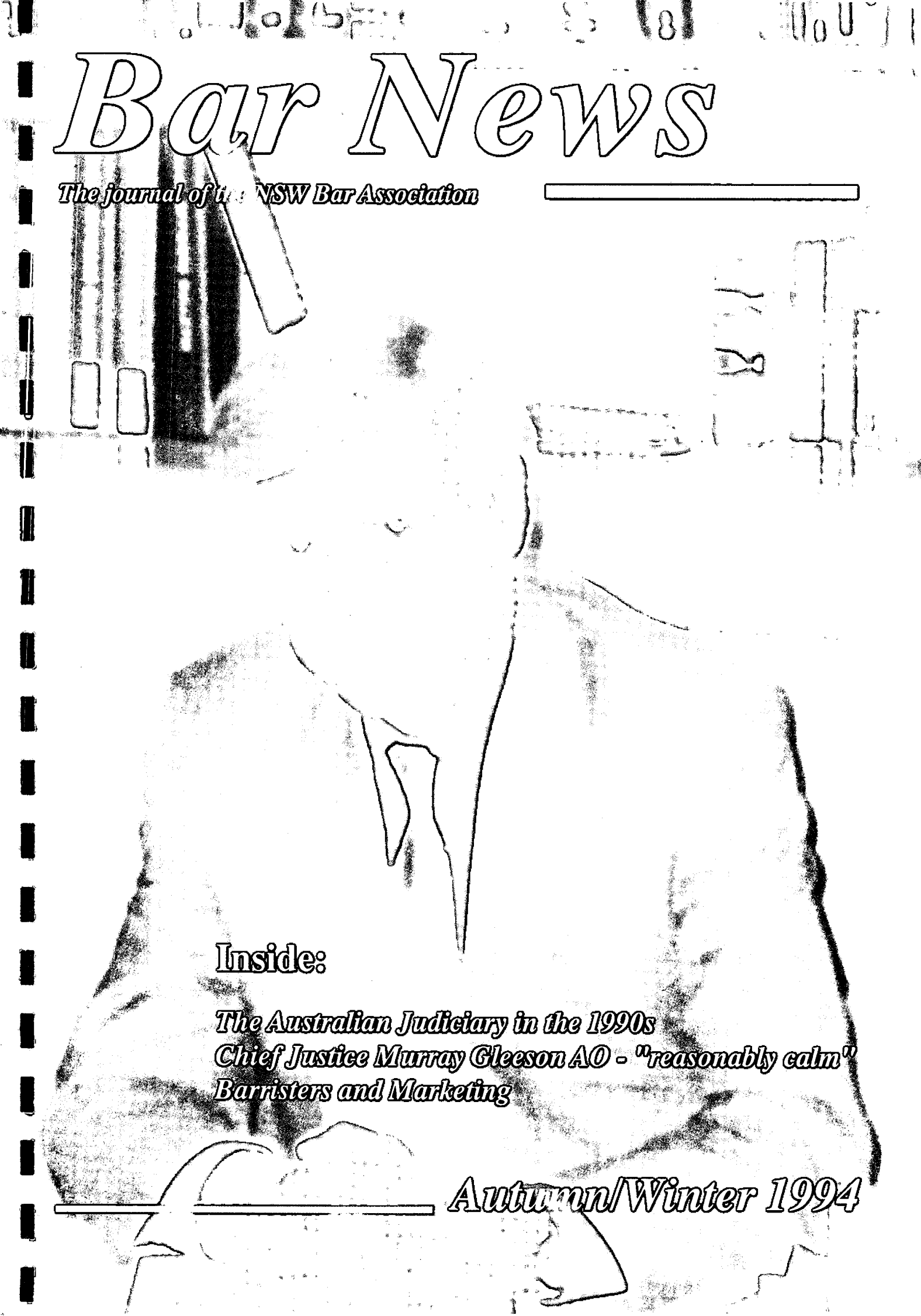
Bar News

The journal of the NSW Bar Association



Inside:

The Australian Judiciary in the 1990s
Chief Justice Murray Gleeson AO - "reasonably calm"
Barristers and Marketing

Autumn/Winter 1994

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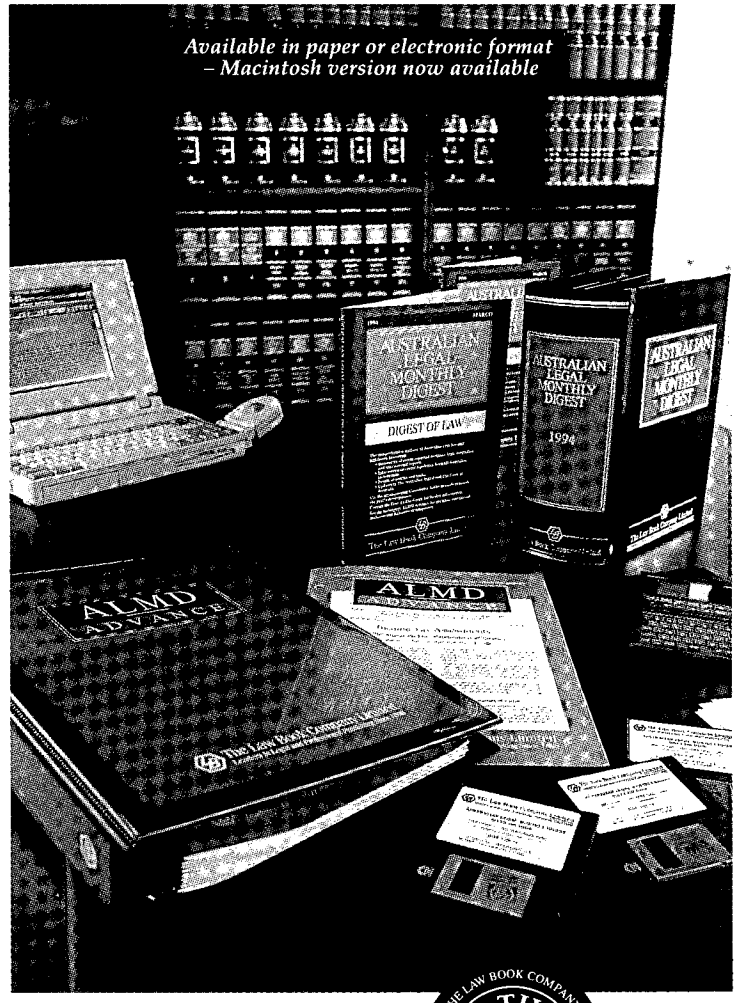

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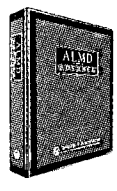

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Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they would be interested in assisting.

