragile consensus on some of the main principles had been reached. Over the three week break more of the detail was negotiated. The original draft deed produced a litter of little deeds that struggled along like ducklings a few editions behind the drafting of the mother deed.

Upon resumption in Court on 21 September the parties asked the Court for a week's further adjournment which was granted. The whole of that week was spent negotiating and drafting in the Allen's boardroom. Progress was painfully slow. ANI's annual results were due to be announced in a press conference on Sunday 27 September. Everything had to be done by then.

The mediation had now become very lawyer driven. Some clients became exasperated by the Byzantine debates between lawyers on drafting issues. This lawyer domination was brought home starkly to one ANI executive. He recalled with amusement that at one stage when there were more than 50 people in the room Sir Laurence called for the lawyers to leave so he could have some discussions with the parties. Only six people remained behind.

### **Saturday Night Fever**

Saturday 26 September was the most intense day of drafting and negotiation of the whole mediation. For most it started at 9.00am. The wordsmiths worked furiously all day and into the evening and signed off with amendments to the penultimate draft at about 2.45am on Sunday.

To the relief of some, Edition 13 of the main draft deed came and went early that day. The prospect of signing off on such an unlucky number caused superstitious types to propose amendments quickly.

The Allen's kitchens kept producing sandwiches all day until about 7.00pm. From then on the negotiators grazed over the same placid sandwiches and soggy chips into the early hours of Sunday morning. Until this day, the mediation had generally been "dry". About 10.00pm the first cold beer appeared on the boardroom table. Even the most iron-willed of the negotiators began to make concessions. A momentum was developing. Parties who up till then had argued interminably began to cooperate. Most lawyer-client conventions broke down. Barristers and opposing clients negotiated with each other directly.

One group of negotiators began to enforce reasonable standards of behaviour by awarding yellow cards on soccer

penalty principles. The display of a yellow card was a warning to an opponent who was taking absurdly negative positions in the bargaining process. Fortunately, no red cards were dispensed. The production of a red card would, no doubt though, have seen a grant of relief against forfeiture by the mediator.

Macfarlan QC had not been seen at the mediation since the opening plenary session. His arrival about midnight that night was the firmest sign to the non-Spedley parties that the prospect of the case restarting on the following Monday was a fiction. A telling sign of where the mediation was heading was that that night even he turned up in a leather bomber jacket. Sir Laurence's was still the only coat and tie in the room and that night even the coat came off. Removal of the tie was, of course, unthinkable.

Even at this late stage of the negotiations and despite the goodwill glowing from some parties there was still a residue of suspicion among others. This led to Sir Laurence taking on an additional role as a stakeholder for some parties until settlement deeds were signed and all title deeds could be handed over.

### **Grand Finale**

At about 8.00am on 27 September the first of the previous evening's hungover negotiators began to struggle into Allen's. Edition 16 of the draft deed was available for checking. A further negotiating session was due to commence at 9.00 am. By that time, the few who were gathered in the Allen's boardroom were intently discussing the prospects for that afternoon's football. By 10.00am several bilateral negotiations on aspects of the deed had sprung up but prospects for a signing in Canberra for a 4.00pm ANI press conference were already looking grim.

I had always planned to go to the Rugby League Grand Final on that Sunday. By the time I left the Allen's boardroom at about 11.45am tensions were rising. Compromises on drafting issues which only the day before would have resulted in hours of debate were being solved in less than five minutes. An angry insistent tone was finding its way into many voices. Anything that looked like causing an obstacle to the momentum for settlement was pounced on.

There was little I could do now. All the amendments required by my client had been incorporated into the deed. A caretaking role was still required to see the deed through to signature.

I said goodbye to David Gray, Helen Brennan and David Hill and headed off for the Sydney Football Stadium.

As I left the worst shouting match of the mediation was developing between one of the major parties and one of the minor parties. An execution problem had arisen with a power of attorney which, if not resolved, would abort the whole signing. Temperatures were rising rapidly. A meltdown looked possible. I left because there was nothing I could do but to hope that, like all the other myriad issues in this mediation, this one too would solve itself. After I left that problem was solved. The account of what follows for the balance of that day

is only hearsay. It is, however, as reliable as every lawyer in the room with whom I checked it.

By about 11.45am edition 17 of the principal deed, the final version, was coming out of the laser printer. Some of the little deeds were still on their way. The couriers were well short of leaving for the airport. One major party shouted at his minor party opponent, "Unless this deed is signed in Canberra by 12.00 noon the deal is off". As it was then 11.45am the threat had an instantly hollow ring to it. This demand, like perhaps the whole debate itself, was a product of lack of sleep, which is best known to deal makers and new parents. Although Sir Laurence was both of those, his voice never lost its calm. After midday successive execution deadlines were raised and passed.

Eventually, just before the Grand Final started, the couriers left for Kingsford-Smith Airport, where an aircraft waited with engines warming on the tarmac. It was from here on that an element of high farce began to creep into the proceedings. The two couriers were to take the documents to the offices of Mallesons Stephen Jaques in Canberra and then execute them as attorneys to each of the parties. This was all supposed to be done by a nominal 3.00pm deadline, well before the ANI press conference which was scheduled for 4.00pm at the Ritz-Carlton Hotel in Double Bay. In fact, one of the little deeds was not ready and missed the plane. The amended plan was to fax it down to Canberra for the signing that afternoon as soon as it was ready.

For some time Sir Laurence has acted as an appeal tribunal from the Rugby League judiciary. He adjudicates upon high tackles and punches and the other principal ingredients of first grade Rugby League. In this capacity, he too was due to attend the Sydney Football Stadium that afternoon. He felt sufficiently confident that all was arranged to leave for the Grand Final about 2.30pm. Upon his arrival at the football Sir Laurence instantly became one of that day's more unusually equipped football fans. As stakeholder, in his inside coat pocket were the deeds to a fortune in real and personal property, including an elegant Georgian mansion in Chelsea. Sir Laurence, though, did not get to see the end of the match that day. Back at the Allen's boardroom a major problem was developing. Just before half time he was summoned back from the game on the mobile phone.

The half-time score was Brisbane 6, St George 4. The tension on centre-field was barely a fraction of that in the Allen's boardroom. About 3.45pm, during half time, I used a public telephone from the football stadium to find out what was happening back at Allen's. My instructing solicitor, Helen Brennan, told me some wonderfully reassuring fibs. I was informed that everything was proceeding smoothly towards the 4.00pm press conference.

The reality was otherwise. Genuine delays and last minute amendments meant that the deed to be faxed to Canberra was not ready for execution by 4.00pm. Those negotiators not concerned with this deed were gathered in Paddy Jones' office watching the Grand Final. Former sworn enemies in the litigation were swapping football stories and issuing regular time calls for the 4.00pm press conference, "10

minutes to Armageddon...", "5 minutes to Armageddon...". Armageddon in fact passed and the press conference was put back to 4.30pm, to try and save the deal. Those concerned with the extant deed were still arguing and refining its contents in another room.

About 4.15pm an agreed version of the extant deed finally emerged from the scrum of negotiators and was slowly faxed to Canberra. It was only a little over an hour since the couriers had left Sydney. They too had not yet arrived at Mallesons in Canberra.

Shortly before 4.30pm the ANI executives at the Ritz-Carlton were on one phone line to Tim L'Estrange in the Allen's boardroom, asking for clearance to start the press conference, whilst on the other telephone line Sir Laurence was talking to the proposed signatories in Canberra.

All the negotiators were now assembled anxiously in the boardroom. Sir Laurence relaying progress reports from Canberra. His bulletin, "They've (the couriers) arrived" was greeted with cheers. "One complete big deed now signed." More cheers. A few minutes went by. "The little deed arriving on the fax now." From the Ritz-Carlton came the ANI question, "Can we start now? We must keep to our 4.30 deadline". Sir Laurence reconsulted Canberra. It was just after 4.30. He must have been told at that point that the signatories were in the process of reading the faxed deed. Sir Laurence, one of New South Wales' most eminent equity judges, was then heard to say down the telephone, "Don't read it. Just sign it!" One of the parties who was standing close to Sir Laurence was startled by this and asked his lawyers "Wasn't that how we got into this mess in the first place?" The instruction was carried out and the signing was completed as the cameras started to roll at the Ritz-Carlton.

The principal deed in its final form looked just like what it was, the tortured product of six weeks of drafting compromises by over 50 lawyers. It had 18 parties, was 69 pages long with over 100 pages of annexures. It had several hundred sub-clauses and umpteen conditions precedent. The other deeds were nearly as bad.

The parties owe a special debt to the hospitality of Tim L'Estrange and Allen Allen & Hemsley who endured and even fed a three month debate in their boardroom. John Halley, then at Allens and now of the Bar, managed to publish and deliver each new edition of the draft deeds on time and with graceful acceptance of what were at times ridiculous drafting requests. Tony Bannon, for the Spedley liquidators, drove the final negotiations with relentless vigour, simultaneously settling terms with up to a dozen parties.

### The Sequel

The following Monday, 28 September, the proceedings were mentioned and adjourned to January 1993 when all the conditions precedent in the Deed of Settlement would have an opportunity to be fulfilled. The settlement meant a return of at least 51 cents in the dollar to unsecured creditors of Spedley. As events have turned out, Spedley has been spectacularly more successful in its preference recovery claims than had

been anticipated and the return to unsecured creditors will probably be 69 cents in the dollar. The settlement was a triumph of commercial common sense and of mediation techniques.

### Conclusions

What though is mediation? It looks like the latest of a long series of games developed by societies for the safe discharge of their internal tensions. Our institutions of Parliament and the Courts utilise game theory with roughly agreed rules, teams, a referee, and an audience to appreciate the contest. To play any of the games offered by these institutions involves a commitment to achieve a result according to the rules and thereby an acceptance of the outcome. Mediation uses the same theory. Players participate to win the best outcome for themselves but a result is achieved because the participants begin to believe that the game has a purpose of its own. □

## Individuality

*(An extract from the occasional address delivered by Justice Matthews at the Graduation Ceremony at the University of Wollongong on 8 October 1993)*

It was not until I went to the Bar, in 1969, that I first realised what a disadvantage being a woman can be. It is not my intention to talk to you today about the actual difficulties we women suffered. Suffice it to say that they affected every level of our professional existence. My reaction at the time was to rail against the misfortune which had me born female. I envied men, because they had a wealth of choices, and they would never have to face the ignominy of rejection which confronted us at every turn. I resented that my career path would never be the same as theirs, just because of an accident of birth. I believed that what we women needed was complete integration into the legal community - to be treated, in effect, as honorary chaps. So I refused to join the Women Lawyers Association, believing that it was counterproductive to have a separate group based on gender.

It didn't take me very long to realise that this was a fallacious approach. Equality, I then realised, was the goal to which we women must aspire, not absorption. Our intellectual capacities were no different from those of men and there was no reason why we should not take an equal place beside them. But until we achieved our goal we needed the support of organisations such as the Women Lawyers Association. I found it difficult to field questions about whether we women, with our perceived qualities of intuitiveness and sensitivity, might not actually be better as lawyers; and I tended to refute the proposition. After all, just to achieve equality seemed a near impossibility. How could we dare to claim superiority?

It took me some further time to realise that this approach also was fundamentally flawed. For a start, and most importantly, it is not a question of superiority. It is a question of

diversity. And it is a question of having confidence and pride in our differences - of being able to use them positively rather than allowing ourselves to be diminished by them. For if we cannot do this, we are never going to realise our own individual potential.

I know it is all very easy for me to say this, and that the reality is not nearly so easy. It takes a great deal of strength and self confidence to be proud of the things that make us different. Indeed the greater the differences, the more profound the difficulty. If you have spent much of your life being denied jobs or refused entry to hotels simply because you happen to be black it's difficult to be proud of your skin colour. Similarly if you've been taunted with insulting epithets - and sometimes physical abuse - because you happen to be homosexual. Or even - as most of us women have encountered - if you've been fondly treated as someone who is excellently suited to cater for the needs of others, but not really able to be trusted in a position of responsibility.

This might seem to be overstating the stereotypes, but they still exist to this day. The complaints received by the Anti Discrimination Board are ample testimony to this.

And this brings me to the subject of stereotyping. It is something which we all do at some time, no matter how hard we try not to. The important thing is to be conscious of it, and to pull ourselves up when we find ourselves doing it. Because when we judge people according to the group they belong to, rather than for their own qualities, we are not only diminishing them as individuals, but we are also serving to perpetuate the problem. □

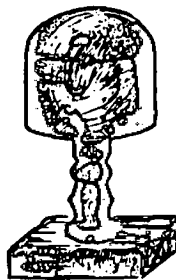
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# Of What is Past, or Passing, or to Come

*Speech by the Hon Justice Michael Kirby A.C., C.M.G., President of the Court of Appeal at the 1993 Bench & Bar Dinner at which he was the guest of honour.*

*"Once out of nature I shall never take  
My bodily form from any natural thing,  
But such a form as Grecian goldsmiths make  
Of hammered gold and gold enamelling  
To keep a drowsy Emperor awake;  
Or set upon a golden bough to sing  
To lords and ladies of Byzantium  
Of what is past, or passing, or to come."*

W B Yeats

## WHAT IS PAST

On an occasion such as this, and in this common room, it is inevitable that an affliction of nostalgia will take the mind back through the lost years.

It is thirty-five years since my first encounter with our profession. It was in 1958 that I began my articles of clerkship. The Queen was in the sixth year of her reign. Mr Menzies was the Prime Minister. Sir Arthur Fadden had just retired as his Deputy. In the wake of the successful struggle against the anti-communism referendum, the Democratic Labor Party had been formed. It helped snatch victory from the Australian Labor Party in the Federal Election in November that year. Sir Garfield Barwick was elected Member for Parramatta. As a tribute to his unique distinction as a barrister, he went straight to the office of Federal Attorney-General.

The High Court of Australia comprised Chief Justice Dixon and Justices McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer. In the Supreme Court, Sir Kenneth Street was nearing the end of his time as Chief Justice. Within two years he would retire to be replaced by the exhausted Evatt. Sir William Owen was the Senior Puisne Judge. There were twenty-one judges of the Supreme Court at that time. The youngest of them were the redoubtable Kenneth Manning, the bucolic "Barney" Collins, that gentleman Rex Chambers and the multi-talented Rae Else-Mitchell.

Judge Lloyd was the Chairman of the District Court Judges. Theo Conybeare presided in the Workers' Compensation Commission.

At the head of the Bar Association was Bruce Macfarlan QC. His able lieutenant was Nigel Bowen QC. The leaders of the Bar were towering figures of my youth - Kerrigan, Meares and Asprey. A F Mason was a younger member of the Bar Council and the newest recruit to it was D A Yeldham.

We have it on Chief Justice Mason's authority that Ken

Asprey kept, hanging on the wall of his chambers, behind the chair at his desk, the famous cartoon of F E Smith. Next to that cartoon was hanging a mirror. Looking in the mirror "it was natural to see oneself as a reflection of the great English counsel."

The President of the Incorporated Law Institute (as it was called) was Norman Cowper, later to be knighted. Reg Downing was the State Attorney-General. The most senior silks were H V Evatt himself, his brother Clive and C A Hardwick. Amongst the senior juniors were those memorable figures Wilf Sheppard, Walter Gee, Bertie Wright and Humphrey Henchman - the last of whom I saw, evergreen, in this place but a month ago.

The spirits of these advocates are in this room with us tonight. They lived and laughed here, just as we do now. They told the tales of their triumphs. They were ribbed - not always gently - about their embarrassing moments. They were mighty figures of my impressionable youth.

At that time there were 430 members of the Bar Association. Of them 51 enjoyed the commission as Her Majesty's Counsel. The constitution and the law looked very sure and stable indeed.



Sixteen years passed before my first judicial appointment was announced. This occurred in December 1974 when I was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. Alas, I must acknowledge that this is now nearly 20 years in the past. The Governor-Generalship had just changed from Sir Paul Hasluck to Sir John Kerr. The Governor of this State was Sir Roden Cutler VC. Gough Whitlam was Prime Minister. Of the High Court, Barwick was at the height of

his powers as Chief Justice. The latest member appointed to the Court was Anthony Mason. There was an empty seat to be filled. Shortly, it was to be occupied by Justice Jacobs, the third President of the Court of Appeal. That court had been established with sharp recriminations and much bitterness in 1965.

In the Supreme Court, Sir John Kerr was soon to be succeeded by Sir Laurence Street - third Chief Justice of that name. There were 37 judges. The latest appointments to the Court were Ian Sheppard, Hal Wootten and that fine teacher of many barristers, Harold Glass.

Jim Staunton, still in office, had just begun his long and distinguished leadership of the District Court. Chris Langsworth was Chairman of the Compensation Commission.

Of all the judges who were serving at that time, day by busy day, nine only remain in judicial office today, together with myself. They are Chief Justice Mason of the High Court; Justice Sheppard now of the Federal Court; Justices Evatt and

1. See A F Mason, unpublished address to the District Court Judges' Conference, 1 May 1992, 4.

Gaudron (then, with me, in the Arbitration Commission) now respectively President of the Law Reform Commission and Justice of the High Court. Dennis Mahoney, now my colleague in the Court of Appeal. John Cahill still sits on the Industrial Commission, today as Vice-President. Judges Staunton and Harry Bell still grace the District Court. Frank McGrath, another teacher, presides in the Compensation Court. Nine only are left. The rest of our judicial company at that time have moved on - such is the cycle of the law.