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in this issue ...

Bar Notes

Conduct During Arbitrations

The Bar Council has had referred to it a number of cases in which there has been excessive familiarity between members of the Bar acting as District Court Arbitrators and other barristers appearing in front of them. In some cases this has caused embarrassment to clients, solicitors or opponents from the Bar itself.

Members of the Bar sitting as arbitrators or appearing before them are reminded that, while the procedure is obviously less formal than that which takes place in a courtroom, care should be taken to avoid excessive informality. This is particularly the case where one counsel only is particularly well-known to the arbitrator because informality in such circumstances can give rise to an appearance of partiality on the part of the arbitrator. "In-jokes" passing between the arbitrator and counsel for one party are quite inappropriate to arbitrations. ❑

ACT Supreme Court

Practice Direction No 2 of 1994 Queen's Counsel - Senior Counsel

1. This Practice Direction applies to persons admitted to practise in the Australian Capital Territory, or entitled to practise in the ACT under the *Mutual Recognition Act*, and who practise solely as barristers.
2. In view of the moratorium placed by the Australian Capital Territory Executive upon the further appointment of Queen's Counsel, the Judges have decided that barristers who have been appointed Queen's Counsel for the Commonwealth or for a State or for another Territory should be accorded recognition similar to that accorded to Queen's Counsel for the Australian Capital Territory.
3. Queen's Counsel from outside the Territory may continue to robe as previously and may use within the Territory the title of Queen's Counsel. However, the title "Queen's Counsel for the Territory" may be used only by persons appointed to that office.
4. Queen's Counsel from outside the Territory who wish to be accorded the recognition proposed should observe the courtesy of notifying the Court by writing to the Registrar informing the Registrar of the fact and date of the appointment relied upon and asking that the records of the Court be noted accordingly.
5. Barristers appointed Senior Counsel in New South Wales will be accorded similar recognition. Schemes similar to that in New South Wales will be considered as the occasion arises.
6. Precedence of practitioners continues to be governed by the *Legal Practitioners Act* and appearances are to be announced according to the precedence laid down in the Act. (Issued 17 March 1994). ❑

Advocacy Seminar in Singapore

On Saturday, 19 February, the Asian-Pacific Liaison Committee, in conjunction with the Singapore Law Society, organised a very successful advocacy seminar at the Oriental Hotel in Singapore. The participants were John West, Ron Sackville, Henric Nicholas (who presented a paper by John Sackar who was unable to attend), Brian Donovan and David Bennett. Geoff Lindsay, a member of the committee, accompanied the group and acted as team manager. All participants paid their own fares and hotel expenses.

Each barrister presented a paper on some aspect of advocacy. The occasion was sponsored by the Singapore Law Society and each session was chaired by a Singapore lawyer.

It had been expected that about 50 or so people might attend. The actual attendance was 350, all of whom paid $Sing.100, so the Singapore Law Society made a large profit out of the occasion (a Singapore dollar is worth very slightly less than an Australian dollar). The attendance represented about 15% of the lawyers in Singapore.

The Committee had planned to make a small sales pitch for the New South Wales Bar at the end of the session and had been worried how to do this in a reasonably subtle way. This problem was solved because the Chairman of the last session, Michael Hwang, made a speech about us that was far more commercial than anything the participants would have dared to say. He described from personal experience how expensive English silks were and how moderate Australian silks were in comparison, and exhorted all those present (fortified by the performances they had seen) to brief Australian rather than English silks in the future. ❑ DMJ Bennett QC

Operation of Amendments to Legal Profession Act 1987 - Counsel's Fees

Part 11 of the *Legal Profession Act* 1987 will come into force on 1 July 1994. Among other things, the provisions of Part 11 have a significant impact upon arrangements as to fees between barristers and solicitors.

In recognition of the significance of these changes, the legislation contains a provision designed to enable barristers to preclude the operation of the amendments to work done or in progress up to 30 June 1994. This provision is as follows:

Schedule 8

"Barristers' costs

42. Part 11, as substituted by Schedule 3 to the *Legal Profession Reform Act* 1993, does not apply to barristers' costs for which a fee has been marked or a memorandum of fees has been rendered before the commencement of that substituted Part."

This provision is specifically brought to the attention of all practising members so that they may decide whether to render a memorandum of fees in current cases on or before 30 June 1994. ❑

From the President

Those who are elected to high office are usually permitted 100 days when they can do no wrong: everything runs smoothly and without angst. I wish I could say that had been my experience. Regrettably, it has been a period of considerable turmoil caused by the continued pressure upon the legal profession to restructure.

When I was elected President, the *Legal Profession Reform Act* 1993 had just been passed. So far so good. Then the hard work commenced with the review of our rules as required by the Act. This revision is now advanced to the point that I am satisfied the New South Wales Bar Rules will not only be found to meet the provisions of the *Trade Practices Act*, but will also satisfy any test of public interest or competition which the Advisory Council may apply under the Reform Act. That result could not have been achieved without the hard work and sacrifices made by Bret Walker SC who, practically single-handedly, undertook the task of rewriting our rules.

Since January, however, three other related issues have also required our attention. The first was the publication of the final report of the Trade Practices Commission (TPC). Generally consistent with the discussion paper which was published last year, the report expressed concern at the Bar's sole practitioner rule and what is referred to as "the solicitor's rule", that is, the rule that requires barristers to accept briefs only on referral from solicitors with certain well-defined exceptions. Reading between the lines, however, it seems that the TPC accepts that even if the Bar maintains these two rules this would not involve any breach either by individual members, the Bar Council and/or Association of the provisions of the *Trade Practices Act*.