In the Bar Association in 1974 Tom Hughes QC was President and in that capacity welcomed me to judicial office in the Arbitration Commission. It was in that speech that he allegedly claimed that I was well known for my "urbanity". The shorthand reporter, who rarely erred, still swears (as she recorded) that he said "vanity". Tom Hughes's deputies were Doug McGregor and Phillip Powell. The latest members of the Bar Council were Roger Court, Barry Toomey and myself. The President of the Law Society was Alan Loxton. The most senior silks of the time were still Clive Evatt and Hardwick. The most recently appointed silk was one M H McHugh QC. But do you remember Sid Webb? Sir Jack Cassidy of champagne charm? The redoubtable Jack Smyth? And that civilised and graceful man, Marcel Pile? The senior juniors included Wilf Sheppard. And Harry May and Ivan Roberts were also there. Their spirits too are in this room with us tonight. They are here to remind us of our brief journey through this profession which gives so much and to which we must also make returns.

When I first took up judicial appointment in 1974 there were 590 members of the Bar of New South Wales. Of them, 68 were Queen's Counsel. Today there are 1700 members of the Bar and 200 silks. Inevitably, with the expansion of the Bar, there have been changes. But many of the traditions of courage, honour and comradeship endure, akin to those enjoyed by soldiers under fire. May it continue to be so.

## OR PASSING

Of course, in the daily life of the law there are inevitable crises that blow up. They appear like a summer storm and pass away as quickly. We saw such an event in the recent judgment of the Court of Appeal in *Videski v Australian Iron and Steel Pty Limited*.<sup>2</sup> Following a few innocuous comments of mine on the need for sensitivity to different curial reactions by people of different backgrounds, Justice Meagher observed that I had developed:

*"An elaborate, and distinctly xenophobic rodomontade."*

Warming to this theme, he fashioned an apparently logical analysis of Macedonian truth-telling, illustrated, naturally enough, by reference to Arrian's *Life of Alexander the Great* with allusions to the suggested taciturnity of Alexander's epigoni. His Honour's appeal, in this confection, to international human rights instruments was the last straw. But at least that suggested that my tireless efforts in that direction were having an impact upon his occasionally resistant legal thinking.

In the corridors of the law, following this much publicised exchange, I was stopped constantly by anxious-looking colleagues of Bench and Bar. In hushed tones they hastened

to assure me of heartfelt sympathy in my hour of need. I did not know what they were talking about. Surely Justice Meagher's observations were merely the public exchange of pleasantries between colleagues sharing, with the profession, their inner thoughts.

For my part, I knew that there was no malice in Justice Meagher's words. My reading is wide enough to enable me to recognise a true personal denunciation when I see one.

Take these words of Justice Rehnquist, joined by Chief Justice Burger in the Supreme Court of the United States in *United Steelworkers of America v Webber*<sup>3</sup>.

*"... By a tour de force reminiscent not of jurists such as Hale, Holmes and Hughes but of escape artists such as Houdini, the Court eludes clear statutory language, ... legislative history and uniform precedent ..."*

Or take Justice Rehnquist, again joined by Chief Justice Burger but also by Justice O'Connor in *Florida v Royer*<sup>4</sup>:

*"The plurality's meandering opinion contains in it a little something for everyone ... Indeed, in both manner and tone, the opinion brings to mind the old nursery rhyme: 'The king of France - with 40,000 men - marched up the hill - and then marched back again'. The opinion nonetheless, in my view, betrays a mind-set more useful to those who officiate at skuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice ..."*

Within weeks of writing these words, Justice Rehnquist was elevated to become his nation's Chief Justice. His strong words were rewarded with a marvellous judicial crown. When I measure Justice Meagher's words against such vituperation, I realise once again how sweet is my brother's disposition.

I also know Justice Meagher's writing well enough to be able to recognise, without hesitation, when he is straying from his natural disposition into a few gently chosen words of criticism. That was not so in *Videski*, as I hastened to reassure all those concerned for my sensibilities. For example, when his Honour took a mild dislike to Simon Gardiner's book *An Introduction to the Law of Trusts*, he wrote the following words, displaying a rare (but happily passing) note of disapproval:

*"This book, by an author who has been a Fellow of Lincoln College, Oxford, since 1978, is one of the Clarendon Law Series, a series which produced masterpieces such as H L A Hart, The Concept of the Law and Barry Nicholas' Introduction to Roman Law. Alas, it is not of like quality."*

And he finished his review with the following helpful advice:

*"No one should yield to the temptation to buy this book,*

2. Unreported, 17 June 1993. For earlier remarks to the same effect, see *Askarou v Nominal Defendant (NSW)* (1989) 8 MVR 491 (NSWCA), 499.
3. 443 US 193, (1979), 222.
4. 460 US 491, (1983), 519f.

and the author, the publisher and the editors of the *Clarendon Law Series*, ought all to be ashamed of themselves and of each other.”<sup>5</sup>

How any member of the legal profession of this State could have read into Justice Meagher’s words in *Videski*, measured by such standards, even the mildest public criticism of myself, truly astonishes me. I am glad to have this public opportunity to say so.

Even the President (Mr John Coombs QC) seems to have made this mistake. At the recent public farewell to Justice Peter Nygh, he asserted that the latter’s appointment, as an academic, to the bench of a court in Australia was as unique as a joint judgment of myself and Justice Meagher. Well, I have to tell the President that this morning another such joint judgment was handed down in the case of *Marsland v Andjelic*.<sup>6</sup> Justice Meagher and I agreed in a joint opinion; with Justice Mahoney dissenting. I shall make sure that the President gets copy. Neither Bench nor Bar should make any assumptions about the inner workings of the Court of Appeal from media entertainment, public speculation or common room gossip. Things are not always as they might appear.

This has not been a particularly good year for the Bench or the Bar. The Bar saw the Government’s announcement of the end of appointment of barristers as Her Majesty’s Counsel. I keenly regret this move. I have already had my say upon it. I feel the disappointment of those who had a legitimate expectation of appointment to that rank. I do not favour confining the leaders of the Bar to those who enjoy the good opinion of barristers. Appointment by the Government of the day has permitted the infusion amongst the silks of a range of other talents and not a few rebels. Now, that may be lost in this State. I regret it.

We have also seen a nasty row between barristers and solicitors, urged on by the countless official inquiries into the legal profession of Australia which are now taking place. One calm and steady voice through this storm has been the President of the Law Society, Mr John Nelson, here tonight. Numerous changes in the Bar have been foreshadowed. Some have already been adopted. Things long settled are coming under scrutiny.

For the Bench, the worst event of the year was undoubtedly the disgraceful action of the Victorian Government in effectively dismissing ten undoubted judges of that State. The judges, members of the Victorian Compensation Tribunal, were promised by Parliament and their warrants protection against dismissal of a kind equivalent to that enjoyed by judges of our tradition since the Act of Settlement which followed the Glorious Revolution in England in 1688. The ground was laid for this totally unacceptable assault upon judicial independence by what happened to Justice Jim Staples<sup>7</sup> and, in this State, to Magistrates McCrae<sup>8</sup> and Quin<sup>9</sup>. In all of these shabby assaults upon judicial independence, both in and out of Court, I have had my say. But the voice of the Bar, and until the Victorian case, of the Bench, has tended to be muted. Many could not see the danger to our institutional conventions of this advancing bad precedent. The Bar must lift its voice on such occasions. It should support the Victorian judges in their legal challenge against their dismissal.

Another unhappy development has been the stereotyping of judges as sexist. And in the intolerant media pressure for

attitudinal correctness in judicial work. I do not wish to justify some of the judicial observations which have been criticised in the media. Public criticism of everyone is a healthy corrective in a free society. I would point out that the appellate process promptly addressed the instances which have been identified. The Australian Institute of Judicial Administration is addressing the wider question of sensitivity to gender issues. I hope this concern will be widened to a larger sensitivity to ethnic and other minorities. But to lump all judges together, denigrate, ridicule and bully them is intolerable. We must resist such pressures and insist upon our independence.

In the recent edition of the television programme *Sixty Minutes* we saw a new danger added to judicial life in Australia. The television camera which follows the judges in public streets to work or chases him from his chambers to render him accountable to a couple of questions before an audience of thousands. This has not happened before in Australia. The system has its own inbuilt procedures for accountability. They are many. Harassment of judges by the media is completely unacceptable. I fear that it is part of the symptomatology of the destruction of institutions. From the monarchy through parliaments, the civil service, the church and now it is the judiciary’s turn. What then will be left to defend our citizens and their liberties? Only the media itself: an unreliable and flighty guardian I suggest.

In the face of media attacks, there has all too often been a deafening silence on the part of the Law Officers and the organised profession. I was myself “slammed” (as it was put) by the Premier of the State in the *Sydney Morning Herald*. I had been rash enough to suggest consideration of a reform of the *Workers Compensation Act* which now deprives a worker of compensation if the slightest fault is shown on a journey home from work. The return to the 19th Century law of contributory negligence, at this advanced stage of our legal system, did not appeal to me as a meritorious reform of compensation law. At least, I thought it deserved reconsideration by Parliament. Elsewhere, I have told the story of the media manipulation of this event<sup>10</sup>. My present point is simply to ask - where was the Attorney-General and where was the Bar when this attack was made?

It is fairly clear that the judiciary can no longer rely upon the conventional defenders of times gone by. Chief Justice Mason told a Cambridge audience recently of his move to join the informal group of Chief Justices of Australia to be in a position to respond to serious matters of general judicial concern. This initiative comes not a moment too soon.

When I was asked to appear on the *Sixty Minutes* programme, I naturally hesitated. But in the end, when I was

5. Cited Mr Justice B Williams, “Enlivening the Law” [1992] NZLJ 288, 291.
6. Unreported, 30 July 1993.
7. See M D Kirby, “*The Removal of Justice Staples - Contrived Nonsense or Matter of Principle?*” (1992) 9 No 2 Aust Bar Rev 93.
8. See *Macrae v Attorney General for New South Wales* (1987) 9 NSWLR 268 (CA).
9. See *Attorney General for New South Wales v Quin* (1990) 170 CLR 1.
10. See M D Kirby, “*Judiciary, Media and Government*” in (1993) 3 *Journal of Judicial Administration* forthcoming.

told no other judge would do it, I felt that someone in judicial office should seek to interpret the judiciary for the community they serve. We have not done this with skill and conviction in the past. I hope we will do better in defending the judiciary in the future. And that we will have the support of the Bar in doing so.

Thought should be given to collecting, in an appropriate body, the retired Presidents of the Bar and of the Law Society who are not judges to speak up for the defence of the judiciary when it is attacked and to explain its operation and imperatives to the community. Unless something like this is done, I fear that we will continue to see the media-led erosion of public confidence in the judiciary of this country that has been such a feature of the year past.

## OR TO COME

By all of these comments I do not mean for a moment to suggest that there is not a need for reform both in the Bar and the Bench. I think you will agree that much of my professional life has been dedicated to reform. A natural modesty restrains me from mentioning the many proposals for reform of the Bench which I made in my Boyer Lectures a decade ago which have now come to pass<sup>11</sup>. At the time they were attacked. The passing of time has made them all seem rather modest.

I have no doubt that the move to appoint more women to the Bench will accelerate and I support this move. I believe that it is appropriate, and perfectly possible, to ensure that the Bench also reflects, in a necessarily general way, the variety of the community it serves. A monochrome judiciary is vulnerable to the appearance of isolation and to attack.

We have seen an enormous change in recent years in the extent of judicial intervention in the conduct of litigation. This has been the judiciary's response to the legitimate public concerns about delay and cost. If the judiciary had not responded, others would do so.

The imposition of time limits and other procedures to avoid delay and cost have been the most noticeable change in the conception of the neutral passive judge - transformed to a much more active manager of litigation. The extent of the change in my lifetime has been remarkable. Its absorption in the space of a decade or so is a tribute to both the Bench and the Bar.<sup>12</sup> The process is continuing. What has been achieved demonstrates the error of suggesting that our profession is impervious to change.

In the Bar, too, there have been important reforms. Increasingly, in the Court of Appeal, we see senior counsel appearing without juniors. Time limits are fixed. Argument is increasingly reduced to writing. Cases are vigorously monitored and managed by the judges. Shoddy work is reported to professional bodies. This week it was announced that the Bar would henceforth permit direct access to other professional groups such as accountants. The winds of change are everywhere.

There is no doubt that these are hard times for many barristers. The stereotype about high earnings is by no means universal. What will keep the large numbers of new barristers busy? The decision of the High Court in *Dietrich*<sup>13</sup> will doubtless stimulate some increase in professional representation in criminal trials. Perhaps, as the media is

suggesting, the decision in *Mabo*<sup>14</sup> will open up opportunities for true lawyerly work. Barristers should never forget Lionel Murphy's counsel, offered in this common room when accident compensation was on the brink of abolition in 1974. One door closes. Another door opens. There will always be a need in our society for skilled advocates. The long-term future of a profession of advocates is completely assured. The common law system necessitates such a profession.

But the profession must also be equal to the systems's requirements. In my years as a member of the Bar Association, I have seen regrettable signs of the decline of idealism in its members. Perhaps this trend accompanied institutional legal aid. In those far off early days of which I spoke, it was by no means unusual for the leaders of the Bar to appear in the major cases on what we would now call a *pro bono* basis. Gordon Samuels accepted a brief from me when I was a solicitor to help "liberate" the cinema at Walgett for the Aboriginal citizens of that town. Kevin Holland took a brief with Jim Staples in the Flock Inquest into a police shooting. Maurice Byers led Gordon Johnson in the *Corbishley Case*<sup>15</sup> which produced Justice Holmes's memorable words:

*"The picture is one which shows how the poor, sick and friendless are still oppressed by the machinery of justice in ways which need a Fielding or a Dickens to describe in words and a Hogarth to portray pictorially."*<sup>16</sup>

We need more of this spirit of service from the Bar - and not just by the repeat players and idealists amongst you. The leading commercial lawyers should offer a proportion of their times, in the traditions of old, to help the courts champion justice and right wrongs.

Last week I was in Malawi in Central Africa. I was there for the United Nations Electoral Unit in New York. The Life President, Dr Hastings Manda, unwisely succumbed to a rush of self-confidence. Under the pressure of foreign aid donors he submitted his One Party State to a referendum. The people, peacefully in their multitude, voted overwhelmingly to restore Parliamentary democracy.

The occasion of my visit was the first encounter in thirty years of the Government and the Opposition leaders of Malawi. Some of them had returned from long years in exile. A number had been imprisoned. One such prisoner, who had been held for twenty-seven years, had that same charity which we have seen in the public conduct of Mr Nelson Mandela, freed by his captors after such a time of incarceration in South Africa. Another prisoner was the leader of the legal profession. The lawyers, with the churches, were foremost in the demands for an end to the One Party régime.

The two sides sat on either end of the hall in Lilongwe looking at each other for the first time. "There is blood on their hands!" the Opposition would say. I chaired the small groups

11. See MD Kirby, *The Judges*, Boyer Lectures 1983, ABC, 1983, 70.

12. See D L Mahoney, "Delay ... A Judge's Perspective" (1983) 57 ALJ 30.

13. *Dietrich v The Queen* (1992) 67 ALJR 1 (HC).

14. (1992) 175 CLR 1.

15. *Ex parte Corbishley; re Locke* [1967] 2 NSW 547 (CA).

16. *Ibid*, 549.

where these enemies of old talked to each other about the future of their country. I also chaired the meeting as it moved to its final session.

The judges appeared. When the Chief Justice and his male and female colleagues, seemingly without thought, ventured towards the Government side, the Opposition let it be known that they would walk out. Wisely, the judges took their places in the neutral centre, evenly between the two sides. As I looked at the eyes of these judges, I realised how important in our polity it is to have a neutral, independent judiciary safe in its tenure.

The Constitution of Malawi provides in the normal way for the removal of judges for proved incapacity and misconduct. But in 1988 a provision was added permitting the Life President to remove a judge where, in his opinion, it was "in the public interest so to do".<sup>17</sup> Pray do not laugh at such a provision. This is precisely what has occurred in our own country in the year past in Victoria. And to other judicial officers in recent times, including in this State. Judicial officers have been removed for what the politicians - our local equivalents of the Life President - conceived to be "in the public interest", interpreted by them.

Judicial tenure is the foundation stone of judicial independence. We are not so much above Malawi that we cannot learn from its sad experience. It is incumbent on judges and all members of the legal profession to strive to teach the community about the foundation stones of our democratic way of life.

Before I went to Malawi I spent five days in Cambodia for the United Nations Transitional Authority. My task there was to take part in a course of instruction for the new judges who will serve under the constitution of that unhappy country. They are new judges because Pol Pot and his DK régime exterminated all the old judges. Indeed, virtually all of the lawyers of Cambodia were killed or driven into exile. Intellectuals were conceived to be dangerous. They were simply exterminated.

Teaching these young men and women how to be judges in such a short time was not easy. I told them to take heart from the great tradition of the common law. This, after all, is how our judge-made system began. By honest people of integrity striving to determine cases with fairness. Building on precedents towards a coherent legal system.

The class in Phnom Penh asked questions which would be rudimentary to us. May the judge remain a member of a political party? How should the judge deal with a problem of conflicting evidence? They asked for books. How can we have the rule of law without laws? We have no laws. I told them that the books from Australia would all be in the English language. They would portray a common law system. No matter, they said. We must have reference books and we will struggle with the English.

The Minister of Justice of Cambodia told me of the

pressures to restore the French legal system and its language. But he saw some dangers in isolating Cambodia from its natural trading partners in the region who uniformly use the English language and are now profoundly affected by the common law system. The French are offering large sums for the restoration of their culture and language. The Australian Ambassador told me that he had a small fund available - a few thousand dollars - how could it be used? A pitiful sum for the rule of law I thought.

The Minister appealed, through me, to idealistic Australian judges and lawyers. It would now be unacceptable to have white faces on the Bench. But perhaps if lawyers were willing to spend some time in chambers with judges they could explain, with more time than I had available, what it means to bring the rule of law to a country which until recently knew only the rule of the gun.

On one occasion during this training session I stole away from the classroom in the No 1 Court of the Supreme Court at Phnom Penh. I took a motorbike to a back street, over a canal to a large edifice. It was a building constructed by the French as a high school. On the wall could be seen the graffiti of generations of students - jests at their teachers scrawled on the walls in French. Cartoons of their European masters of earlier times. In fact the three-storey building looked remarkably like my own high school in Sydney. But there the similarity ended.

This was the torture place - the infamous S 21. Here the victims of the Cambodian revolution were submitted to barbaric cruelties.<sup>18</sup> All of these acts were faithfully recorded. On the walls are photographs with the searing, reproachful eyes of thousands of victims of lawlessness and brutality. Those eyes remain with me, haunting me. They are the visible warnings of what happens to a society without the protection of law.

As I walked beside the great lake we knew as Nyassa in Central Africa and stumbled around the jungle undergrowth at Angkor Wat in Cambodia, I had several hours to reflect upon the blessings of our legal system. It has become ever so fashionable to attack it and its temporary players. Doubtless many of the criticisms are fully justified. But when we look around the world and compare our lives with those of most of the other human beings we should appreciate, and reflect upon, the inheritance whose good features we must strive to explain, justify, defend and improve.

I am grateful for this dinner offered in my honour. What have we shared together?

I suggest that we have shared together the familiar features of life at the Bench and the Bar. A touch of nostalgia, with a wistful look back to the figures who provided the examples which we must now provide. A hint of humour and gossip; but not too much for ours is a rather serious business. Some thoughts of changing times and new ways which remind us that even things long settled in the law can be changed and must submit to the popular concerns about cost and delay, the law's enduring double burden.

And there has been optimism and idealism when we look to the future. It is a future which takes our service as lawyers even beyond our own country to a concern about the rule of law in countries close at hand and far away.

These are the things which bind the Bench and the Bar together.

I see them much in evidence about me tonight. □

17. The Constitution (Malawi) 1966, s 64(3)(c) [(c) "Where the President considers it desirable in the public interest to remove him from such office."].

18. DP Chandler, *Brother Number One: A Political Biography of Pol Pot*, Allen and Unwin, 1993. See note Law Inst of Victoria (Vic), August 1993, 755.

# Meaghertyrdom

Speech by BMJ Toomey QC on 10 September 1993 at the Clerks' Dinner

Roderick Pitt Meagher - the only Judge to have a CBD street named after him - was born of rich but honest parents on 17 March 1932 - St Patrick's Day. The midwife who delivered him was disappointed that there was no silver spoon in his mouth but while inspecting him to see that he was intact found instead, clutched in his tiny hand, an exquisitely enamelled silver French snuff box.

When he was two years old a tendency which has marked His Honour's life first became apparent. After his mother had chastised him for prattling she was staggered to hear the following words fall from his cherubic lips: He said "*Bwevwis esse labowo, obscuwus fio - Howace.*" You will note that the little fellow had then, as now, an engaging, indeed some would say delicious, lisp. The Horace referred to is, of course, the Latin poet, not the Sydney barrister and patron of the arts Horace Millar. Of His Honour's legendary friendship with the latter I shall speak later.

The phrase enunciated by His Honour means "*It is when I struggle to be brief that I become unintelligible*". Jumping ahead momentarily, it may be said to explain His Honour's densely obscure judgments - usually dissenting and never longer than two hundred words - in myriad quantum appeals. The combination of his lisp and his life long struggle against brevity also explains the phrase which often appears in his oral, but never his written, judgments where he refers to the submissions of counsel as "pithy".

But, you say, surely the question which really arises is: How could His Honour speak classical Latin at the age of two? That question troubled me too, but intensive research with the two Judges upon whom His Honour has modelled himself - President Michael Kirby of the Court of Appeal and Justice Marcus Einfeld of the Federal Court - has given me the answer.

It appears that when His Honour was nearly two years old he was playing in the garden of the family mansion at Darling Point when a flying saucer landed beside him. Its occupants were so captivated by the chubby and beautiful little fellow that they kidnapped him for a week and tutored him in Latin, Greek, the dialects of Ancient Hibernia and differential calculus. This experience is the explanation for His Honour's well-known tolerance - he learnt in that week that just because aliens have several heads, six arms and an astonishing variety of sexual organs does not mean that they are not really nice persons. Even more importantly for his future life, he learned that difficulty in expressing oneself in English does not mean that one is not a thoroughly credible and decent chap, to be accepted without question when one swears that a bruise on the buttock has caused one to suffer devastating and irreversible brain damage.

But, I hear you asking, how can Toomey know these things, even if he has spoken to Justices Kirby and Einfeld? Well, the fact is that Einfeld J told me that he had dismissed an application by the Department of Immigration to have the aliens deported as illegal immigrants - the basis it seems was that the Department had not supplied each of the thirty-seven aliens with a Martian interpreter and had thus denied them natural justice. And President Kirby gave a speech on ABC Radio in which he recounted the incident with the young Roddy Meagher as part of a plea for greater understanding of foreign and different cultures. Of course, anyone so sparing and selective in his public utterances as the President must be

taken to be careful of exact accuracy on the rare occasions when he does speak. There is in any event powerful circumstantial evidence to support the story - those who have heard His Honour say that he does, indeed, speak Greek and Latin as though he had learned them on another planet.

As he grew up His Honour became an enthusiastic sportsman. He was captain of rugby at Riverview - a forward of such untrammelled ferocity that Joey's offered him a scholarship. They persisted with this even when they found he could read, but His Honour's wealth was so great he was able to tell them he would reject the Catholics and remain with the Jesuits. His other sporting interests were mud wrestling and buck jumping. He is still, I am told, frequently seen as a spectator at women's mud wrestling events.

At Sydney University the extraordinary and long lasting effects of the aliens' teaching methods were demonstrated when His Honour won a medal or two for such subjects as Consumerism, Female Homosexuality and the Law, and the Praxis of Poverty Law in Shopfront Legal Centres. In the last subject he was the proud winner of the Bert & Elizabeth Evatt Prize for Sensitivity in the Law.

Laden with honours (and still, fortunately, with private wealth) His Honour came to the Bar. His love of humanity, especially disadvantaged humanity, drew His Honour inevitably to the Workers' Compensation Commission. A personal magnet in this direction was, as I have said, his legendary friendship with Horace Armitage Millar. On almost any day until his appointment to the Bench His Honour could be seen fully robed, usually in the full bottomed wig which he affected when appearing before the Commission, walking arm and arm down Macquarie Street with Horry Millar - one with a partly eaten meat pie in his right hand, the other with a partly eaten Big Mac in his left.

His Honour's true democracy was demonstrated in one of his probing cross-examinations of an illiterate Mongolian peasant who claimed not to remember having seen a doctor in Macquarie Street or even to know the building in which the doctor had his rooms. His Honour devastated him with the flashing question - "*You know, the building just next to the Australian Club*". As he rose in his profession, taking silk in 1974, His Honour became a sought after public speaker. No doubt he was usually asked because of the moderation and love of his fellow man which shone through his public words. Of teachers at law schools, for instance, he said:

*"At any of the various institutions [in] Australia [which] actually purported to teach practical skills one finds to an alarming degree [that the staff] are failed practitioners, usually psychopaths and sometimes alcoholics as well."*

The thorough, judicious and reasoned expression of cautious views such as those led to His Honour being appointed to the Court of Appeal in 1989. Since I have at least once case reserved before him I think it prudent to say no more than that His Honour has conducted himself on the Bench exactly as those who knew him expected he would. Finally, let me say, misquoting Voltaire, that if Roderick Pitt Meagher did not exist it would be necessary to invent him. Ladies and gentlemen I ask you to rise and toast the misanthropic, the eclectic, the esoteric, the indispensable, the unique Mr Justice Meagher. □

# More on the American Scene

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Virginia Wise, Lecturer at Harvard Law School, specialising in legal information and legal research, wrote (while visiting ANU), to R J Angyal with some comments on his two articles "Understanding and Using Citations to American Cases" (Bar News Winter 1992) and "Researching American Authorities" (Bar News Spring/Summer 1992).

Thank you for your nice letter and for the articles. You did an admirable job of condensing the complex subject of American legal research. I have just a few comments, in case you do this kind of thing again. The first is that the *Uniform System of Citation* came out with the 15th edition in 1991 (maybe after you had already submitted your article). The 15th ed. made some fairly significant changes in citation practice which you may find interesting. The first is to drop the requirement for citation to official reporters and require only citation to the West regional reporters unless one is practising in that particular jurisdiction. Thus, a Massachusetts lawyer practising in Massachusetts could still have to cite the official *Massachusetts Reports* (Mass.) and could optionally cite the regional reporter (N.E., N.E.2d). But lawyers practising in New Jersey who wished to cite a Massachusetts case could cite only the N.E. or N.E.2d. This codifies the actual practice as you indicate in your article, that is, most people have access to, and use, as a practical matter, the West regional reporters only. Of course, your point about the importance of indicating the court which decided the case when citing the Regional reporters is crucial. This has interesting ripple effects on the practice of Shepardizing, making it more important than ever to Shepardize both the official and unofficial cites. Both Lexis and Westlaw now have star paging for some official and most of the West reporters so that one can easily use the online services without having to actually check the bound volumes if one wants to cite particular language within a case.

Another important change in the 15th edition is to provide for citation to material which only appears in electronic format (primarily Lexis and Westlaw) if it does not yet appear in any printed form. This grants a certain legitimacy to online sources which they might not have possessed before this rule change.

Another change requires that in citing journal articles and book material, one must provide the full first name of the author. I applaud this change because it makes things easier to follow up (avoiding the nightmare of looking in an online service for D Smith). The inside story is that it was seen by the editors as a blow against sexism. The notion is that when initials only are used, everyone assumes the cited authors are men. Using first names would allow women to be more easily identified and therefore get more credit for their work.

Finally, the 15th ed. has a greatly expanded and improved international and foreign law section. I'd be curious to know whether Australian lawyers think the Australian section is adequate. I have regular consultations with the Bluebook editors so I could probably actually get any suggested changes implemented!

A few other minor clarifications from the article, *Researching American Authorities: An Introduction*.

Looseleaf Services - The CCH Tax Reporter is the *Standard Federal Tax Reporter*, not the *Federal Standard Tax Reporter*.

Digests - It's better to indicate Federal digest series as a group of items consisting of the *Federal Digest* 1789-1938, *Modern Federal Practice Digest* 1938-1961, *Federal Practice Digest 2d* 1961-75, *Federal Practice Digest 3d* 1975-ending date depends on letter of alphabet, *West's Federal Practice Digest 4th*, beginning date depends on letter of alphabet, approximately 1980. There is no such thing as the *Federal Reporter Digest* nor is there a *Northeastern Digest* any more. West is cutting back on the Regional digests; I believe only the Atlantic and Pacific are being published currently and as a practical matter, very few lawyers use them (the exception being in the three states where there is no state digest). Most rely either on the individual state digests which cover both state and Federal cases arising in that jurisdiction, the Federal digest series described above or the Decennial Digests updated with the General Digests.

Shepard's Citators - This paragraph is somewhat misleading. There are Shepard's for the Regional reporters but there is a big difference between the Regional Reporter Shepards and the state Shepard's which each have a Regional Reporter section for citations to decisions of that state. Say one has a cite to 142 P.2d 238, a Nevada Supreme Court case and wants to Shepardize it. In *Shepard's Nevada Citations*, one could turn to the P2d section, look up the citation and find citations to other Nevada cases which cited 142 P.2d 238. In *Shepard's Pacific Reporter Citations*, if one looks up 142 P.2d 238, one will find citations from non-Nevada jurisdictions, say if a Michigan court cited this Nevada case. Shepard's are available on both Lexis and Westlaw along with several other new citation services Auto-Cite, Insta-Cite, Quickcite, Lexcite, Checkcite, Westcheck. But online Shepard's are not equivalent to the print Shepard's in coverage therefore libraries which cancel their subscriptions thinking that online Shepard's are equivalent to print Shepard's are sadly mistaken. Of course, it's hard to explain Shepard's in a paragraph because it's so complex.

Computerised legal research - The only quarrel I have with this is the implication that Lexis and Westlaw are primarily case law retrieval systems. In fact, of course, statutes, regulations, court rules, full texts of law review articles and texts, indexes and secondary material now have an equally important place in these online systems.

American Law Reports - ALR is also difficult to do in a paragraph. The most direct way to say it, I think, is that there is a multivolume index, the *ALR Index*, which covers the ALR2d, 3d, 4th, 5th and Federal and that one should always consult the Historical Annotations table to see if an annotation has been superseded or supplemented. There is no

comprehensive index which includes the *ALR*, first series. There are several separate digests for this series but again, American lawyers seldom use them. In addition to AutoCite which does give ALR cites as you indicate, ALR2d-5th and Federal are also online in full text on Lexis so that any word or phrase in the text can also be searched.

#### Understanding and Using American Cases

To understand the structure of the American court system, it would be well worth any Australian lawyer's money to invest in the annual *BNA Directory of Federal and State Courts, Judges and Clerks* which has good charts explaining the individual state and Federal court systems as well as addresses and phone numbers. Two alternatives which are not updated as often are the *Want's US-State Court Directory* and the

*American Bench*, a hardbound volume. This is a case where pictures are often worth a thousand words.

I could not tell in this article whether you were trying to explain *Uniform System of Citation* form or giving citation the way an Australian court would expect to see them. If you were trying to recreate Bluebook form, your citation example for Gideon at the top of p.6 contains a couple of errors. The *Supreme Court Reporter* is cited S.Ct. not Sup.Ct. and there should be commas, not semicolons between the reporter citations I believe. (I don't have my Bluebook with me.)

I realise many of these are niggling little points and probably more than you or any other Australian lawyer actually cares to know about the details. I applaud your efforts to educate Australian lawyers about American legal research. □

## The Readers Course - February 1993 - A Reader's Perspective

38 Barristers, 34 Queen's Counsel, 1 Chief Justice, 1 Immediate past Chief Justice, 1 Attorney-General, 3 Registrars, 1 Deputy Chief Magistrate, 3 Supreme Court Judges, 1 District Court Judge, 1 Land & Environment Court Judge, 1 Family Court Judge, 1 whacky NIDA teacher, 1 Commissioner for the Star Chambers, 1 Chief Judge of the Compensation Court, 1 Coroner, a few dead bodies and many other members of the profession all contributed to our readers course.

They are those who gave their time, energy and commitment to what was a gruelling, pleasurable, horrible, entertaining, educational and downright tiring four weeks for members of the profession who mistakenly thought it was a good idea to test their powers of persuasion against others in our time-honoured adversary system by coming to the bar.

Of those 91 mentioned above, 89 posed varying interrogatories to the following effect:

"Well, I don't know why you are coming to the bar. I guess you are all masochists, fools, independently wealthy or certifiably insane."

These gratuitous offerings were then coupled with:

"Well, I suppose you thought it was hard passing law school, going to the college, becoming solicitors and then doing the readers course because that's nothing compared to the curtain of financial adversity through which you will now pass!"

and other such words of encouragement.

Generally though, the Bar Association and specifically Phil Greenwood, who doubled as a 60 minute man and Kelly Wright who doubled as a mother, organiser, educator, photocopier person and many other roles, provided a thoroughly worthwhile course of training.

The contributions included a welcome from the President who cautioned us to watch out for the demon drink and to also take care of your relationships. Whether the two were related was not clear - one suspects so.

Also a practically instructive lecture from the Chief Justice who compelled us to prepare, prepare, prepare and then

prepare some more.

Paul Donohoe QC won the most appeared lecturer award as well as receiving the inaugural Readers Award for "Contributions to Sexism", which he later sought to clarify.

Peter Graham QC left no stone unturned nor any reader unflummoxed as he briefed us on interlocutory procedures as used in the great brick supplier case.

Rick Burbidge QC lectured us on how to ask questions in cross-examination while telling us not to ask him any questions.

The Honourable Attorney-General, Mr Hannaford, won the prestigious "you can believe me" award.

All in all - no-one this writer knows had bad words to say. All were educated. Some were educated a lot. Most had a good time and everyone was glad the 12 hour days were over.

The course finished off with a sumptuous dinner which most attended. Esprit de corps was the order of the night with close new friendships forged in revelry.

Thanks Kelly and Phil; and thanks Phil for being the worm; and thanks Eva for all the photocopying.

□ Lewis Tyndall

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# Hush or He Might Hear You

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*Oops sorry! I didn't see you there. And you see I find the keyboard a bit intimidating and it's a bit embarrassing being such an incompetent typist and I thought that if I wrote in really little letters that you wouldn't notice the mistakes I will inevitably make - small characters will save me large blushes.*

Silly, isn't it? And yet in a frighteningly large number of cases it corresponds to the sort of behaviour on view everyday at the bar table. "Oh dear, I don't really know this brief all that well. If only that damned solicitor had given it to me a day earlier. Perhaps if I mumble the judge won't spot the gaping holes in my knowledge of the facts - or, God forbid, the law. At least it won't be so bad if it's not clear when I stuff up." It really is hard to believe that this is what's going on in the minds of the cream of the legal profession, but it's certainly the impression given.

For the past month or so, I have had the privilege to begin my legal career by observing the courts and their workings. I'm not trying to soft-soap you, I really do count it a privilege. The intricacy of procedure, the surprise of an unexpected revelation, the patience and care of a good cross-examination, the brilliance of the occasional shaft of wit, as bright and sharp as a shard of glass, have combined to educate, entertain and inform me.