The second new issue is the agreement of COAG at the Hobart conference in February last to set up a Working Group on Micro-economic Reform to report by the August 1994 meeting of COAG.* The group is required to produce detailed proposals for the further reform of the legal profession. It is anticipated that these proposals would go beyond the powers of the TPC and notwithstanding that such reforms could not be a consequence of any rules and/or conduct which could be attacked under the provisions of the *Trade Practices Act*. It is rumoured that some members of this group wish to transfer the control and regulation of the profession from the States to the Commonwealth. It would appear that the Minister for Justice, Mr Duncan Kerr MP and the Assistant Treasurer, Mr George Gear MP may support this approach.

The third new issue arose from papers delivered by the President of the Law Society, Mr David Fairlie, and the Chief Executive Officer, Mr Frank Riley, at a symposium entitled "Australian Lawyers, National Practice and Competition Conference", on 11 March last. They appeared to support a legal profession controlled and regulated from Canberra. Fortunately, the idea was not taken up by the other Law Societies and Bar Associations across the country. The constituent bodies of the Law Council of Australia, including our own Council, unanimously passed the following resolutions at the Council meeting on 26 March:

"1. That the LCA should support the proposition that the profession should operate in a national market for legal services in the sense that uniform or harmonious rules regarding its conduct and practice should exist in all States and Territories, so that a practitioner in one State or Territory may practise in another State or Territory under rules which are substantially common.

2. That the LCA support the following concepts:

(i) a right to practise as a lawyer conferred by the laws of a State or Territory (State) should be recognised as conferring a corresponding right to practise in all States, without any requirement for admission by the Courts of those States, or other formality, including the issue of a separate practising certificate except for a requirement to register in such States the lawyer's practising certificate upon payment of a fee, if required;

(ii) a lawyer who exercises the right referred to in (i) should, in relation to its interstate exercise, be subject to the disciplinary control of the State in which the right is exercised;

(iii) full faith and credit should be given by all States to any determination by the home State, or of any State referred to in (ii) as to the lawyer's entitlement to practise.

3. That the LCA is opposed to the concept:

(i) that regulation of the legal profession should pass from the States to the Commonwealth, or some Commonwealth instrumentality;

(ii) of the creation of a federal bureaucracy to 'regulate' the legal profession."

Following the above, the Law Council established working parties to clarify common conduct and ethical rules relating to lawyers, including rules relating to categories of work (such as advocacy), disciplinary processes and a number of other areas. The New South Wales Bar hopes to play an important role in a number of these. We are already liaising with our sister Bars in the other States and Territories seeking agreement that the proposed new Barristers' Rules for New South Wales should become the standard rules for all Bars in Australia. This alone would make a substantial contribution to achieving what the Federal Attorney-General, Mr Michael Lavarch MP, has defined as a national profession, namely, one which is State-regulated but in respect of which there is general commonality of rules of conduct, structure and regulation. The NSW Bar Council, as well as the Law Council, supports the Attorney's approach.

The Law Council took another significant decision at its meeting on 26 March. Some constituent bodies sought to increase individual membership of the Council. The Law Council's funding is limited and inadequate for its important work and a recruitment drive for individual membership of the Council from the members of the constituent bodies could be supported as a fund-raising exercise for the Law Council. Another view, however, held that such a drive for individual membership could be a precursor to changing the constitution of the Law Council so the votes of individual members would ultimately replace voting by constituent body, a development which would not be in the interests of the Bars, whose membership is far outnumbered by the Law Societies, especially the main eastern seaboard Law Societies.

With the support of the Law Institute of Victoria, the New South Wales Bar moved for the abolition of individual membership in the context of the following motion which was adopted unanimously:

> "That the Law Council resolve in principle to authorise the implementation from 1 July 1995 of membership of LCA Sections under which individual membership of the LCA would be abolished but all members of constituent bodies will, so long as they remain such members, be eligible to join LCA Sections upon payment of appropriate fees."

The New South Wales Bar supports the purpose of this resolution which is to encourage members of the constituent bodies to join LCA Sections. By doing so they will enable more people to participate in the valuable work of the Sections. They will make the Sections more financially self-sufficient and, since part of the fee will pass to the Law Council, could assist its financial position and avoid increasing capitation fees.

Another matter of recent concern to me and to the Bar Council has been the draft protocol of the New South Wales Attorney-General on judicial appointments. The New South Wales Bar contributed to the Law Council's submission to the discussion paper released by the Federal Attorney-General's Department on this matter, as well as to the original New South Wales draft protocol. On 10 March the New South Wales Attorney issued a new draft protocol which eliminated many of the aspects of the original to which the Bar had objected. However, the current draft maintains the concept of calling for "expressions of interest" about which both the Chief Justice and I have provided further submissions to the Attorney opposing the idea. The problem with calling for expressions of interest and keeping a list of those who respond is first, it is unlikely to remain confidential and secondly, the mere existence of such a list will raise expectations which will be disappointed when persons are appointed who are not on it. As the Chief Justice has pointed out, and I agree, the existence of the list will "result in practical pressure to make appointments from the list of applicants and it will also lay the ground for public challenges to appointments".

I should, however, emphasise that I believe members of the Bar who aspire to judicial office should be encouraged to inform the President of the day. I would certainly find it helpful to learn, either formally or informally, who would accept appointment to the Bench. Such information would, of course, be kept entirely confidential but I would be assisted by the information when making a recommendation of suitable appointees to the Attorney-General.

We thus still live in interesting times and the controversy on structural reform is regrettably not yet behind us. However, I am confident that whatever the further reforms may be, they will, if properly thought through and understood, not unduly affect the Bar: To the contrary, I consider the independent Bar will continue and thrive, stronger and more united than ever. ❑

M H Tobias QC

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* Council of Australian Governments - ed.

CCH UPDATE

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It was in 1866 that *Blackburn* J in the Court of Exchequer Chamber ruled that:

> "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Although his decision created new law, *Blackburn* J himself wasn't (according to most commentators) apparently conscious of that fact and thought rather that he was generalising accepted rules. He pointed to cattle trespass, escape of fumes, the flow of filth from a privy. Wigmore, writing in the *Harvard Law Review*, said that these instances of strict liability had wandered unshepherded and unhoused until met "by the master-mind of Mr Justice Blackburn who guided them into the safe fold where they have since rested".

Well, they rest there no more ... according to Australian law at least.