But - and here's the sting after all that praise - for the ten years or so before I turned whatever talents I have to the law, I earned my living as an actor. Sadly, I have to report that from a performer's viewpoint, what's on display at the bar table is hugely disappointing. I'm not talking about the preparation of cases or counsel's knowledge of procedure or the law - I'm not quite that arrogant - but of the basic physical presentation of the case. We work in an adversarial system, a system that obliges the parties to persuade the arbiter of the strength, correctness and justice of your case. Part of that persuasion goes beyond the mere words that are spoken and into the way in which they are delivered. To some extent they have got to be interesting to be listened to.

Because I have confessed to my thespian past you will tend to pooh-poo my criticisms. "Silly man wants everything to be like Rumpole - a joke a minute and a quote from Wordsworth every half hour. Life's not like that." All I can say is I know. But there are some basics which common sense says should be observed and which are not. These are not basics that the good advocate is born with, but techniques that can be learned. Actors spend part of every day for years learning them; half an hour a day of the Reading course might be well invested in learning them too. I am not suggesting that there should be a conscious effort to alter your personality at the bar table as I'm sure that could be disastrously disorienting, but I do recommend (and I stress that this is purely from the point of view of a professional performer) that you have a look at your own physical presentation at the bar table to see what you might do to improve. Judges obviously won't be hood-winked by bare-faced theatrics, but you could do a whole lot better than boring them into submission.

As a modest contribution to this process of self assessment, I offer the following check-list based on my observations over the past month:

## SPEAK CLEARLY

Diction doesn't have to involve exaggerated jaw bending or lip curling; it's often just a question of having your mouth open when you speak.

## SPEAK UP

This doesn't mean shouting, just an acknowledgement that you are engaged in something other than a tête à tête over a coffee table.

## STAND UP

This has the effect of improving the quality of sound that comes out and presents a much more appealing and convincing picture to your audience.

## STAND STILL

Don't make the judge reach for the sea-sick pills when you get to your feet.

## DON'T GET PROP BOUND

Leaning on the lectern, adjusting the wig, pulling down the jacket, pulling up the gown, filling two separate glasses with water all have their place, but become a bit tiresome if it appears that's all you have to offer.

## ENGAGE THE BENCH

It's a lot easier to see what the judge might be thinking and how you might better help him/her if you can raise your eyes from your papers.

## DON'T HIDE BEHIND JARGON

If you have nothing better to say than "in my respectful submission", then, in my respectful submission, it's probably better to say nothing.

## TRY A LITTLE SPEECH COLOUR

Monotony is unsurprisingly dull.

## DON'T UPSTAGE

It's really not fair to clank the water jug, to harumph and hurrah when your opponent is making his submissions.

I repeat, I enjoy the courts. I should like one day to earn my living playing an active part in them and I certainly don't want you to think that my check-list applies with equal force to all members of the Bar, but I have nonetheless seen all these basic shortcomings in the short time that I have been around the courts.

It can be done better - and with very little extra effort. □

Peter Barley LLB  
Law Courts Building

# Report on Special Meeting on Legal Education and Practical Training

*A special meeting on legal education and practical training was held on Saturday 17 July 1993. Three members of the Bar were present: Kevin Lindgren QC, Jeremy Gormly and Phillip Greenwood.*

*The meeting was initiated by the Centre for Legal Education and attended by a range of invited representatives from the Court and admission boards, the Attorney-General, the Law Society and the Bar, law schools, practical training institutes and students. There were also participants and observers from the Department of Employment, Education & Training, professional bodies in other states, and the Law Council of Australia.*

*An Issues and Options Paper was prepared for participants. This article by Chris Roper, Director of the Centre for Legal Education, sets out the introduction to that paper. It outlines the fundamental issues faced by those considering the proposed changes to practical training in New South Wales.*

*The issues are of relevance to the Bar, particularly because the Legal Profession Reform Bill (No 2) which envisages common training prior to common admission.*

## The Challenge

We rapidly approach a new millennium which, it is generally agreed, confronts us with enormous challenges as a nation. We are in the midst of ongoing and rapid change which constantly requires us to readjust and refocus; even at the level of legal education. Perhaps a good recent example is the impact the mutual recognition legislation has had on legal education and training, and admission requirements. It has even forced us to reexamine the very concept of admission to practice.

We know that some of the nation's brightest young people pass through the legal education system. Many of them will go on to play very significant roles in our society, not only at the bar but also in areas such as politics, business and social service. There they will be required to provide the expertise, the skilfulness, the "cleverness", which will enable us as a nation to enter the new millennium with a proper standard of living, with social institutions that are appropriate and fundamentally just, and with an economic and intellectual competitiveness which will ensure our national security.

In addition, we have the challenge of overcoming the persistent criticism that the legal system, including the court system, is inaccessible to many members of the community. This translates itself into a widely-held expectation that the legal establishment must overcome the inequities which cost and delay bring. We need to be able to produce barristers who can do this.

At the same time, from another perspective, we need to compete in an increasingly difficult global market for goods and services, and so we need lawyers with extremely sophisticated skills and knowledge.

Is legal education up to these challenges? Are we structuring legal education and training in such a way as to enable us to meet these challenges? Do we have the resources and a system to meet these challenges?

But more than this, with so much hinging on the quality of the legal education and training, even more "challenges" are upon us which complicate the issue yet further.

Some of those further challenges are:

- the enormous pressure on the legal profession itself from government, and government initiated activities such as the Trade Practices Commission Inquiry and the Senate Inquiry into the Cost of Legal Services, the media, and other elements of society. These may well lead to a restructuring and even a reconceptualising of what being a profession is, and what forms the provision of legal services might take;
- the dramatic increase in law student numbers and thus presumably those seeking admission to both branches of the profession;
- the implications of the pressure, initiated by the mutual recognition regime, to move rapidly towards national standards (and maybe even national institutions) for legal education, practical training, admission and for the regulation of practice;
- the implications for practical training of barristers of the proposed changes to the structure of the legal profession in New South Wales, particularly so-called common admission.

In focussing on these three immediate challenges, we need to consider them in the context of the wider challenges outlined above.

Our underlying goal is to ensure that:

- the system of legal education and training; and
  - the regulatory system for admission to and certification for practice,
- are ones which meet the challenges and opportunities of the immediate and longer term future.

Every choice we make about the future involves a balancing of three dimensions. They relate to quality or standards, resources, and access and equity. A fourth dimension intersects with these; it is the implications on every choice of the mutual recognition regime.

## The Four Dimensions

### *The Quality Dimension*

The legal profession is entitled, indeed bound, to ensure that appropriate standards are maintained throughout all aspects of its life. This includes the maintenance of standards in regard to those who enter it. Standards are inherently discriminatory: that is exactly what they are meant to do - discriminate against what is not of a sufficient standard. It is very easy to portray

the profession's concern with standards as simply a "front" for restricting entry to the profession, either to a certain number or to certain types of people. Sometimes professional groups may in fact use the maintenance-of-standards issue to protect their members.

The nature of a profession is that it has special knowledge and skill which it offers to the community (for a fee). We would not use professionals if we could do it ourselves. So, as members of the community, we rely on the various professions to maintain their standards, otherwise the trust which underlies our use of them would be destroyed. The patient under the scalpel of the surgeon is delighted that it is hard to become a surgeon, and that only the best do so. The argument equally applies to the legal profession.

The most recent example of the profession reexamining the question of standards or quality is seen in the Law Society's recent proposals for practical training for would-be solicitors.<sup>1</sup> The Law Society Council, after an extensive review of practical legal training, came to the firm opinion, supported by many of its members, and by others, that the quality of the process of preparation for practice as a solicitor must be improved, and therefore changed. This has been expressed in various concerns about the practical training course at the College of Law, and in a belief that a person should not commence practice as a solicitor unless he/she has had *both* institutional-based practical training and on-the-job practical experience.

As admission to practice as a solicitor (a court-controlled process) and commencement of practice as a solicitor (a profession-controlled process) are interlinked in the existing system, the only apparent way to achieve this was seen to be to require both of these components prior to admission.

Whilst there has been no sustained argument against this on educational (or quality) grounds, there is strong opposition on access and equity grounds. Students, academics and some members of the profession consider this is unfair because it inevitably requires a graduate to find a job in order to enter the profession. (The profession is not in a position to provide that job for the person, unlike the medical profession where publicly funded teaching hospitals offer the venue for the practical experience.)

Arguments are put and accusations made that the effect, and some even say the purpose, of this is to limit the numbers entering the profession (and thus protect those already within it). This, it is said, effectively limits entry to the lucky and those from privileged backgrounds who are more likely to find jobs. Increasing numbers of law graduates, coupled with a stagnant economy, mean that those jobs are going to be very hard to get for many law graduates.

The unfairness of the proposal (real or imagined) means that politically it faces strong opposition.

There is another quality dimension, which relates to undergraduate legal education. It has recently been expressed as, "given the large number of law schools, there is legitimate concern about the variable quality of graduates emerging and the consequences this will have in the future for professional standards and consumer protection". This is taken up later in this paper.

### *The Numbers Dimension:*

#### *Effect on Resources and Expectations*

The numbers graduating from law schools and the Barristers and Solicitors Admission Boards course are increasing significantly. This may not matter if the only effect were increased competition within the legal profession. There is no suggestion that lawyers are advancing an argument that numbers are a problem because of their impact on competition.

The majority of those graduates will want to be admitted as solicitors, even if some of them do not wish to practise. To be admitted they have to undertake practical legal training (PLT). PLT is very expensive. There is not enough money from current sources to provide PLT to all the existing graduates as they graduate, let alone the future greater numbers. PLT can be funded by government, the profession or by users. There is no likelihood of increasing funding from the former two sources. There is no way of providing PLT cheaper without reducing quality.

So the lack of funding for PLT is a real source of concern, as there is insufficient money to fund the necessary places to accommodate the numbers coming through the university and BSAB system.

Furthermore, if this happens, a large number of law graduates will be disappointed in their career expectations. We have an impending political problem when lots of law graduates find themselves unable to be admitted as solicitors because they cannot get PLT training and be admitted (as distinct from the question whether or not they then get employment). Their frustration will be turned against the universities, the profession and the government. This is not confined to law. Frustration is, of course, a predictable side effect of recession and changing society. There are many graduates in other disciplines whose hopes have not been realised.

### *The Access and Equity Dimension*

There is a strong and widespread view that no insurmountable barrier should be placed in the path of a law graduate which would prevent him/her obtaining entrance to the legal profession, ie. admission by the Supreme Court. Anything which does do that is seen as inequitable.

In a recent article, Matthew Johnston, the Education Officer of the Australasian Law Students Association (ALSA), whilst acknowledging that many students now see law as a "valuable string in the bow" for other careers, says:

"Whatever the desired field of employment for the future, there is still no doubt that many students studying law in Australia expect to be able to gain admission to the profession. ... [The] professional qualification ... is a marketable commodity which represents the culmination of their years of study. ... The real prize is admission."

He goes on to say, referring to the proposed Professional Program, outlined in the Blueprint:

"This practical experience requirement [ie. pre-admission] makes admission to become a solicitor job-contingent. The insidious part of its operation is that only those employers fulfilling the necessary criteria can offer this training, and thus the profession becomes self-selecting. It is in this context I would submit the proposed Blueprint is a restrictive practice - an effective, though arguably unintentional, method of controlling numbers and the scope of the profession. This problem is exacerbated by such factors as the present economic climate and burgeoning numbers of law students."

Later he says:

"[We must] distinguish between admission and employment. Both are barriers. Ultimately, both must be cleared in order to work in the legal profession. The latter we can do nothing about, the harsh economic reality of market forces continues to dictate the supply of jobs. However, admission is not, nor should it be, beyond our control. Admission is merely a procedural step. It is the culmination of our training. Its denial will prevent law graduates moving any further. It has become the necessary springboard to employment as a solicitor in New South Wales, but also increasingly in other states, overseas, and in other professions. If there are no jobs, too bad, at least give us a chance to compete."

The question is whether this expectation is proper. Has it grown up without any valid foundation? Whatever foundation it may have, should it be challenged? The question can be asked why a law graduate also needs a designation accorded by the Supreme Court. Other professional and business groups do not have a similar ceremony. Surely, it can be argued, the Courts, when admitting people, see this as a ceremony to mark a beginning within the legal profession, not to mark an ending of an educational process. Maybe this expectation, amongst students, employers (if it does exist) and others, needs to change.

Another element of this dimension is that any proposed action can be examined in the light of whether it will assist the already privileged and disadvantage those less privileged.

#### *The Mutual Recognition Dimension*

Mutual recognition is not a problem in itself. But it does mean that we cannot look at any solution simply from the perspectives of quality, numbers and access and equity and in state-centred isolation. Many of the options, related as they are to admission to practice, are about "registration" for a profession within the concepts of the mutual recognition legislation. The effect is that so long as requirements in the various states differ, the possibility of "forum shopping" exists and it is therefore possible for a NSW law graduate to bypass our local requirements and achieve the right to practise as a solicitor in NSW by obtaining "registration" in another state.

Furthermore, in response to the mutual recognition legislation, the profession is rapidly moving towards common standards for both undergraduate education and practical training. Any option therefore must also be examined in the light of how it fits in with, or lives alongside, the common standards.

#### **Conclusion**

The Legal Profession Reform Bill (which is likely to lead to common admission and thus common practical training), the rapidly increasing numbers of law graduates, the limited or reducing resources available for legal education and practical training, the effects of the mutual recognition legislation, and the changing and restricted opportunities for employment for people with legal qualifications all combine to produce a time fraught with dangers and yet filled with opportunities.

For the Bar, these issues are also important as in the new post-reform bill era the education and training of those seeking admission as barristers will be the same as that required of would-be solicitors. The Bar will therefore have a stake in the focus and content of pre-admission practical training.

The special meeting on legal education and practical training, initiated by the Centre for Legal Education, brought together representatives of all the major stakeholders in legal education. It is likely to lead to a more informed consideration of these issues, and a more cooperative climate for change. □

1. The Solicitors Admission Board has recently not accepted the Law Society recommendation that this new program be implemented. It is not clear at this stage what steps will now be taken, but the Law Society is engaged in discussions with the Bar.

#### **Digging Deep**

Mr Biscoe: I would respectfully concur in that approach, Mr Referee. You have affirmed the principle that somebody may be qualified by training or experience or both. Rather than plough our way laboriously through each one of these objections which, as you pointed out, are mainly based upon lack of qualifications —

The Referee: Strange that you should use the term "ploughed", Mr Biscoe, because the first reported use of an expert in the common law in England is reported in "One ploughed, one ate", in 1554, as Ploughman's Reports. Thank you, proceed. □

*Multicon Engineering Pty Ltd v Federal Airports Corporation* Day No 124 (Transcript)

# Mediation and the Courts

## Introduction

With the increasing frequency of use of mediation, it is not surprising that a body of case law has begun to accumulate about it. Here is a brief guide to some recent cases.

## Enforceability of Agreements to Mediate

In *Hooper Bailie Associated Limited v Natcon Group Limited* (1992) 28 NSWLR 194, Giles J gave effect to an agreement to mediate by staying an arbitration that one party sought to resume in breach of the agreement, which was to the effect that the arbitration would not resume until the mediation was concluded. *Hooper Bailie* is significant because it did not follow the House of Lords' decision in *Walford v Miles* [1992] 2 AC 128 which refused to give legal effect to agreement to negotiate.

*Hooper Bailie* is significant also because it emphasises that, for a mediation agreement to be recognised as having legal effect, it must specify with sufficient certainty the conduct required of the parties. It also makes clear that, because equity is unlikely to order specific performance of an agreement to mediate (because supervision of performance would be impossible), such agreements should make concluding the mediation a condition precedent to commencing an arbitration or litigation. The Court can then enforce the agreement by staying an arbitration or litigation commenced in breach of the agreement to mediate.

## Privilege Attaching to Communications during a Mediation

In *AWA Limited v Daniels* (unrep. Supreme Court of New South Wales, 18 March 1992), Rolfe J considered the limits of the "without prejudice" privilege in the context of mediation. A very large commercial cause was attempted to be resolved by mediation after twelve hearing days at the direction of the trial judge: *AWA Limited v Daniels* (unrep. Supreme Court of New Wales, 24 February 1992, Rogers CJ in Comm. Div.). The mediation was unsuccessful and the hearing resumed before the trial judge. The proceedings concerned a claim by the plaintiff against its auditors for damages for alleged failure to audit properly the plaintiff's 1986 accounts. The auditor defendants cross claimed against the plaintiff's former chairman and chief executive officer, the former non-executive directors and two banks.

Before the mediation started, the defendants had requested an amendment to the draft mediation agreement. The defendants asked for a warranty from each party that it had a position wholly independent from that of the other parties and that its ability to mediate was not fettered by any existing agreement for indemnification by another party. The plaintiff would not consent to such an amendment. The matter was resolved by the plaintiff's solicitor making an oral statement at the mediation on the basis that what he said was without prejudice and confidential. The mediation then proceeded.

When the hearing of the case resumed after the mediation had failed to resolve the underlying dispute, the defendants

served notices to produce on the plaintiff and some of the cross-defendants. They sought documents relevant to the existence of a matter to which the proposed amendment to the mediation agreement related - presumably, whether the plaintiff AWA had agreed to indemnify its former officers from liability to the defendants.

The plaintiff claimed the notices to produce were an abuse of process because they called for the production of documents whose existence probably only became known to the defendants as a result of what the plaintiff's solicitor said at the mediation. The defendants argued that they were not attempting to put into evidence something said at the mediation, but rather were attempting to gather documents whose existence had been confirmed by something said at the mediation.

Rolfe J considered himself bound by *Field v Commissioner of Railways of New South Wales* (1957) 99 CLR 285 at 291-292, where Dixon CJ and Webb, Kitto and Taylor JJ said:

"This form of privilege, however, is directed against the admission in evidence of express or implied admissions ... It is not to be concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence."

Applying this test, Rolfe J held that the notices to produce were not an abuse of process. In his Honour's view, the plaintiffs were not seeking to prove directly or indirectly what was said at the mediation. Rather, they were seeking 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" (at 13).

His Honour emphasised (*id.*) that nothing in his reasons was intended to cast doubt on the proposition that admissions or statements made at a mediation carried out on a confidential and "without privilege" basis could not be proved in evidence unless the parties consented.

Pursuant to the notices to produce, deeds of indemnity were then produced. The defendants tendered them. The plaintiff and the former directors objected, claiming that the deeds were protected by obligations of confidentiality. In ruling on the tender, the trial judge, Rogers CJ in Comm. Div., commented on the reasons for judgment of Rolfe J already discussed: *AWA Limited v Daniels* (1992) 7 ACSR 463.

Rogers J pointed out that the question for decision in *Field's case*, by which Rolfe J had considered himself bound, was whether an admission made by the plaintiff in a personal injury case to the defendant's doctor was admissible against him. Rogers J pointed out (at 467) that the issue was narrower than that posed in the passage quoted by Rolfe J and quoted earlier in this article:

"In other words the judgment [in *Field's case*] concerned the admissibility of an admission and not of objective evidence to which earlier reference had been made. If the defendants were to attempt to prove what [the solicitor for the plaintiff] had said at the Mediation then, in my view, that would have been inadmissible. Strictly speaking, that is all that *Field* stands for. The earlier

statement, in the joint judgment, as to proof by extrinsic evidence is strictly obiter. In my respectful view the judgment of the High Court is not determinative of the present question although, without a doubt, a judge at first instance is hardly likely to take a view different from a statement, even if obiter, in a joint judgment in the High Court."

Rogers J continued:

"Rolfe J was prepared to take the view ... that objective evidence will not be excluded merely because the defendants learnt of the relevant facts in the course of the mediation. With very great respect I would prefer to consider that question further if, and when, it arises on some future occasion. If the fact be that the other side has absolutely no inkling of some matter, which, if known about is capable of being established by objective evidence, but which would not ordinarily come to the knowledge of the other side in the normal progress of litigation and its existence is revealed only by a statement made in the course of, and for the purposes, of the mediation, I would hesitate long before concluding that the objective evidence so revealed is admissible. It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them. As well were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process." (at 467-468, emphasis added)

Rogers J also pointed out that, since the deeds were in the possession or control of parties to the proceedings, they should have been discovered if relevant; thus the whole question ventilated before Rolfe and Rogers JJ would not have arisen. His Honour observed that it followed that the really difficult situation would arise

"where the evidence, if documentary, is not in the control, or possession, of the party seeking to protect its contents, or, if not documentary, the material will remain unknown to the other party but for the disclosure at the mediation". (at 468)

This difficult question remains for determination. Rogers J went on to admit the deeds subject to relevance.

The effect of AWA thus is that there is a nice judgment to be made before disclosing to the other party things which might enable it to prosecute its case more effectively if the mediation fails and litigation ensues or continues. On the one hand, disclosing the matter may assist in settling the dispute. On the other hand, if the dispute is not settled, the other party may be able to prove the subject matter of the admission by admissible evidence. But this nice judgment is, of course, one that participants in "without prejudice" negotiations have always had to make. The increasing frequency of mediation

only serves to highlight the point.

In *Re D (Minors)* [1993] 2 WLR 721, the English Court of Appeal, led by the Master of the Rolls, Sir Thomas Bingham, considered whether a statement of a mediator was admissible if tendered by one of the parties to custody proceedings. The parties, husband and wife, had had three joint meetings totalling about five hours with a clinical psychologist for the purposes of conciliation (a word the Court used to include mediation). When conciliation could not be achieved, the wife sought to tender a statement of the psychologist based on the joint meetings. The Court of Appeal said:

"A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party (whether official or unofficial, professional or lay) receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties' agreement: ... [citing authorities].

It is not, in our view, fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice'

privilege. That its underlying rationale is similar, and that it developed by way of analogy with the 'without prejudice' privilege, seem clear. But both Lord Hailsham of St Marylebone and Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 226, 236 regarded it as having developed into a new category of

privilege based on the public interest in the stability of marriage. We respectfully agree, and we can see no reason why rules which have developed in relation to 'without prejudice' privilege should necessarily apply to the other ... [We] do not accept that evidence can be given of statements made by one party at a meeting admittedly held for purposes of conciliation because, in the judgment of the other party of the conciliator, that party has shown no genuine willingness to compromise. Wherever an attempt to conciliate has failed, both parties are likely to attribute the failure to the intransigence of the other. To admit such an exception would reduce the privilege to a misleading shadow." (at 726)

The Court of Appeal in *Re D* described in some detail the great growth in England of the use of conciliation in family disputes and the practice of according confidentiality to what is said at a conciliation. The Court held:

"These practices and expressions of opinion cannot of course be regarded as authoritative statements of the law. But in this field as in others it is undesirable that the law should drift very far away from the best professional practice. ... In our judgment, the law is that evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to

cause serious harm to the wellbeing of a child.” (at 728)

Applying that test, the Court of Appeal upheld the refusal of the trial judge to admit the conciliator’s statement.

Although the privilege identified by the Court of Appeal is described as one based on the public interest in the stability of marriage, the public interest in encouraging the resolution of disputes without litigation would seem to support a similar privilege attaching to mediation of disputes generally.

### **Privilege With Respect to Third Parties for Communications During a Mediation**

There is apparently no direct authority on whether communications during a successful mediation are privileged if a person not a party to the mediation seeks discovery of them or subpoenas them in other proceedings. In *Rush & Tomkins Ltd v Greater London Council & Anor* [1989] 1 AC 1280, the House of Lords considered the situation where a builder had sued the owner of land for which it was constructing 639 houses, and one of the builder’s subcontractors. The builder and the owner settled and the builder discontinued against the owner. The subcontractor sought discovery of the “without prejudice” correspondence by which the settlement was accomplished. The Court of Appeal [1989] 1 AC 1285, held that once the builder and the owner had settled, the privilege ceased.

The House of Lords reversed. It held unanimously that the privilege continued and had effect against the subcontractor. Lord Griffiths, in a speech with which the other members of the House agreed, said:

“It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the ‘without prejudice’ rule. I would therefore hold that as a general rule the ‘without prejudice’ rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party.” ([1989] 1 AC at 1301, emphasis added)

It is worth noting that the general rule set out in the second-last sentence of the passage just quoted is wider than strictly was necessary to decide the issue before the House. The last sentence of the passage was sufficient to decide that.

Read widely, the general rule would seem to prevent admission of communications made during a mediation in subsequent litigation between entirely different parties, if the mediation and the litigation concerned subjects that were connected. The narrower rule set out in the last sentence of the passage quoted would of course apply the privilege only as

between parties in the same litigation in which a settlement had been reached.

Perhaps a hint as to the direction the courts may take is contained in the English Court of Appeal’s decision in *Dolling-Baker v Merret & Anor* [1990] 1 WLR 1205. There, an underwriter had brought an action against another underwriter claiming money due under a reinsurance policy. The first defendant claimed that he could avoid the policy for non-disclosure. In the event that that defence succeeded, the plaintiff also claimed against the placing brokers. The first defendant had written similar reinsurance policies where the same placing brokers were involved. Those similar policies had been the subject of an arbitration in which the arbitrator had declared the reinsurance to be invalid.

The plaintiff sought discovery of virtually all documents produced for the purpose of the arbitration. The trial judge found that the issues in the arbitration were very similar to those in the proceedings and for that reason found the arbitration documents to be relevant and discoverable. Parker LJ, with whom Ralph Gibson and Fox LJ agreed, allowed the appeal:

“We were invited ... to consider whether this was a case where there ought to be production. It is not contended on behalf of the first defendant [the reinsurer] that the fact that the documents were prepared for or used in an arbitration, or consist of transcripts or notes of evidence given, or the award, confers immunity. It could not, in my judgment, successfully be so contended. Nor is it contended that the documents constitute confidential documents in the sense that ‘confidentiality’ and ‘confidential’ documents have been used in the court. What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.

It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case. It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production

of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking." ([1990] 1 WLR at 1213-1214, emphasis in original)

If for "arbitration" one substitutes "mediation" in the passage just quoted, and bears in mind that parties to a mediation invariably promise to keep confidential their communications during the mediation, the holding in *Dolling-Baker* probably provides a guide to the minimum level of protection that the courts will accord - as against third parties - to communications during a mediation.

### Mediation and Costs

Most mediation agreements provide that if the mediation is not successful, the parties will agree to treat the costs of the mediation as costs in the cause. Questions may arise about the treatment of the costs of mediation, however, where a court has ordered the parties into mediation and, as a result, no mediation agreement dealing with costs exists.

In *AWA Limited v Daniels & Ors* (unrep. Supreme Court of New South Wales, 19 April 1993) the matter came before Rogers CJ in Comm. Div. on a motion for adoption of a referee's report on the costs to be awarded to the successful cross defendants.

At pages 3-6 his Honour discussed whether the costs of counsel, particularly senior counsel, for participating in a mediation should be allowed. In heavily qualified dicta at pages 4-5 Rogers J doubted whether the fees of senior counsel should be allowed. In the event, however, his Honour ordered the adoption of the referee's report, which allowed the costs of all counsel for appearing at the mediation sessions.

His Honour's reasoning seems to be based on the premise that the role of counsel where a matter is being mediated is merely to advise their clients of the strengths and weaknesses of the competing cases - something that in his Honour's view can be done before the beginning of the mediation sessions. As a result, in his Honour's view, there may have been no need for counsel to attend the mediation sessions themselves.

With respect, this reasoning ignores the contribution that counsel trained in mediation can make at the mediation sessions to resolution of the disputes between the parties.

In *Capolingua v Phylum Pty Ltd (as trustee for the Gennoe Family Trust)* (1991) 5 WAR 137, Ipp J considered whether a successful defendant should be deprived of an order for costs because of, among other things, its conduct at a mediation required by Order 31A of the rules of the Supreme Court of Western Australia. Essential elements of the defence had not been made clear until the fourth day of the hearing, when amendments to the defence were sought and granted.

Given the amended defence, the matter could have been heard far more quickly.

Ipp J held that the position had been exacerbated by the conduct of the defendants and their solicitors during the mediation conference before the Principal Registrar of the Court. Available to his Honour was a report of the mediation prepared by the Registrar; neither party objected to his having regard to it and both commented on it in submissions on costs.

At the mediation the defendants' solicitor first objected to the plaintiff's counsel taking notes. Then, after an adjournment of the mediation, the defendants said they were not willing to continue. The plaintiff's counsel asked the defendants' counsel whether there was any point in just the counsel remaining with a view to endeavouring to narrow the issues. But defendants' counsel indicated that her instructions were to say simply "yes" or "no" to the various issues raised.

His Honour was of the view that if the defendants had not refused to participate in a process of identifying and resolving unnecessary issues,

"there is every prospect that the confusion and obscurity in their pleadings would have been noticed and remedied.

This in turn would probably have led to a substantial shortening of the trial." (at 140)

He held that justice required that there be no order as to costs. □

Robert Angyal

## Overthetop

### Coram Gallop J (ACT Supreme Court)

Sheriff's Officer to Litigant in person seated at the bar table:

"What's in that flask you are sipping from?"

Litigant: "Just some spirits."

(The matter is dutifully reported to the Associate.)

Litigant: "Your Honour I'm fairly nervous. Is it OK if I sip from this flask (holding it up)?"

His Honour: I've never had anyone ask if they could consume alcohol in Court - it is alcohol, is it?"

Litigant: "Yes."

His Honour: "I wouldn't want to impede your presentation of your case if it will overcome your nerves. Do whatever you like."

Litigant: "Well, I won't sip it then. Is it OK if I eat a banana then?"

His Honour: "Look, just sit down will you, and don't talk nonsense. This is a serious business here and there are others wanting to get their cases on. I won't let you make a farce of the proceedings."

Litigant: "Can I get an adjournment to get some legal advice?"

His Honour: "Well, that's the most sensible thing you've said so far." □

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# *Advocacy Institute's Workshop on Appellate Advocacy*

*(Two perspectives on the Bar Association's Workshop on Appellate Advocacy)*

On 19-21 February 1993 I attended the Australian Institute of Advocacy's workshop on appellate advocacy held in the Supreme Court of New South Wales. The Institute has held a number of advocacy workshops around Australia since it was established in September 1991 but this was the first on appellate advocacy. The purpose was to improve style and technique.

About 40 advocates participated from all States and Territories except Tasmania, including half a dozen from the NSW Bar. Surprisingly, most were very experienced. There was a high ratio of instructors led by the Institute's Chairman, Justice George Hempel of the Supreme Court of Victoria. The instructors included a strong contingent from the Victorian Bar and four Sydney silks: O'Keefe, Jackson, James and Donovan.

Kick off was on the Friday evening with a succinct address by Gleeson CJ on the elements of good appellate advocacy. He spoke of the need to be sensitive to the occasion and the audience, of tactful appreciation of the likely response, and of courtesy. Above all other considerations, he said, are the merits of the case. If the merits are against you, wider considerations such as the application of the law in other cases may assist. He pointed out the three main differences between appellate and other advocacy. First, there has already been a decision. Second, there is a multiplicity of judges. Third, the law may not be settled at the appellate level. Many appellate judges are confident of their legal knowledge but all are anxious not to misunderstand the facts. In an appellate court, there is a greater premium on directness. It is necessary to come to the point quickly and to simplify and concentrate submissions. One should be appropriately tenacious. The multiplicity of judges on an appellate bench raises communication problems. It is common for one of the judges to have been assigned beforehand to write the first judgement (perhaps *ex tempore*) and it is therefore likely that that judge will be asking most of the questions. To whom do you address the argument? You have to appeal to all minds. A silent judge is a chilling judge. So encourage interchange to find out what he thinks he knows.

Justice Hempel told us that communication skills were critical to the art of persuasion. There was theatre in advocacy. Judges were human, he reminded us. Tell a good story concisely and powerfully or seductively. Appellate judges are looking to see if something has gone so wrong that they must interfere.

Over the next two days, the advocates each argued three cases before a mock court. Two of the arguments were videoed. Each advocate was allowed only seven minutes for argument. This was followed by comments from the three person bench and a review of the video by another instructor outside the courtroom. Obviously, in seven minutes there was time to put only part of an argument, and it was necessary to do so crisply. In my first case I artfully put my best points forward first, confident that there would not be time to reach

the weak ones. My theory that it is easier to be stylish with a strong point than a weak one proved to be correct. This tactic did not work in a later case where the mock court unaccountably allowed me to run over time until the whole argument, warts and all, finished.

A regional divergence was disclosed and its dangers solemnly discussed. In some regional jurisdictions it is acceptable practice to address the judge as "sir" as an alternative to "Your Honour". Jackson QC warned against this practice in the Federal Court or the High Court lest the regional advocate encounter a judge from a State where to be called "sir" might be regarded as insufficiently respectful.

A fascinating thing occurred when, in due course, advocates were allowed to sit on the bench and adjudicate on other advocates. Often these judges became interventionist, with a keen interest in putting the mercilessly hard, if not unanswerable, question.

I think that the workshop was worthwhile for three main reasons. First and foremost, the videos enabled you to see yourself as judges see you and to compare the reality with your own preconception. Second, constructive criticism of your arguments by others was helpful. Third, the views of others as to the principles of appellate advocacy were often stimulating and sometimes informative. □ Peter Biscoe QC

In the Winter 1992 edition of *Bar News*, Donovan QC reported on an Advocacy Seminar conducted by the Bar Association. The Australian Advocacy Institute has gone one step further, conducting an Appellate Advocacy Workshop over the weekend of 19-20 February, 1993. The Workshop was designed for experienced advocates, and some 40 practitioners from all States and the Northern Territory participated. Most had at least 10 years experience in advocacy, and several Silks became "students" for the weekend. As Julian Burnside suggested in the recent edition of the *Victorian Bar News*, one might think that in a profession where humility is not a prominent virtue, a workshop aimed at teaching senior advocates how to run an appeal would fail to attract sufficient starters. However, the response and the level of participation was enthusiastic.

Any thought that this would be a relaxing view of how to run an appeal was dispelled when a large bundle of papers arrived from the Australian Advocacy Institute in the week before the Workshop. The materials covered 6 appeals. Each participant was expected to be familiar with all the materials, and was to argue 3 appeals, either as appellant or respondent. The cases included appeals involving a strike out application, joinder of parties in a Land and Environment Court matter, a conviction for theft, a Family Provision Act matter, a sentence appeal involving Commonwealth drug offences, and an application for a stay in a commercial matter. Researching and preparing submissions in the course of a busy week before the Workshop required some sacrifice, but some of the more

diligent students even had chronologies and outlines of submissions prepared by the time they stood up to argue their appeal.

The Workshop was led by Hempel J of the Victorian Supreme Court, with assistance from a team of Silks and senior juniors, including O'Keefe QC, James QC, Jackson QC and Donovan QC. Proceedings commenced on Friday evening with an address by Gleeson CJ and an overview of the appellate process by Hempel J.