A majority of the Full Bench of the High Court has held that strict liability under the rule in *Rylands v Fletcher* has been absorbed into the general principles of negligence. Their reason was that the more dangerous is the activity in question the greater is the care that is required to satisfy the reasonable care requirement and that where an occupier permits a "dangerous" activity to take place on his or her premises the duty of care owed to persons outside the premises is non-delegable. The majority said that an activity did not have to be "inherently" dangerous in order to be "dangerous".

▪ ▪ ▪

The case before the High Court[1] arose from a fire caused by welding activities carried out by an independent contractor engaged by the defendant. The welding took place near where that contractor had stored a large quantity of polystyrene which, through the contractor's negligence, caught fire, destroying the building and the plaintiff's property.

As our report (in the ***Australian Torts Reporter***) explained it:

> "The majority of the High Court held that both the storage of the expanded polystyrene and the carrying out of welding activities were relevantly 'dangerous' such that, coupled with proof of foreseeability, a non-delegable duty of care was owed by the defendant to the plaintiff and was breached by the negligence of the contractor. The majority also held that any rule of strict liability regarding the escape of fire (the 'ignis suus' rule) had been absorbed by the rule in *Rylands v Fletcher*."

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Because our aim is to publish clear, direct, informative and accurate writings, our editors are instructed to write accordingly and, put colloquially, to tell it as straight as possible without indulging in criticisms of or glosses upon new legislation, judicial decisions or departmental rulings. We try to keep any raised eyebrows out of our writing ... but sometimes the occasion arises when it seems helpful to add, say, a "with respect" comment, as for example our torts editor did when (about five years ago) we said in our ***Australian Torts Reporter*** that sec 20 of the Queensland *Motor Vehicles Insurance Act* (which came into operation at that time) appeared to offend sec 117 of the Constitution.

Well, in a case handed down in April,[2] the High Court has (how can we put this and retain a semblance of humility?) taken the opportunity of confirming our editor's comment by striking down that section as contrary to sec 117.

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Mention of humility brings to mind the opening words of Bill Lawry's address to the Primary Club breakfast during the Test in Sydney (against South Africa) this year. He said:

> "It's hard to be humble when you're a Victorian ... and impossible when you're a great Victorian".

▪ ▪ ▪

It's fairly trite to say that you can't make people honest by legislation, and a government can't guarantee that an industry will operate in an honest and fair manner through the introduction of controls, but there is a well-held theory that governmentally imposed controls will at least make honesty and fair dealing *more likely*.

That's the thinking behind the federal government's introduction of the SIS scheme. Getting its name from the main piece of legislation in this package,[3] the purpose of the SIS scheme is to provide prudential supervision of the superannuation industry; its aim is to make more likely the operation of this industry in an honest and fair manner.

For the most part that scheme comes into operation on 1 July but, as the preface to our ***SIS Handbook*** says, everybody involved in the day-to-day running of a super fund, approved deposit fund or pooled super trust "must quickly become familiar with the scheme and sure of their obligations".

Note that word "quickly". It's for that reason that the said ***SIS Handbook*** was published in April well in advance of the commencement of this legislation, so those people who must know about the scheme — the trustees themselves, the scheme auditors and managers, and professional advisers — can do so in a practical way.

Our description also says that this handbook "as well as being a valuable reference for fund trustees, investment managers and advisers, is a tool by which members and their advisers can ascertain their rights".

▪ ▪ ▪

In an article on forensic humour in *The Times* last year, Sir Frederick Lawton told the story of a judge,[4] whose wit was sometimes a little cruel, when he presided over a case involving the errant son of a wealthy family who had pleaded guilty to several charges of larceny.

A psychiatrist had testified that the young accused was suffering from schizophrenia. The judge sentenced him thus:

> "The eminent physician who has been called on your behalf has told me that you are two persons, one well educated, cultured and kindly, the other a common burglar. You are indeed a most unfortunate young man because both of you will have to go to prison for 18 calendar months."

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Which brings to mind that *Private Eye* cartoon:

> *Psychiatrist (to patient)*: You're lucky Mrs Pindleby — most shoplifters aren't rich enough to be kleptomaniacs.

▪ ▪ ▪

1. *Burnie Port Authority v General Jones Pty Ltd* (1994) Aust Torts Reports ¶81-264.
2. *Goryl v Greyhound Australia Pty Ltd* (1994) Aust Torts Reports ¶81-268.
3. The *Superannuation Industry (Supervision) Act*.
4. Sir Gerald Dobson, Recorder of London.

Letters to the Editor

Queen's Counsel

Dear Editor,

I refer to the brief historical review of the origins of Queen's Counsel in New South Wales (*Bar News* 1993 Edition, 9). In my paper "Of Silks and Serjeants", (1978) 52 ALJ 264 at 270-271, I wrote of the difficulties that stood in the way of giving an authoritative answer to the question "Who was our first QC?" at the time of compiling *A History of the New South Wales Bar* (1969). I referred to my later discovery, by pure serendipity, of an unlikely but nevertheless official record that enabled the question to be answered definitively, and I set out a list of our first 22 silks (appointed between 1856 and 1889). At the head of the list was John Hubert Plunkett: his commission was dated 6 June 1856, though the Executive Council appointment was earlier. The contemporary, but unofficial, source, which claimed that Darvall had taken silk in 1853, was wrong.

The silk gown supposedly given to W C Wentworth as a mark of esteem, was mentioned thus in the *Sydney Gazette* of 12 February 1835 (p. 2): "We understand that Mr Wentworth will be presented with a silk gown, and something equivalent to a 'patent of precedence' at the Australian bar, on the first day of the ensuing term." The "something equivalent" was, presumably, a document, but it could not literally have been a patent of precedence (not "precedent" as your typesetter put it) for that amounted to letters patent of the Crown. Such patents had not always given an assured right of preaudience and, at times, the courts had been somewhat coy about yielding their discretion in these matters to the Crown (Renton (ed.), *Encyclopaedia of the Laws of England* ,Vol 10 (London, 1898), "Precedence, Patent of", at p. 296). The Supreme Court in Sydney was similarly touchy in its early years about attempts by the Crown to obtrude upon preaudience questions. I mention such a case (that of Foster) in my *History of Solicitors in New South Wales* (Sydney, 1984), at p. 50.