The real fun began on Saturday morning when we broke into small groups and argued the appeals before a bench of three. Both appellant and respondent were generally subject to frequent interruptions and attempts by the bench to divert the train of thought. James QC was particularly active in that area! At the conclusion of each submission the advocate was subjected to detailed criticism from the bench and, frequently, the balance of the class. The dreaded moment then arrived - reviewing one's own performance on video, in an individual session with one of the teaching faculty. Donovan QC was so pleased with the performance of Biscoe QC that he allowed him to take home the video tape of his own argument in one matter.

Another very useful dimension was added when students sat as one of the appeal judges. One quickly appreciates from that perspective the many nuances of style and presentation which attract or irritate the bench.

The Workshop concluded on Sunday afternoon with a detailed review by Hempel J and comments from the balance of the teaching panel.

The preparation and organisation by the Australian Advocacy Institute was first class. The willingness of the eminent range of teachers to devote their time to the weekend is to be applauded. Comments from all students indicated that the weekend had been extremely constructive, and no doubt the next Workshop will be an early sell out. ☐ Mark Williams

## Get Smart

- Q. "I think in about June 1983 that you commenced working for the Government Motor Services."
- A. "That's right."
- Q. "Was that a position of a motor mechanic, classification 99?"
- A. "That's right, yes."
- Q. "Do you know what the significance of 99 is?"
- A. "It means Maxwell Smart's girlfriend, I think." ☐

(*Franklyn-Smith v Government Motors*)

## Compulsory Reading

- Cripps JA: "Where was the new Rule introduced?"
- Poulos QC: "It is in the New South Wales Government Gazette."
- Cripps JA: "I knew I had read it somewhere." ☐

(*Admax Processing Pty Ltd v Pan Court of Appeal 14 December 1992*)

## Beginner's Legal Dictionary

ABATE	A food for catching fish
AFFIDAVIT	A device for launching half a lifeboat
APPROBATE	Fish food used by experts
AMEND	The last word on pleadings
ASSIGNOR	Graffiti artist
CORROBORATION	Food served to aboriginal dancers
CUSTODY	Tasting like old-fashioned dessert
EX PARTE RELIEF	A glass of Berocca
EXPECTORATE	Pregnant with octuplets
FORFEIT	A quadruped
ILLEGAL	A sickly bird of prey
LIABILITY	Skilled in mendacity
LITIGATE	An opening for rubbish
NEGLIGENCE	Sleepwear worn by men
NUISANCE	Information about small insects
PLAINTIFF	An airborne assault
PRIVILEGE	On the outskirts of town
PROCESS SERVER	A professional boardrider off Bondi
TERMINAL ILLNESS	Sometimes fatal symptoms occurring while waiting for your flight to leave
TORT	A mental process which sometimes precedes speech
TRESPASS	A cleared area of forest
WARRANT	A declaration of hostilities

☐ Peter Deakin QC

## Goulburn Gossip - Supreme Court Circuit

- At the circuit dinner John McDonald of and concerning Mr Justice McInerney:

"His Honour is a man of infinite patience who suffers fools gladly."

- In court on 24 March 1993 (*Richards v R E Neal & Co Pty Ltd* [in arguendo]):

McInerney J: "What do you say to that, Mr Gleeson?"

Gleeson QC: "Your Honour ..."

McInerney J: "Don't you 'Your Honour' me." ☐

# Restaurant Reviews

## Circuit Food 1993

No long-term discussion of Circuit Food can properly omit the pies of Yackandandah. On the Monday of the Albury sittings I had an early Motion and was free, by 12 noon, for the day.

The party of the third part and I borrowed a car and drove through a stunning Autumn day, adorned with the red and golden leaves of elms, tobacco and other assorted deciduous trees, to the birthplace of Isaac Isaacs in the north of Victoria.

The town is picturesque and old, with craft shops, antiques and Mel Gibson's pub, unspoilt by any sign of his spending money on it! The piece-de-resistance is the Bakery. Its 19th century baker's oven produces steak plain, steak and onion, steak and mushroom pies and big sausage rolls. The fillings are juicy, meaty and full of flavour, but best of all is the pastry. The pie bases are a thick and crumbly fresh short pastry with flaky pastry on top. Worth the trip even if the drive wasn't lovely!

Albury food is adequate. In the Carlton Hotel/Motel (the old Travelodge) the dining room is fine if you aim for the simpler dishes. The steaks, char grilled, are first class and they can cook Bernaise sauce and good chips. There is a fair Italian and a fair Spanish and the Aussie Roast at the Commercial Club is as advertised. Out of town, about 35 minutes, is "The House" at Mount Prior, which overlooks the Murray River and is serving excellent food and wine. Home-baked bread and paté is free while you choose. The goats' cheese salad was a delicious entrée and the duck was perfectly crisp and moist, not a bit oily. The veal pie with truffles stopped me, but the other party got to kiwi fruit shortcake with creme Anglais and loved it.

Tamworth hasn't improved much since last year, although the "Jumbuk Cottage" is innovative and serves buffalo, crocodile and 'roo steaks. At the Power House Monty's fine dining is not so fine, pretentious and expensive. The fast food café is better, and very varied. The "Dragon Palace" is the best Chinese, with steamed dim sim, barbequed quail and deep fried duck with lemon sauce their best offerings.

In Byron Bay "The Rocks" maintains its very high standards and the "Oh Delhi" is producing wonderful Indian food. Try the Masala Dosa, a delicious lentil pancake with potato and onion curry. The "Bikie Fish Café" in Lismore serves fabulous fresh fish, fried, with great chips for \$7.00 a serve. "Buy beer next door", the man says.

But the Ringmaster's Award for the Year goes to the Hermitage Restaurant at the "Hunter Resort" in the Hunter River Valley; close enough to Newcastle and on the way to all points north, so a valid circuit food experience. The chefs are a pair, brother and sister I think. The young man trained with Neil Perry at the Rockpool, the woman with Paul Merrony! The lentil, chorizo and spinach soup was absolutely delicious. The party of the fourth part had chargrilled blue swimmer crab in a ginger butter and chilli sauce and the third party's entrée was octopus grilled and served with a basil hollandaise sauce. The chargrilled rump with braised borlotti beans, steamed vegetable in a separate bowl, perfectly cooked, and good

chips, was my main, and superb. The others were "today's special" a lamb curry with papadams, spicy tender and delicious, and roasted Atlantic salmon, served with avocado, salsa and dressed with lemon and olive oil. The fish was *just* cooked and melted in the mouth.

An icecream cake with layers of blackberry ice cream, raspberry sorbet and boysenberry ripple ice cream was too tempting by far, and the second irresistible dessert was a scrumptious fig shortbread. All their own wines by the glass and excellent. They also serve a wide range of other wines and I loved the Calais Estate Sauterne (1991) with the sweet.

There was hot competition, but this was the Meal of the Year. □

John Coombs QC

Melbourne is a food perv's paradise, and not just the fancy places. The fast food, the cheap cafés, the pub food, are all good.

For fabulous early morning coffee, foccaccia with herb and garlic and a daily lunch special that is fast, cheap and good (veal knuckle and bottle of red \$15.00!) try "Nick's Spaghetti Bar" in King just up from Lonsdale. Noisy but fun.

Just across the road is an upmarket brasserie called "Kay's on King". Definitely lunch only, it dies at dusk. I tried it twice; once with Richard Stanley and once with "Stick" Collis, both Victorian Silks who know food. The venison sausages, home made, just with potato salad, were wonderful. They were part of a sausage and Yarra Ridge pinot noir promotion and as good a way to deal with being not reached Tuesday, Wednesday, Thursday and Friday as there is! Next time we "celebrated" a hung jury with asparagus vinaigrette and a fabulous oxtail and crunchy fresh vegetables and good chips to share and some St Hallett's "Old Block" shiraz.

We sampled Mietta's, which is good, *fancy* and dear and everybody has already read about it. Try the "Greek Deli & Taverna" in South Yarra which is noisy, fast, cheap, and with cheerful cheeky waiters. The best Greek was the set menu (what you get is what's on!) at "Vasilis Greek Tavern" in Abbotsford. Taramasalata and tzatziki with crunchy bread, pan-fried crumbed sardines, grilled octopus, tender and superb, crunchy crispy lamb on skewers, salad, and more I can't remember. It just kept coming! We had my daughter, my son-in-law, Annette and I and the three grandchildren and the whole lot, including booze, cost \$114.00!!

The "Continental Café" in Greville Street, Prahran, is well worth a Sunday lunch and we also enjoyed "Bortolotto's" in St Kilda, another noisy bistro with good Italian food. Try the garfish, the homemade ravioli and the tripe! The latter was stewed long and slow with onions, tomato, garlic, carrots, borlotti beans and served with an orange brick of polenta, absolutely correct.

But the Ringmaster chooses "La Chaumiére", a little French BYO for the Circuit Food (II) Award. "Stick" Collis recommended it and we hit it twice. The specialities of the house were terrific! French onion soup, snails, duck livers,

## Knocking Around

crispy roast duck, rabbit stew, pepper steak and creme brulée, all very, very good. I especially liked the rabbit - cooked long and slow with vegetables in red wine so the meat stayed juicy, not dry as rabbit often is. The pepper steak was rare and thick and sitting in a hot puddle of tangy pepper sauce. Nothing in the before and afters was less than very good. Service quick and efficient and not *too* Gallic!

I would go a third time with great pleasure.

I cannot tell you how good it was to get home after Melbourne, Sri Lanka and Hobart. Annette and I cooked a special meal that I would like to share with you.

We fried finely chopped onion, carrot, parsnip, garlic and celery. Then we browned 4 thick-cut pieces of veal shank, put the lot in a veal and chicken stock (homemade) with 500 grams of peeled, but not pipped, tomatoes. We bubbled this lot away until the meat was just about falling from the bone.

We served this with broad beans cooked with finely chopped onion and garlic in the microwave and with *desirée* potatoes just microwaved.

A bottle of Gil Walquhist's Botobolar Shiraz (1990) made this better than *any* circuit meal! □

John Coombs QC

## Lunch on the Run

In these tight financial times more and more barristers can be seen eating at the cheaper places around town. Not too far away is the "Taco Tandoori" where the "taste of Mexico and India is right here in Sydney". The proprietor, Helal, offers a variety of foods which can be eaten in the nearby open eating areas.

On the occasion when I visited his eatery again I was in the middle of a Family Law conference and needed a break. My instructing solicitor and I walked down to Helal's shop where he made us a terrific lunch comprising Butter Chicken which has a mild curry flavour, Kashmiri Beef, again of a mild flavour, and Lamb Vindaloo, which was quite hot. These were served with saffron rice, known as Basmati.

We followed this up with Mango Lassi, a mixture of rose water, yoghurt and sugar.

As it was both important and traditional that I shout, I was delighted when the bill came to under \$20.00!

For a quick taste of India and Mexico, the Taco Tandoori in the Hunter Connection Arcade is well recommended. □

Gary McIlwaine

"Lunches O'Brien"

Taco Tandoori

Shop F4-5 Hunter Connection Arcade

7-13 Hunter Street

Sydney Telephone 233 1689

Q. I think you said in evidence today that that occurred after he got out of the vehicle?

A. Yes.

Q. I suggest to you that you knocked Mr Fitzgerald unconscious with your police baton?

A. At no time was he unconscious. I certainly knocked him, but at no time was he unconscious.

A. You have been equivocal about where you actually hit him with the baton, haven't you?

A. Yes, I agree with that, yes.

Q. You weren't equivocal when you were giving your report to the Internal Affairs Branch, were you?

A. I don't know, I haven't read the report at the moment, now.

Q. Didn't you say - you will find it on the second page of your report - "I then drew my baton and struck him with it about the arms and legs"?

A. That's correct, yes.

Q. That's what you said?

A. Yes.

Q. Was that the truth?

A. Yes.

Q. "During this Fitzgerald attempted to grab the baton from me and then I struck him about the legs and he fell to the ground"?

A. That's correct, yes.

Q. Were you trying to create the impression that his falling to the ground was as a result of your administering blows to his legs?

A. I wasn't trying to create any impression. I was simply telling whoever it was, the inspector, in the report, to the best of my knowledge, what happened. I didn't try and create any impressions at all. In the heat of the thing when you aim at somebody's arm and he moves, it's a possibility that you could hit him somewhere else. It's a possibility. You certainly don't aim to do that or try to do that.

Q. Is it a possibility that he threw the left side of his head violently against your stationary baton?

A. I've already said that that's a possibility, yes. It is also a possibility that he received that injury in a fight that he had had earlier on.

HIS HONOUR: Just a moment.

Q. Did you listen to that question that was asked of you? (Last question read out)

A. Oh, I'm sorry, I beg your pardon, sir. That is not a possibility. What I thought you said was is it a possibility that he threw himself and the baton came into contact. I beg your pardon, sir.

(*Leo Fitzgerald v Hayllar Trading Pty Ltd trading as Hayllar and Howe Haulage. Supreme Court of NSW*)

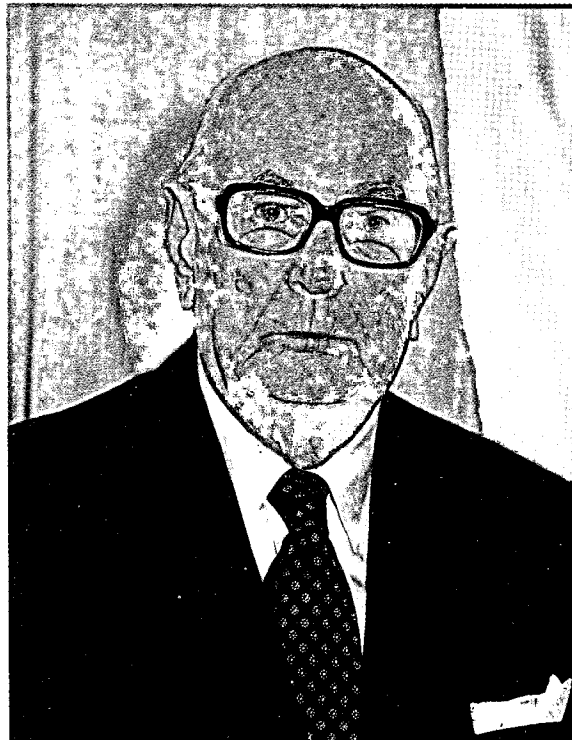
## *The Hon Kenneth Asprey CMG Q.C.*

The death of The Hon Kenneth Asprey, CMG, QC on 28 October last at the advanced age of 88 was a final, sad severance of the Bar's association with one of the great characters, forensic and judicial, of the era in which he lived and flourished in our midst.

For many reasons, he was an altogether remarkable man. It is seldom that the qualities of accomplished lawyer and powerful advocate are united in one person in such full measure. Had he not chosen the Bar as a career after first having practised as a solicitor, his thespian qualities would certainly have enabled him to be an outstanding actor. But his penchant for playing a role was not just ostentation; it was the gift of a man who exerted himself to the utmost in the task of representing his client. He was able to combine a powerful manner with a commanding voice in the exercise of the art of ridicule - one of his favourite weapons in cross-examination. This is not to say that he lacked attention to the more humdrum tasks of an advocate: his work was always painstaking and thorough, save an aversion at times to writing opinions and drafting pleadings. Paper-work briefs travelled many miles between chambers and home without being opened. One of his secretaries, the formidable Mrs Cole, was greatly skilled in the art of placating expectant and impatient solicitors.

He was a good and careful teacher. I had the privilege of being his pupil in 1949-1950. He taught me much, for which I shall ever be grateful. Being his pupil was fun; there was never a dull moment. Occasionally he meted out impossible tasks: I remember that on one occasion he sent me up to the court of Roper CJ in Eq to seek an ex parte injunction to restrain the infringement of an industrial design; he did not seem surprised when I came back empty-handed. A vivid recollection of my time with him was of a junior brief for the defendant in a particularly difficult malicious prosecution action. The case went for some days and we worked with intense energy far into several nights in an attempt to prop our client's cause, but to no avail. But he taught me the importance of planning a cross-examination: to construct, if possible, a beginning, a middle and an end.

Sir Anthony Mason, in an eloquent tribute recently published in the *Sydney Morning Herald*, said that F E Smith KC was Asprey's role model. I would add that he also had a profound admiration for the Chief Justice's uncle, the late H H Mason KC, about whose performances as an advocate he enjoyed telling stories. Asprey was an entertaining raconteur, whose accounts of his own forensic feats never lost anything in the telling, except perhaps a little bit of accuracy.



That Asprey was not just a talented show pony with gusto of manner was always apparent to those who knew him and worked with him. His performance as a judge demonstrated the error of those very few critics who thought that his great style covered a lack of essential substance. After talking silk in 1952, he was appointed to the Supreme Court in 1963 and to the Court of Appeal in 1966. He was a model of exemplary judicial behaviour, partly because he consciously set about acting the part of a judge, confounding those who, because of his strength as an advocate, doubted his aptitude for judicial work. Unlike some great advocates who ascend to the Bench, he became a great judge.

In 1967-1968 he sat as one of the Royal Commissioners in the Second Voyager Inquiry. He was Chairman of the Commonwealth Taxation Review Committee, which did its work in 1972-1975. He was made a Companion of the Order of St Michael and St George in 1977.

Let me now tell you a short story about him. At a Bar party many years ago one of his colleagues ventured the remark: "We are an odd looking lot, aren't we Ken?" From his great height he looked around the room and said "Yes, aren't they!" His self-exclusion was correct.

In his career as counsel Asprey epitomised those qualities of intellectual rigour and rugged individualism which are the *raison d'être* of an independent Bar. The political and other minnows who are bent upon turning the Bar into an industry rather than a profession would do well to remember that traditions continued by men such as Ken Asprey may not endure if such nihilism prevails. □

T E F Hughes A.O., Q.C.