The action of the "Australian Bar" in 1835 does, however, provide a pertinent "precedent" in the 1990s, though it is regrettable that resort should have had to be made to it. If one of the first acts of Responsible Government in New South Wales in 1856 was to commission Queen's Counsel, it is, surely, a mark of irresponsible government that so significant and useful a distinction and tradition should now be abrogated unilaterally.

Victims of Crime

Dear Editor,

It is a matter of regret that humour is still being sought and had in our professional ranks from the terror being experienced by victims of crime, retailed in court evidence.

I refer to "Observant!", p. 56 of the 1993 Summer Edition.

Christopher Ryan, Barrister, Canberra City

Cases!

Dear Editor,

I was interested to read the comments made by Sir Anthony Mason as reported in the *Sydney Morning Herald* on Wednesday, 16 March 1994:-

> "It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes."

I was reminded of a case in which I was involved in the early-1960s when Mr Mason (as he then was) was citing cases to the Chief Judge in Equity, Mr Justice (Charles) McLelland. The following exchange occurred:-

His Honour: "Mr Mason, you know that I am not interested in cases."

Mr Mason: "I have noticed that deplorable tendency on your Honour's part."

Peter Scammel
Henry Davis York

Digging Deeper

Dear Editor,

The referee quoted on p. 42 of *Bar News* 1993 Edition managed to uncover a 1554 expert witness by using a plough. Had he dug deeper he probably would have unearthed the real first specimen, namely the 1313 expert on fishing nets. A gentler successful approach might have been to dig into the literature, thus exhuming only a limb, namely L Hand, "Historical and practical considerations regarding expert testimony" (1901) 15 Harvard L Rev 40 at 42.2.

George Humphrey

Boating

Dear Editor

I have plagiarised D T Kennedy's ideas and manner of expressing them in that a report of the Great Bar Boat Race of 1992 was published in your magazine under my name when all the original work was that of Des.

I take this opportunity to acknowledge my guilt in this matter and to tender to Mr Kennedy an abject apology.

Damages are to be assessed by an arbitrator yet to be appointed.

D A Wheelahan QC

PS Publication of this letter will mean that Des and I have made up.

*The Australian Judiciary in the 1990s**

The Hon. Sir Anthony Mason AC, KBE, Chief Justice of Australia

The Australian judiciary has recently attracted more media attention and public scrutiny than it has previously received at any time in my career. One would like to think that that is because people have begun to recognise the fundamental importance of what the courts do. And it may well be that the widely-publicised decisions of the High Court in recent years have had something to do with it.

But the distasteful (and more likely) possibility is that much of the public attention stems from dissatisfaction with the quality of legal services provided to the community. The courts and the judges, along with the legal profession, have been in the spotlight of that attention. Received doctrine has it that, due to the very high cost and the delays inherent in litigation, the accessibility of the court system has failed to measure up to the expectations of the ordinary litigant. Community expectations have almost reached the point that persons who have sustained loss or injury believe that they, at little or no cost to themselves, should be able to sue to recover compensation from someone else. Whether those expectations are realistic or justified is another matter. The point is that many who wish to litigate simply cannot afford to resort to the courts.

The judges are seen as having some responsibility for the present state of affairs. True it is that judges do not fix lawyers' fees and that they have no alternative but to administer the thorough yet expensive common law adversary system of trial. But the judges happen to be identified with that system with all its merits and detriments. In one sense that is right because judges control court procedures and, in some cases, court administration.

The burgeoning cost of litigation and responses to it

Governments bear a large share of the cost of litigation. Increased litigation, in part a product of the availability of legal aid, has added considerably to the governments' bill for both court funding and legal aid. That meant that governments were no longer willing to maintain an increasing level of funding for the courts and legal aid.[1] One response was to lift the level of court fees - a move in the direction of user pays which has resulted in additional costs to litigants. Another was to insist that courts should become more efficient, i.e., lift the number of cases disposed of.

To meet this situation, the courts have introduced streamlining procedures such as case management techniques developed in the United States. They are designed to reduce time spent in court hearings and to eliminate delays. These techniques require early preparation of cases and more use of written materials. Curiously enough, solicitors have criticised these techniques on the ground that they add to the work of the profession, thereby increasing costs. I doubt that there is substance in this complaint. Although the new techniques have been successful in civil litigation, there is less scope for them in criminal cases. The length and complexity of the criminal process and of trials continue to be a major problem in other common law countries.

For the future, our hopes for reducing pressure on the court system rest substantially on two main possibilities. One is greater recourse by litigants to alternative dispute resolution; the other is a lowering in community expectations about litigation as a solvent of problems. However, even if these developments take place, their impact in the criminal courts, where we have trial by jury, will be negligible.

Except in the realm of family law, alternative dispute resolution has not proved as popular as one might have expected. Our legal culture is firmly anchored in the adversary system. There are some signs that the heavy cost of long-running litigation, along with the widely publicised success of some prominent mediation efforts, will eventually work a change in sentiment. Such a change would bring Australia more into line with Asian nations where mediation and conciliation are more accepted modes of dispute resolution. In passing, I make the comment that our effort to promote alternative dispute resolution is a clear recognition that the adversary system alone is incapable of providing a comprehensive answer to our problems.

The judge as manager

Making the adversary system more efficient necessitates a change in the traditional role of the judge. In civil cases, the judge is now expected to be more of a manager: to keep the parties to the issues, to limit protracted and unprofitable cross-examination and to confine oral argument. In this respect, the role of the common law judge becomes a little closer to that of the judge in the civil law system, though the gulf between the two is still a very large one. So far there is no indication that Australia is likely to adopt the European civil law approach which is more inquisitorial in character. Such an alteration would call for a massive cultural change, an expansion in the number of judges because that system makes greater use of judges, and the training of judges along very different lines. Adoption of the European civil law system might well reduce the cost of litigation to litigants but it might well increase the cost to governments of funding the court system. However, at the same time, there is some scope for giving the common law judge more control over civil proceedings, e.g., deciding how many witnesses a party should be permitted to call, whether cross-examination should be allowed and for how long. These

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* Reprinted with the kind permission of the Hon Sir Anthony Mason AC, KBE. Sir Anthony Mason's address was given to The Sydney Institute on 15 March 1994 and published in *The Sydney Papers,* Vol. 6, No. 2, Autumn 1994.

1. The present level of court funding differs between jurisdictions; some State courts fare not at all well. The "principles" on which funding is based are by no means satisfactory and create difficulties for forward planning. There is a bias in favour of "new initiatives", particularly if the success of a new initiative is a political imperative.

possibilities have limited application to the criminal trial where scope for the judge acting as a manager is more limited.

Already, in cases involving litigants in person, judges are expected to take a more active role in the courtroom to ensure that a litigant in person is not disadvantaged by his or her lack of legal representation. And other officers of the courts, particularly registry officers, are also expected to provide assistance. This increases the workload of the courts, particularly at a time when litigants in person seem to be becoming more common, due in part to the high cost of professional legal services.

Legal complexity

There is undoubted scope for reducing the complexity of our law. Legal complexity is a significant contributor to costs inside and outside the courts. The *Income Tax Assessment Act* and the *Corporations Law* are well known examples of the complexity of modern legislation. There are, I am glad to say, proposals to simplify them. But, as they stand, they represent the tip of a very large iceberg which includes many instances of prolix or poorly-expressed legislation. Legal complexity is not merely a matter of drafting inadequacies. Very often it is the product of ill-judged policy decisions or expedient political compromises. Another contributing factor is the widely held belief that every problem has a legislative solution. In other words, the passing of a new law, like the waving of a magic wand, will solve fundamental community problems. I happen to think that belief is mistaken but, so long as it holds firm, we shall remain a community beset by law and legal disputation.

The principles of both statute law and judge-made law are expressed, to a greater extent than before, in terms of standards rather than strict rules. It is said that the prescription of standards leads to an element of uncertainty. However, the prescription of standards results in justice in particular cases and the element of uncertainty decreases as court decisions reveal how the standard is applied.

The expanding role of the judge

Just as the judge is becoming more of a manager of the litigation, so the judge is also likely to become more of a constructive interpreter of legislation. That will happen as the so-called "plain English" reforms in legislative drafting find their way into the statute book. The movement away from detailed regulation, which reached its apogee in the *Income Tax Assessment Act* and the *Corporations Law*, to the broader statements of principle characteristic of United States legislation and, to a lesser extent, of United Kingdom legislation, will leave the courts with more to do. The judges will be called upon to spell out the interstices of the legislative provisions. In doing so, they must resolve questions of interpretation by reference to the policies and purposes which are reflected in the legislation.

What I have just said may not be welcome news to those who believe that the courts do no more than apply precedents and look up dictionaries to ascertain what the words used in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law. That history is one of judicial law-making which shows no signs of unaccountably coming to an end. However, a distinction must be made between appellate judges and primary or trial judges who, generally speaking, are confined to applying settled principles of law to the facts as they are found.

Changes in the principles of substantive law attract criticism in varying degrees. But, interpretations of the Constitution apart, although it is always open to the legislature to repeal or amend the common law as the courts declare it or the interpretation which the courts give to a statute, legislative overruling or amendment of a judicial ruling is a relatively rare occurrence.

Sometimes judicial initiative is inevitable. That was the case when the High Court decided two years ago that the common law did not entitle a husband to sexual intercourse with his wife against her will, despite old authorities which suggested otherwise.[2] It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to act otherwise. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.

Judicial appointment

There were several sub-themes in the media campaign directed at lack of gender awareness on the part of judges. It was suggested, following the example of the English press, that judges are an out-of-touch élite, set apart from the community by gender, class and race. This led to a call for a more representative judiciary - more female judges, more judges educated at State schools, more judges from non-Anglo-Celtic backgrounds. And a more public process of judicial appointment was suggested.

The judiciary, like other institutions - for example, our Parliaments - is not fully representative of the various elements in Australian society. Although a more representative judiciary may assist in maintaining public confidence in the administration of justice, it is essential that that be achieved without any diminution in the quality of judicial performance. The insistent demand for enhanced judicial performance requires the appointment of those who are best qualified. A diminution in the quality of judicial performance would impose

2. *Reg. v L* (1991) 174 CLR 379. In England, the old rule, described as "anachronistic and offensive" by the Court of Appeal, was also overturned: *R v R* [1991] 2 WLR at 1074; affd House of Lords [1991] 3 WLR 367.

an even greater burden on courts of appeal which are already struggling with a massive workload. It would also erode the essence of the existing system which depends on decision-making as well as presentation of argument by highly-skilled professionals.

The demand for judges to represent sections of the community may be misunderstood as a statement that, in deciding cases, a judge acts as a representative of a section of the community. That, of course, would be completely inconsistent with the judge's paramount responsibility to act impartially. That is why we continue to protect judicial independence, though the value of the concept may not be fully appreciated by the public. Unfortunately, the public may have gained the impression that judicial independence is a cloak for judicial privilege.

Only 10 days ago the Attorney-General for New South Wales announced that the State would advertise for expressions of interest from persons seeking judicial appointment and that their names would be put on a list. Critics of the proposal suggest that it will lead to speculation about appointments, lobbying for appointment and the best qualified persons declining to put their names forward.

The proposal is said to have two advantages. The process of appointment is made more public. I suppose the inference to be drawn is that the Attorney, if not Cabinet, considers the names on the list. But that would not tell us why the Government appointed A instead of X, Y or Z and who was consulted as to the relative merits of A, X, Y and Z? The keeping of the list will avoid an Attorney's embarrassment at being turned down by many prospective appointees, as has happened in recent times. However, it will only avoid that problem if all suitably qualified persons willing to accept appointment register their interest. The possibility remains that an Attorney will be compelled to look beyond the list if he or she is looking for the best appointment and that is what an Attorney should be doing. It would be a step backwards if the new procedures excluded the best qualified persons from consideration simply because their names were not on the list. We should continue to seek to appoint the best qualified person and, if need be, to persuade that person to accept.

The debate and the proposal do not focus on the core of the problem - the difficulty of attracting the best qualified persons to accept judicial appointment.[3] The gulf between the higher reaches of professional remuneration and judicial remuneration is an obstacle. Quite apart from that, there are various disincentives. Judges are saddled with a daunting and difficult workload; they do not enjoy the status their predecessors enjoyed; they have been subjected to strong criticism, some of it quite unfair. Their situation is scarcely an inducement to the leaders of the profession to change course.