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## ***William Wallis Caldwell QC***

At the age of 46 Bill was killed in a plane accident on 11 June 1993. An attendance of over 500 friends at a memorial at St Andrew's College (where Bill had been senior student) was one indication of the respect and affection in which he was held in the legal profession.

Bill's education was at Young, Scot's College Sydney, Sydney University and London University. He did articles at Hunt & Hunt before practising as a solicitor with his father Jock in Young, and later at Sly & Russell.

Called to the Bar in 1975, Bill practised widely in the area of commercial law and equity. He was one of the leaders of the maritime bar. His advocacy style was one of quiet, confident persuasiveness backed by a command of legal principle. After taking silk in 1986 his appellate practice grew.



Bill married Hilary Mills in October 1981. They have four daughters: the twins, Helen and Elizabeth born in 1984, Meredith born in 1988 and Rosemary born in 1989. Bill was devoted to his family and particularly enjoyed camping and teaching the girls to ride. He was particularly attached to the Young district, where he was born and where he died. In his younger days Bill had been an enthusiastic rugby player and an accomplished rower. Latterly he acquired a passion for mountain climbing which saw him trekking in South America, New Zealand and Switzerland. A love of sailing and theatre also marked this finely accomplished man.

Bill's engaging disposition gathered and bonded a wide circle of friends at the Bar and beyond. His sudden passing is a sad loss. □

Keith Mason QC

## ***Judge Donald John McCredie***

Judge Donald John McCredie died tragically as the result of an accident when the light aircraft in which he was a passenger crashed in Florida USA on 21 July 1993.

He was born on 11 June 1937 and was educated at S.C.E.G.S. North Sydney and the University of Sydney. At Shore he developed a love of sport and his proficiency was awarded with colours in cricket and tennis. He enrolled in the Faculty of Medicine in 1955 and entered St Pauls College.

After finding that medicine was not his vocation he turned to law and graduated with the degree of LLB. He was admitted as a solicitor in 1962 after serving articles with the firm of Conway Maccallum & Co.

Donald represented Sydney University in both squash and tennis at the first level. He was a member of the Badge tennis team and was awarded a Blue for squash.

Before being admitted to the Bar on 26 July 1968 he became a partner in C R Potts & Co Solicitors.

No brief was so modest that it did not receive his utmost attention and he had a high regard for the traditional ethical obligations and responsibilities of a barrister.

In later years, having shown an early propensity to perform at school, he became an active member of the Sydney Philharmonic Choir.

He continued to play cricket and squash on a regular basis until recently and was still playing a mean game of tennis right up to the time of his death.



A deep love of travel led to the commencement of flying lessons in the last twelve months.

During his time as a member of the bench of the District Court, Judge McCredie proved to be careful, conscientious, hard working and dedicated to his work.

He was interested in taking part in any of the programs aimed towards improvement of the court system. In this respect he participated in the individual judge list system for civil cases and the first sentence indication hearing scheme in Parramatta at the beginning of 1993.

He was fastidious by habit, punctual in performance and deferential and courteous in his behaviour yet he was convivial by nature and enjoyed nothing more than to fraternise with his wide circle of friends. His loyalty to his friends and fellow practitioners and the high regard in which they held him was demonstrated by the large numbers in attendance at the funeral service held in St James Church on 30 July 1993.

He had a close relationship with each of his three children and he was extremely proud of their achievements.

David is employed as a solicitor after graduating with a BA (Hons) and LLB while Fiona holds the degree of Bachelor of Agricultural Science (Hons) and Anna is a Bachelor of Economics.

The untimely passing of Donald McCredie will be profoundly regretted. □

# Book Reviews

## ADR Principles and Practice

Henry J Brown and Arthur L Marriott

Sweet & Maxwell 1993

Hardback \$A185.00

410 pages plus tables, index, glossary and appendix

Distributed by the Law Book Company Limited

This book is proof positive, if proof were needed, that alternative dispute resolution (and particularly mediation) has become part of the mainstream of law practice in common law countries. As Sir Thomas Bingham, the Master of the Rolls, says in the foreword to this substantial work:

"To facilitate a just settlement between hostile parties is, as this book makes very clear, a highly professional task."

The authors are respectively partners in Penningtons and Wilmer Cutler & Pickering (an international firm of high standing based in Washington DC). They, likewise, have approached their task of providing practitioners with a comprehensive and practical guide to alternative dispute resolution in a highly professional way. And, while it is refreshing to see an English text say:

"Various jurisdictions, particularly in Australia, are very considerably ahead of this country in introducing procedural change in litigation, particularly by using ADR procedures (p. xiii),"

there is no doubt, as Sir Thomas observes in the foreword, that this book will help the English catch up.

This is a work that sets out to discuss principles and also to provide a comprehensive guide to practice. The authors believe it to be the first work of its kind in England. There is as yet no Australian equivalent; one is badly needed.

Even given the lack of an Australian ADR practice book, can one justify spending \$A185 on an English text? That, of course, will depend to some extent on your library budget. Obviously, *ADR: Principles and Practice* will not guide Australian practitioners through the recent proliferation here of statutory provisions, practice directions, judicial decisions, articles and practical developments (and, indeed, the brief description at pp 47-48 of "the experience in Australia" is rather dated and somewhat inaccurate). What can be said, however, is that it provides, in one volume, an enormous amount of well-organised and useful information on the principles and the practice of ADR.

The book's primary focus is on mediation. It also has chapters on negotiation, arbitration, mini-trials and other forms of ADR. Mediation has eight chapters devoted to it, covering:

- principles of mediation
- mediation: the common core of practice
- civil and commercial mediation
- divorce and family mediation

- labour mediation
- mediation of community disputes and criminal reparation
- mediation of public issues and social conflicts
- function, role and skills of a mediator

In addition, there are chapters on the choice and timing of using ADR processes, and confidentiality and privilege as they apply to ADR.

There is also a useful chapter on how to represent parties in ADR processes. In it the authors (rightly, in this reviewer's view) advise:

"Lawyers should not assume that their knowledge and experience of traditional adversarial procedures will equip them to represent clients in the ADR mode. Once immersed in an ADR process they will no doubt be able to learn as they go along, and the neutral will invariably assist them in working within the new system; but if they wish to achieve the greatest benefits for their clients, it would be helpful for them to acquaint themselves with the procedural details and the philosophy of the process in which they will be working." (at 300)

In a chapter headed "Jurisdiction, forum and law" the work includes a number of mediation agreements and discusses whether the courts would enforce them. The English law on point suggests that they would not because of a number of decisions, culminating in *Walford v Miles* [1992] 2 AC 128, in which agreements to negotiate were held to be without legal effect. Interestingly, the authors note:

"It remains unresolved whether an ADR clause would be enforced by the English courts if it were to specify a machinery for dispute resolution covering mediation in the first instance followed by arbitration if necessary thereafter. If the ADR provision is clear, certain and reasonably detailed in its terms, and especially if it is an inherent part of a process which involves a stipulation for an eventual determination if the negotiation and mediation phases do not resolve the issues, there would seem to be no reason why a court should not regard it as being enforceable as it would in relation to an arbitration clause." (at 329)

In New South Wales, however, this question has been resolved by *Hooper Bailie Associated Limited v Natcon Group Limited* (1992) 28 NSWLR 194, where Giles J held that an agreement to conciliate or mediate would be given legal effect if it required sufficiently certain conduct of the parties.

What is important, however - and what is not recognised by *ADR: Principles and Practice* - is that because Equity will not order specific performance if continual supervision of the Court would be required, mediation agreements can probably only be enforced by ordering the cessation of other activities (such as arbitration or litigation) that the parties have promised to abstain from until they conclude their mediation. That fact renders it essential that mediation agreements make concluding

the mediation a condition precedent to commencing arbitration or litigation.

This is a useful overview and analysis of the principles and practice of ADR in general and of mediation in particular. It is not cheap. But there is as yet no Australian equivalent. And it has brought together within its covers a great deal of analytical and practical material for the practitioner who wants to know how to integrate ADR into his or her practice.

□

Robert Angyal

## Constructive Trusts

M Cope

Law Book Company 1992

Hard Cover RRP \$175.00

The imposition of a constructive trust as a remedy is an increasingly popular form of relief for litigants seeking to recover assets in the wake of the recent corporate collapses. Creditors have the potential to recover the full amount outstanding rather than being restricted to an often very small dividend payable to unsecured creditors in a liquidation. Liquidators have also sought relief by way of the imposition of a constructive trust when the usual armoury of remedies is circumscribed by, for example, the expiry of relevant time periods or when the proof of insolvency is difficult.

Not only is the conduct of the directors of an insolvent company now rigorously scrutinised by liquidators and creditors, but also that of parties who may have assisted or induced a director to have breached his or her fiduciary duties. The imposition of a constructive trust is a much more flexible remedy than seeking to trace in equity or to recover funds as preferences or voidable dispositions. Proof of the "receipt of the funds" is not essential as a stranger may be liable to compensate a principal if the stranger has induced or participated in a director's breach of fiduciary duty, irrespectively of whether the stranger has received any funds of the company by reason of that breach.

The stated objective of Professor Cope's recent text "Constructive Trusts" is to focus on the constructive trust as a proprietary remedy to give effect to obligations and liabilities enforceable in equity. He commences by examining the nature of a constructive trust and in particular the remedial theory of the constructive trust. Much of the book is concerned with an analysis of the relationship between the constructive trust and the acquisition of property by fiduciaries, through mistake, fraud and duress, on death and by law under an oral agreement. Professor Cope also examines in detail the extent to which constructive trusts can be employed to do justice and to prevent unjust enrichment and unconscionable conduct. The book also includes a useful theoretical analysis of promissory and proprietary estoppel.

Perhaps the most significant aspect of "Constructive Trusts" is Professor Cope's analysis of a stranger's personal liability for a trustee's disposition of trust property in breach of trust and a stranger's liability to account for profits and benefits acquired as a result of a breach of a fiduciary obligation. He carefully reviews the extent to which the second limb of *Barnes v Addy* has now been extended to participation in a breach of fiduciary duty, quite independently of the existence of any express trust, by the High Court in cases such as *Consul Developments and Hospital Products*.

Despite the breadth of the author's analysis, "Constructive Trusts" is ultimate disappointing. Too much of the text is occupied with a review of other relevant texts rather than with an original analysis of the authorities. Conflicting theories and the facts of cases are set forth in great detail in the body of the text rather than being identified and then referred to in footnotes. The text is unduly lengthy and at times it is difficult to identify the propositions which are being propounded by Professor Cope.

The subject matter may be difficult and the authorities often contradictory, but a more robust and concise analysis would have been preferable for practitioners. On a practical level practitioners will find the frequent citations of High Court judgments in unauthorised reports rather than in the Commonwealth Law Reports irritating.

On balance "Constructive Trusts" would be a useful but certainly not an essential addition to a commercial/equity lawyer's library. □

John Halley

## Environmental Law and Local Government in New South Wales (1991)

Zada Lipman (ed)

Federation Press - RRP \$35.00

*Environmental Law and Local Government in New South Wales*, edited by Zada Lipman, lecturer in Law at Macquarie University, is not, as the title may suggest, a comprehensive treatise on the role of local government in environmental control in NSW. It is a collection of chapters by various authors originally delivered at a seminar on Local Government and Environmental Control at Macquarie University in September 1990. Topics covered are Heritage Law (Ben Boer), Social Planning (Donna Craig), Urban Consolidation (Patricia Ryan), Pollution Control (Zada Lipman), Resident Participation in Appeals (Justice Paul Stein) and Land Use Control (Linda Pearson).

According to Lipman in her Introduction, the book has a number of purposes, but in particular it seeks to clarify and explain the role of local government in environmental control. Whether these purposes are achieved is discussed below.

The first chapter on Heritage Law outlines the legal powers of local government in relation to heritage protection and the extent to which these are modified by legislative initiatives at both State and Federal levels. Boer considers the increasing responsibility given to local government in the domain of heritage protection, and highlights the resulting problems through a brief case study. His discussion of the role of local government is essentially descriptive, though he does make some suggestions about how it can play a more effective role in heritage protection.

Donna Craig's chapter on Social Planning considers the extent to which social planning is carried on within the framework of the *Environmental Planning and Assessment Act*, and the legal, institutional and financial weaknesses of this framework. While she discusses the role of local government, and in particular its lack of resources to undertake social planning effectively, she does so only incidentally, approaching the problem from the point of view of social planning rather than from that of local government. She concludes with suggestions about how the issue can be better addressed.

Patricia Ryan's chapter on Urban Consolidation, in contrast, is clearly written from the point of view of local government. Her discussion of the issue highlights the relative roles and powers of State and local government, emphasising the latter's lack of effective control resulting mainly from fundamental problems associated with education, resources and leadership. Her chapter is perhaps one of the most useful in the book, particularly for its discussion of urban consolidation policy, which includes a brief consideration of the more important State Environment Planning Policies. Her chapter also includes an appendix of urban consolidation cases reported in the Local Government Reports.

The chapter on Pollution Control by Zada Lipman is also written from the point of view of local government. She emphasises the important role that local government should and does play in pollution control, and in particular the need for an integration of pollution control and planning processes, and for cooperation between local government and authorities at the level of State government. She ends her discussion with suggestions on strategies local governments can implement to play a more effective role in waste minimisation.

Justice Stein's chapter on Resident Participation in Merit Appeals and Section 123 Applications is somewhat out of place in this book, given that the concern of his paper is the extent of citizen participation in actions before the Land and Environment Court. Local government is mentioned only incidentally, in the context of residents' participation in litigation brought by a local council, and notification procedures in the planning process. Nevertheless, the chapter presents a good summary of the ways that citizens can become involved in environmental matters.

The final chapter, Land Use Control, is concerned with the implications of amendments proposed to the *Local Government Act* by *White Paper: Local Government Act Review* released in July 1990, and the subsequent Discussion

*Paper Reform of Local Government in NSW: Proposals for Legislation* released in August 1991. In a chapter which is essentially descriptive, Pearson focuses on the draft Bills and SEPPs proposed in the White Paper, noting any changes suggested by the Discussion Paper. The proposals contained in these papers have been superseded to an extent by the Exposure Draft Local Government Bill 1992 released as a result of submissions in response to the Discussion Paper in December 1991. Pearson's discussion is therefore not up to date, and although many of the proposals in the earlier papers have carried through to the 1992 Bill, this chapter will be of limited use, except perhaps as background.

The purposes of the book stated by the editor in the Introduction are not completely fulfilled by all of the papers presented in the book. Diverse aspects of local government are discussed, but not in a comprehensive way, and given the difficulty in identifying a common theme, it is difficult to agree that the book sufficiently clarifies the role of local government in environmental control, or that it is essential reading for this reason. With the exception of Justice Stein, all authors make some suggestions about how local government can play a more effective role in environmental control. The book is perhaps most successful in fulfilling its purpose of informing the reader as to basic issues in relation to local government and the environment.

Because of its lack of comprehensiveness in respect of both description and critique of the issues covered, the book is probably of use to practitioners only as background reading. Its discussion of policy issues and suggestions about a more effective role for local government means that it would be of most use to local government officers and councillors. The chapter on Resident Appeals would be of great use to individuals and public interest groups wanting to play a greater role in litigation and the planning process. □

Georgina Hayson

## Guilty or Innocent?

### The Gordon Bennett Case

Mark Clisby

Allen & Unwin 1992 RRP \$24.95

Controversy about the fall of Singapore in 1942 was revived last year following the release of hitherto secret reports by General Wavell to the British War Cabinet. In those reports, Wavell was somewhat disparaging about the fighting ability, courage and demeanour of the Australian soldiers in the defence of Singapore.

The simplistic finger pointing by Wavell has done nothing to answer some of the complex historical questions which arise out of the fall of Singapore and the conduct of the entire Malaya campaign. We have yet to comprehend fully why the numerically inferior Japanese force were able to rout and force the surrender of the British Force.

We have yet to come to terms with the responsibility to be borne by Wavell and Percival, the British commanders, let alone the British War Cabinet. What also of the Australian government's knowledge about the way the war was being conducted in Malaya?

All of these questions are raised by one of the more intriguing incidents in the whole campaign: the escape from Singapore by Major-General Gordon Bennett. The propriety of Bennett's escape and the circumstances surrounding it are addressed in Mark Clisby's recent book about 'The Gordon Bennett case'.

Should Bennett have stayed with his men and gone to Changi with them? Was his escape justified because it was his duty to escape as a POW? Or was his escape justified in the national interest, Bennett being the only senior Australian commander to have faced and fought the Japanese in the jungle?

The controversy surrounding Bennett's escape was the subject not only of considerable public comment during and after the war. In October 1945, apparently at General Blamey's instigation, Bennett's case was brought before a closed Military Court. Bennett's objection to the composition of the Court was overruled, and Bennett took no part in its enquiry. The Court found against Bennett and ruled that he had, in effect, deserted his post.

After agitation by politicians, the RSL and significantly the 8th Division association (the soldiers under Bennett's command in Malaya) a Commission of Inquiry was established. Mr Justice George Ligterwood of South Australia was appointed Commissioner. The Commissioner held public hearings, Bennett appeared and was represented by Counsel.

The facts are simple. Bennett was a distinguished but ambitious citizen-soldier. He was commander of the Australian forces in Malaya. He was under the operational control of the British Commander in Malaya, Lieutenant General Percival. However Percival did not have complete control over Bennett and the Australians, because Bennett had direct right of access to the Australian War Cabinet.

Percival signed an unconditional surrender with the Japanese at 5pm on 15 February 1942. A ceasefire took place under the surrender instrument at 8.30pm that day. Bennett and a small party including some staff officers escaped at 10.30pm that day. The Australians captured by the Japanese were interned in Changi five days later, on 20 February 1942.