Judicial retirements

The phenomenon of early judicial retirement, itself some indication of lack of judicial job satisfaction, is more a problem in New South Wales than elsewhere in Australia, though it is beginning to surface in Victoria as well. It is a reflection of a problem that has assumed serious proportions in the United States. Already it has focused attention on the terms of the judicial pension. Some may think it desirable to restructure the pension entitlement with a view to discouraging judges from early retirement. On the other hand, the pension has been a major factor in attracting the best lawyers to accept judicial appointment. It is of vital importance that changes to the judicial pension do not make it even more difficult to recruit quality judges.

Judicial independence

There has been talk, some of it ill-informed, of threats to judicial independence. The real threat to judicial independence is that the public and the media do not fully understand its importance. It seems to me that, subject to constitutional limitations, governments acting with legislative authority are entitled to restructure courts and tribunals when restructuring is necessary in the public interest. In some situations, hopefully rare, that may mean that it is difficult to continue to provide suitable work for a judge or tribunal member. The problem generally arises with a specialist court or tribunal whose members have particular qualifications. We need to devise appropriate protection for a judge and a tribunal member whose court or tribunal has no effective work to do and who may lack the qualifications or capacity to take up another appointment. What judicial independence does mean is that those persons coming before the courts, particularly in cases involving a contest with the Government, can rely on the judge to be fair and impartial and not subject to pressure or influence by the Government or any other person. That is why appointment of the best qualified persons is so vital and a reason why, in the past, barristers, with their reputation for independence, have been the principal source of appointments.

Relationship with the media

In the last 12 months judges have shown a greater willingness to communicate with the media. The Federal Court and the Supreme Courts of New South Wales and Victoria have appointed information officers. Judges have discussed judicial problems openly in public speeches and have given interviews. For various reasons, I have supported this change of direction. Attorneys-General do not, and cannot always be expected to, speak up for the judges. Even if they did, their remarks lack impact. These days people expect the actors themselves to speak so that they can form some picture of them as personalities. More than that, judges are in a better position than anyone else to give an account of what they are doing and enhance media and public understanding of the role of the courts. Greater communication by the judges will, I hope, lead to a better understanding of

3. See "A judge? I'd rather be a QC, thanks", *The Times*, 22 February 1994, at p. 33.

what the courts are doing and more informed debate about proposals for change which affect the judiciary.

Conclusions

I have said enough to indicate that today's judges are working in an era of rapid and substantial change. The directions of change are not completely apparent. There are important questions which call for answers and much depends upon those answers. I conclude by identifying some of those questions:

(1) How much of our national income are we willing to provide for the funding of the legal system, including the courts?
(2) What will be the terms and conditions, including salary and retirement benefits, of judicial appointment?
(3) What is the future of judicial independence and how will we best protect it?
(4) Are we prepared to make more radical changes to the common law adversary system which would bring it closer to the civil law system?
(5) What role are we prepared to assign to the judges? For example, are we prepared to give them a jurisdiction to enforce a Bill of Rights, a jurisdiction exercised by courts in all major common law countries except Australia and the United Kingdom? ❑

Light Relief

After a searching and skilful cross-examination on documents placed before him by Peter Skinner of counsel, the witness was glad to hear that all of the documents should be returned.

However, the observant Mr Skinner noted one document still in front of the witness - unreturned.

Sensing yet another drawing of blood on the road to forensic triumph, he asked the witness:

"What have you there in front of you?
What does *THAT* document say? "

To which the witness replied, to the delight of the jury:

"Please lean forward to the microphone when giving your evidence."

(*R v Moroney & Bennell*,
District Court of New South Wales.) ❑

Chief Justice Gleeson has requested that barristers be informed that:

The Honourable Antonin Scalia
Justice of the Supreme Court of the United States of America

will be the speaker at a dinner at:

Parliament House, Macquarie Street, Sydney
Monday 29 August 1994

The Subject of his Speech:
The Role of a Constitutional Court in a Democracy

Tickets: $200

The Matthew Talbot Hostel's building programme will receive $150 from every ticket.

Reservations: Ms Lesley Squires
Telephone (02) 560 8666
Matthew Talbot Hostel Appeal
PO Box 5 Petersham NSW 2049

It is expected that bookings will be heavy and seating will be allocated in order of application.

Chief Justice Murray Gleeson AO - "reasonably calm"

Ruth McColl interviews the Chief Justice

Bar News: *When I interviewed you in 1988* at the time of your appointment as the Chief Justice, you said you anticipated having some difficulties translating to the position of being both a Judge and the Chief Justice, and in particular you thought that you may have considerable difficulty in not regarding it as any part of your function to persuade counsel to agree with you. Did you have any problems with that when you first started sitting as you anticipated?*

Chief Justice: Not really. I think that when I first started on the Bench I was probably inclined to intervene to a greater extent than has been the case in the last couple of years. I wasn't setting out to persuade counsel to agree with any particular point of view, but I did make an effort to bring them to what seemed to me to be the issues in the case. Additionally, of course, it is often necessary to seek information from counsel as to the facts or as to the legal principles upon which they rely. Nowadays, however, subject to seeking assistance of that kind, I make a conscious attempt to intervene in argument less. One of the reasons is purely practical. I find that judicial intervention slows down the progress of cases.

Do you think your approach to being a Judge has changed since you first went to the Bench? If it has, how has your approach changed, and what factors have brought about that change?

I'm not conscious of any particular change. If others have observed it, they haven't mentioned it to me.

You said in that interview that we could expect to see you run a relaxed, friendly court, a cosy place in which a just solution to people's problems can be sorted out as the result of a quiet chat between Bench and Bar. Have you been successful in establishing that sort of court?

It is my recollection that you said that anyone who would believe that would believe anything. However, I would like to think that the atmosphere in courts in which I preside is reasonably calm, and I hope that counsel feel they have an opportunity to make the points they want to make.

Has your image of the sort of courtroom you can run changed over the years as a result of any changed appreciation of your role as a Judge?