Bennett returned to Australia. He briefed the Australian War Cabinet about the Malaya campaign and the fall of Singapore. He was promoted to Lieutenant General, given a command in Western Australia, published a training manual on Japanese tactics but was not given any further active command during the War. Antipathy and rivalry apparently existed between Bennett and Blamey. Bennett resigned his commission before the end of the war.

Mr Justice Ligterwood found that Bennett had made an error of judgement, was effectively guilty of desertion but with extenuating circumstances. He found that Bennett's honour and patriotism could not be questioned. The pivotal finding

was that Bennett was not technically a POW at the time of his escape, and that he would not have become a POW until he had arrived at Changi with the other Australian troops. As Clisby points out, that technical finding is open to question as a matter of international law and common sense.

The Commission hearings allowed the Bennett case to be aired publicly. However, its findings did little to resolve satisfactorily the question of whether or not Bennett was right or justified in escaping. It is for this reason that Clisby's book holds such appeal and makes very interesting reading.

Clisby is an Adelaide barrister and Army Reserve officer. He presents the facts and the cases for and against Gordon Bennett in a brief and uncomplicated manner. He treats the reader as a jury member. In presenting the cases, he has used anecdotes, historical commentary and transcripts of important evidence presented to the Commission. Both cases are, for the dispassionate reader, presented fairly.

Having read the cases for and against Bennett, and Clisby's summing up, the reader as jury member is invited to make his or her decision. However, in reaching that decision, one is drawn back to the much wider controversy about the fall of Singapore and the conduct of the Malaya campaign. For this reason alone the publication is timely, because on the wider controversy the jury is still out. □ T D Castle

## Observant!

Kirkham DCJ recently presided at the trial of a young man charged with a serious robbery with wounding at a Bowling Club. Two offenders, one armed with a double barrel shotgun and the other a knife, menaced the victims with their weapons. The male victim was stabbed twice in the process (a very vulnerable and sensitive organ). The other victim was asked this question in chief:

Q. "Did you notice anything about the demeanour of the two men?"

To which she innocently answered ...

A. "The one with the knife was the meaner of the two."

(*R v Visser* District Court of NSW)

### FOR EXPERT PRE-SENTENCE REPORTS

**BRIAN M KEARNEY**  
LLM., MScSoc., DipCrim., Dip Jur

**299 6060**

# Motions and Mentions

## Academic Review of Admission Boards Course Begins

The Legal Qualifications Committee (LQC) of the Barristers & Solicitors Admission Boards has recently initiated a full-scale academic review of the Admission Boards course. This will be the first such review of the course. The work is to be undertaken by the Centre for Legal Education on behalf of the LQC.

The specific terms of reference are:

*To investigate and report on the quality of the Barristers and Solicitors Admission Boards course, including, but not limited to, the learning objectives, course content, teaching approaches, assessment, admission to the course, external studies and administration.*

*The Sub-Committee is not to address the matter of the course's closure nor the issue of oversupply of lawyers.*

More specifically, the review will look at the course's aims, the structure of the course, the content and structure of particular subjects, teaching methods, teaching materials and other resources, procedures for the appointment and review of teachers and examiners, assessment procedures, qualifications for admission to the course and the governance and administration of the course.

The review will include analyses of course documentation, interviews with key people and consideration of submissions received from students, former students, practising lawyers and others.

The LQC sub-committee comprises Professor John Goldring (chairman), Ms Patricia Blazey, Ms Margaret Hole, Mr Bruce Kercher, Mr Phillip O'Toole and Professor Colin Phegan. A panel of consultants has also been appointed comprising Mr Ronald Sackville QC, Ms Jane Levine, Mr David Bowen and Ms Felicity Wardhaugh. They will provide comment on a discussion draft of the final report.

The LQC is inviting submissions from barristers. Any member of the Bar who wishes to make a submission is invited to do so. A set of the full terms of reference should first be obtained from Mr Phillip O'Toole, the Executive Officer of the Admission Boards (telephone 392 0310 fax 392 0315) and submissions made to him by no later than the end of December 1993.

The Centre for Legal Education has already completed several reports for the Admission Boards on the student body of the course.

Two are snapshots of the student body (of over 4,000 students) and the other is a career destinations study of those who completed the course in 1990 and 1991. These reports are generally available and copies can be purchased from the Centre - (telephone 221 3699 fax 221 6280). □

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Chelsea, London, available for short term lets.  
Contact Gordon Johnson 231 4366.

## 1994 Red Mass



Mr John McCarthy QC  
President, St Thomas More Society  
and the Council of the Society  
cordially invite all members of the Bar to the  
**CELEBRATION OF THE 1994 RED MASS**  
conducted for the Opening of the 1994 Law Term  
to be held in  
**ST MARY'S CATHEDRAL, SYDNEY at 9.00 am,  
MONDAY 31ST JANUARY 1994.**

Judicial Procession from Main Doors at 9.00 am.  
Arrangements have been made for Judges and Counsel  
to robe in the Crypt.  
Dress for Senior Counsel: Full Bottomed Wigs  
Morning Tea will be served  
in the Reception Room after Mass.

Any enquiries contact Ailsa Denton,  
Secretary to J A McCarthy QC - telephone 231 1006.

## Superannuation 1994 - A National Conference for Lawyers

The Leo Cussen Institute, together with the Law Council of Australia, will be conducting the Annual Superannuation Conference for lawyers from 24th to 26th February 1994 at the Gold Coast, Queensland. Enquiries should be directed to Dianne Rooney Telephone (03) 602 3111 Fax (03) 670 3242.



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## **Annual Bench and Bar v Services Golf Match - Elanora Country Club 27 August 1993**

A small but enthusiastic team of judges and barristers engaged the Services at Elanora Country Club for the Annual Golf Match played between the Bench and the Bar and the Services on 27th August 1993.

The golf was played in pleasant conditions but unfortunately without success on the part of the Bench and Bar. At the black tie dinner that followed, however, the general consensus was that the Bench and Bar handsomely won the eating and drinking, which was an excellent effort given the absence from our team of Bob Toner.

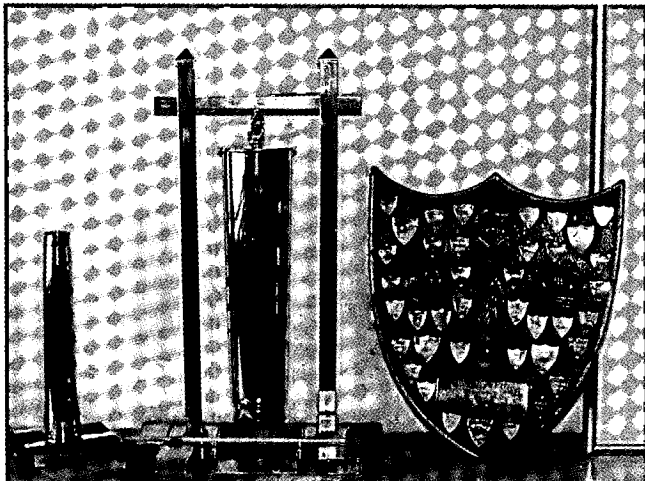
As usual, the match was played as a four ball, best ball, Stabelford competition, but on this occasion an individual event was conducted for members of the Bench and Bar, the prize for that individual competition being the Northern Ireland Medal, presented by the members of the Bench and Bar of Northern Ireland who toured here last year in July.

The Bench and Bar fielded nine teams of two but the aggregate of their Stabelford scores was not sufficient to beat the best nine scores returned by the Services and accordingly the overall prize of "the Gong" presented for perpetual competition by Brigadier General Phillips in 1950 again went to the Services, as it did in its inaugural year.

It pains me to report that the trophy for the "A" grade competition (handicaps scratch to 15) was won by the Services and the "B" grade trophy (handicaps 16 to 27) was also carried off by the fighting forces.

Those three perpetual trophies can be viewed by those interested in the offices of the Bar Association.

Such success as the Bench and Bar enjoyed was limited, effectively, to competition amongst its own number with



*"The Gong" (centre) was first played for in 1933.*



*Winners are grinners - Cal Callaway QC -  
winner of the Northern Ireland Medal.*

Gyles QC and Graham QC combining magnificently to score 49 points (in fact the best result of the day). That effort was made the more remarkable by the fact that Peter Graham was suffering from a transient bronchial disorder, and from having to partner Gyles QC all day.

On the 16th hole Gyles unleashed a prodigious drive which succeeded in winning the prize for the long drive on the day, and I am reliably informed he hasn't stopped talking about it yet.

The winner of the Northern Ireland Medal was none other than Callaway QC with 42 points. One assumes that his Irish background was as responsible for his success in winning the inaugural contest for the Northern Ireland Medal as it was for his popularity with the G.I.O. in his days at the junior bar.

The non-observance of a mid year vacation by the Supreme Court, a lessened emphasis on a mid year vacation by the District Court, and the growing importance to the junior bar of the Local Court has made it difficult to find a convenient day on which to play this long-standing and important contest. I would be interested to hear from those who have any views on when the match might more conveniently be played. One thought is to play the match early in daylight saving time, hitting off between 2.00pm and 3.00pm so as to minimise the disruption to practices, and hopefully to encourage a greater involvement by members of the Bench.

It is also hoped to return to the practice of dining in, after the match, in the mess of the host service club, or in the common room when the Bar is the host organisation.

Many thanks to David Farthing for his organisational input. □

John Maconachie QC

## Bench and Bar v Solicitors Golf Day

On a steamy, stormy, lightning-interrupted day at Manly Golf Club on 21st January 1993 the Annual Bench and Bar v Solicitors golf match resulted in yet another win to the solicitors.

Seventeen matches were played with the solicitors succeeding 10 matches to 5 with 2 matches halved.

Accordingly, the perpetual Sir Lesley Herron trophy remains in the care of the solicitors for yet another year.

A late afternoon lightning storm caused some of the more cautious players to seek the shelter of the Club house - and a welcome application of neck oil - for about 1/2 an hour until the danger of being turned into a shish kebab passed but not even the intervention of Thor could deflect the solicitors from their inexorable march to victory.

Solicitors Mark Saunders and Graeme Morrison carded the best 18 holes of 50 points, well clear of their colleagues John Conlan and John Rouen (who has traded his New South Wales rugby jersey for a set of usefully employed beaters) on 47 points.

The best the Bar could produce was a creditable 46 points from Bob Toner (the Bar's answer to John Daly) and Col Heazlewood, who insists he spent his time feeding Bob raw liver and keeping him away from District Court Judges.

In the consolation categories the Bar did better with Tony Hewitt and Rainbow Trout QC returning 25 points on the front line while the best of the back nines went to John Maconachie and David Farthing, the only golfer other than Tony Puckeridge able to play the game without a back swing.

The Looney Tunes prizes went to Ian Rose (longest drive) and Jim Kearns (nearest the pin) both of them being from the all conquering solicitors team.

Despite the weather, it was again a most enjoyable contest followed by a pleasant and enjoyable dinner attended by most of those who played.

Our thanks again go to Roger Williams, the doyen of the Law Society Golfing Society, for his magnificent organisation.

□



*Nock receiving the Law Book Company sailing trophy from the President.*

## 14th Floor Wardell Chambers Takes John Hartigan Shield

*(This is an historical record to ensure no Great Bar Boat Race goes unreported)*

A record fleet of 53 yachts started in the 1992 Great Bar Boat Race in overcast conditions and a light 5 kt north-east breeze. As the race progressed conditions improved and most of the race was sailed in sunny conditions with a 10-15 kt north-easter making for a fabulous day's sailing.

This year's event saw competition for the first time for the John Hartigan Shield, kindly donated by his former friends and colleagues on 43 Edmund Barton Chambers. The shield is for annual competition amongst chambers with at least two yachts per chamber being required for eligibility - Selborne and Wentworth being combined for the purposes of the competition. There were 13 chambers competing this year and it was won by the 14th Floor Wardell whose team comprised Egan, Kelly and Kennedy who have all regularly competed in the race since its inception. It is anticipated that the shield will produce lively competition between an ever increasing number of chambers and will prove a fitting means of remembering John, who was not only a fine barrister, but also an active sportsman.

"The Law Book Company Sailing Trophy" was won by Nock in Freedom Bound. This victory crowned two previous second placings on the part of Nock but it is clear that the handicappers next year will exact their retribution as a result of this stylish victory.

Second place was taken by Royle in Seahawk and Kennedy was fortunate to take third in Alice-B.

The President of the Bar Association, John Coombs QC, was kindly on hand to present the trophies and Bar Association pewters.

Judge Don McLachlan of the District Court took the Chalfont Cup in Trilogy in the annual competition between judges and silks and presented in memory of the first President of Chalfont Chambers, A J Bellanto QC. It was delightful to have his son, Tony Bellanto QC, on hand to present this trophy.

"The Compo Cup" was won by Halligan in Relish III being a member of the junior bar who competed with distinction in the race but did not otherwise win a trophy.

There was strong competition for the "Gruff Crawford Memorial Panache Trophy". Hughes and his crew were decked out in multicoloured uniforms which were apparently acquired at "Target" but owed something of their origins to World Series Cricket. There was another crew who were impersonating Fathers Christmas but unfortunately there were no reindeer to give them a leg along in the race! The trophy was ultimately awarded to Egan who, as he rounded Shark Island, came in so close in order to gain an advantage over other yachts that he fell into the lee of the island which caused his yacht, Misty, to turn at least 180°. He was becalmed in this

rather distressing condition for at least 20 minutes and lost all chance in the race.

The race again proved a great sporting and social success and there were at least 200-300 persons on Store Beach for the presentation of trophies.

This year the organisers encouraged as part of the entry fee, donations to the Bar's charity, the Prince of Wales Childrens Hospital. At the time of writing this report it was anticipated that some \$2000 had been raised. Many thanks to all those who made donations and to all the skippers and crew that made the day such a fantastic success.

Special thanks to O'Connor QC and McKeand for the provision of start boats and to Alan Brown of CYCA for handicapping the race and acting as Official Starter. □

D A Wheelahan QC



*The President in an expansive mood.*

## Tennis - Judge Barbour QC Cup

The removal of the August Bank Holiday from the days when our Courts did not sit meant there were difficulties in finding a suitable day for the Bar Tennis Competition. With plenty of notice, it was scheduled for Tuesday 22 December 1992 and nearly 40 counsel and Judges (men and women) booked to play.

Unfortunately due to difficulties of the Bar Council, the day was initially cancelled and then on Friday 18 December 1992 it was revived but with a change of venue.

This late change to the Ryde Sporting Complex was made possible by the co-operative arrangements I pursued with Kim Morrissey who organised the venue and arranged the luncheon.

The day's play was enjoyed to capacity by all fourteen competitors "on the Court and off the Court", at the Luncheon. It was good to see people from Wollongong and Parramatta.

The Judge Barbour QC Cup was won in the Final play-off by Clarrie Stevens QC and Tony Bannon who defeated Michael Elkaim and Peter McDowell 6/3 (rain at 4.00pm precluded the second set being played).

The 1993 Annual Tennis Day is presently being organised and it is hoped the other players who, due to the late change of venue, missed the enjoyable day last December, will be "on the Courts in 1993!" □ Tony Reynolds

## Chess - Bench & Bar v Solicitors

An annual chess match pitting the Bench and Bar against solicitors has been 6 years in the planning (you have to do these things properly). The inaugural match finally kicked off on 5 November 1993 at the University & Schools Club, with a team of 12 stalwarts representing each side.

Before the match most players claimed not to have played for years. But after a few drinks at the bar afterwards, details of clandestine training began to leak out. There was a rumour that the Bench & Bar had flown in world champion Garry Kasparov for a practice session. One solicitor actually admitted to having bought a copy of *Modern Chess Openings* for the occasion (though he claimed not to have opened it).

The Phillip Street venue was selected with the great care and sportsmanship for which the Bench & Bar are renowned. The club was sufficiently far from the suburban practices of most of the solicitors to plan their games on the long journey in. By contrast, the short stroll for most of our team deprived us of exercise and meant that the worries of the day were still upon us. Despite these significant concessions, we emerged victorious. When the dust had settled from the thud and blunder, the score stood at 9 points to 3, as follows:

1.	Terrey Shaw	1	Roy Travers	0
2.	Justice John Purdy	0.5	Malcolm Stevens	0.5
3.	Ben Ingram	0.5	Adrian Chek	0.5
4.	Malcolm Broun QC	1	Marcus Pesman	0
5.	Stephen Rares	1	Frank Low	0
6.	Horst Bleicher	1	Ron Berney	0
7.	Robert Colquhoun	1	David Ginges	0
8.	Ken Pryde	1	Roy Williams	0
9.	Doug Williams	0	Duncan McIntyre	1
10.	Paul Glissan	0	Aaron Mucsnik	1
11.	Gordon McGrath	1	Maurice Marshan	0
12.	Ventry Gray	1	Alex Koroknay	0
		9		3

Ken Pryde earned a special prize for the ferocious way he handled his King's Gambit. His opponent, Roy Williams, collected a similar award for the meticulous manner in which he picked his way through (almost) all the ambushes set by Ken. At least one game could easily have gone the other way, but I shall exercise my right to silence by not indicating which it was.

The games finished in 2 hours, but the ensuing post mortem in the dining room and then the bar lasted until the small hours. By that stage, everyone had proved conclusively that he had never had an inferior position at any stage of the evening, and that his opponent had either been extraordinarily lucky or had deserved his fate.

The handsome perpetual shield, donated by the members of both teams, is now on display in the common room trophy cabinet. Have a look at it quickly, as we may not be able to hang onto it next year! □

Terrey Shaw