I regret to say that the enormous workload of both the Court of Appeal and the Court of Criminal Appeal, and the backlog of cases with which those Courts have to contend, means that the judges operate under a pressure that I had not imagined when I was at the Bar. In the Court of Criminal Appeal, for example, we routinely list five or six appeals in a day, some of which, of course, would be sentence appeals. Counsel have to provide written submissions before the day fixed for hearing and there is usually a large amount of paperwork to be read by the judges before the hearing commences. Similar considerations apply in the Court of Appeal. I don't think that I had realised the amount of pre-hearing work which judges have to undertake in order to get through their lists. This also has a disadvantage for counsel. It means that the judges approach the argument with a more developed view as to the issues than would be desirable in a perfect world. Of course, we haven't yet got anywhere near the situation that applies in the United States of America, where most of the work of appellate courts is done on the papers, and oral argument is limited. I, for my part, hope we never get into that situation.

You were asked in the 1988 interview whether you perceived a role in the Supreme Court for a public relations/media liaison person and your response was "no". In the past two years such a person has been appointed to the Court. I would assume that you either initiated that appointment or agreed that it should take place. What happened between 1988 and 1992/1993 to bring about a change in your attitude?

A number of things happened, the most significant of which was the strident criticism of judges that developed as the result of certain events (that occurred mainly, I might add, in other States) in 1992 and 1993. That brought to a head discontent that had been gathering amongst the judges for a number of years. At a conference of judges in 1992 a paper was delivered by Gordon Samuels in which he put a proposal for the appointment of what was then called a Media Liaison Officer. Coincidentally, at about the same time, the Law Foundation approached me with a suggestion that there should be a pilot programme under which the Law Foundation would fund the employment for a year of a person who would perform functions of the kind that were being suggested by Gordon Samuels. The matter was taken forward with the general, although not unanimous, approval of the judges. A person who is now described as a Public Information Officer was appointed for a year, and the appointment was funded by the Law Foundation. That year expired in March 1994 and the Department of Courts Administration took over the

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* *Bar News* Summer 1988

responsibility for continuing her employment. By that time the project had been such a success that, in practical terms, it had to be followed through.

In what way has her appointment been so successful?

First, it has been very successful with journalists themselves. It is obvious that most journalists are anxious to get their facts straight. As professionals they don't like being corrected, and they make extensive use of the officer's services. It also has an important practical benefit for the judges and their associates. They no longer have to field random enquiries from journalists. There is now a well-established system under which the media can obtain information about the operations of the Court as well as about particular cases. Furthermore, she has played an important function in communicating to the media the position of the judiciary on matters as to which, in the past, the views of judges have not been communicated adequately. She is employed as a member of my staff and reports to me and not to any officer of the Executive Government. Her services are available to all the courts in the New South Wales court system.

On what sort of issues has she been able to give members of the media a greater insight into the views of the judiciary?

Let me give a routine example in relation to the magistracy. Some months ago there was publicity critical of a magistrate who had granted bail to a man the subject of an apprehended violence order. Whilst on bail the man killed the woman in whose interests that order had been granted. When that story broke, spokespersons for the police authorities, in an apparent attempt to deflect criticism, suggested that the magistrate was at fault in granting bail. As it happened, the proceedings in the Local Court were tape-recorded. The recording showed that the police prosecutor in court had submitted to the magistrate that he had no option but to grant bail. The Public Information Officer produced the tape-recording to the media and very quickly deflected criticism of the magistrate. There was also a potentially more serious occurrence in which a public disagreement occurred between a senior Minister and a senior Judge of the Court over a particular incident, and in early media reports the position that the senior Judge had taken was incorrectly stated. The true facts were promptly brought to the attention of the media by the Public Information Officer. I think it is fair to say that journalists understand that judges have no political axe to grind, and they have been very ready to accept information coming to them through the Public Information Officer. I think it is important to stress that this is not some kind of public relations exercise on behalf of the judiciary, and it does not represent a radical change on the part of judges as to the extent to which they are prepared to publicise their views on controversial issues. The objective is in keeping with the traditional reserve that judges have maintained, and I hope will continue to maintain, about matters of that character. However, it was felt that the time had come when we had to be more self-reliant on occasions when it was necessary that our views should be known to the public.

Have you felt the need since your appointment as Chief Justice to "speak up" on certain matters? I note, for example, that you published an article in Volume 66 of the Australian Law Journal *concerning "access to justice" (1992) (66 ALJ 270). Is that an example of you trying to speak up on important issues? Is sufficient notice being taken of what you say on such occasions?*

Yes, that is an example of my trying to speak up on issues that I regard as important. I hope that I am appropriately selective in my choice of subjects. As to whether sufficient notice is being taken of what I say, that is a matter that is difficult for me to determine. Time will tell.

"...the public are becoming increasingly aware of the importance of an independent judiciary"

You also agreed in 1988 that the public image of the administration of justice had become tarnished both because of events of recent years concerning the judiciary and generally because the community was more critical of professions than it used to be. You hoped that the passage of time would decrease the effect of the first factor and that reductions in court delays in New South Wales would ameliorate the second. Do you believe that the public image of the administration of justice has improved in recent years and, if so, to what do you attribute this improvement?

I think that different sections of the public have different images of the administration of justice. It is not easy to generalise about this subject. I think, for example, that in recent years parliamentarians and public servants have become more aware of the pressures under which judges operate and of the diligence with which they address the problems confronting them, including, in particular, the problems of coping with an ever-increasing workload. I think also that the public are becoming increasingly aware of the importance of an independent judiciary. There has been a lot of emphasis in the last year or two upon the power of the courts and there have been a number of striking examples of judges intervening to maintain the rule of law. There is no doubt that the community generally is now more questioning and critical of authority than it was in the past. This questioning and criticism is sometimes represented as manifesting a lowering of confidence in the judiciary, but I think that involves a misunderstanding. If you believe, as I do, that the system of administration of justice has its basic principles right, then public discussion and examination of those principles should lead to an increase in respect for the judiciary.

Recently you, and seven other Judges of the Court, participated in a series of interviews published in the Sydney Morning Herald *in early March in which you and fellow Judges exposed your thoughts about a number of issues. The journalists who interviewed you attributed the reason for your participating as being a complaint that the Attorney-General no longer speaks out in the Judges' defence and attributed to you the quote "We have to be prepared to defend ourselves more". Was that, in fact, the key reason for the Supreme Court participating in the series of articles?*

The quotation that appeared in the newspaper article was actually taken from a speech that I gave at a conference of judges in New Zealand in March 1992. To put the quotation in its context it is desirable that I repeat the passage in the speech from which it is taken. I said:

"It is the inevitable consequence of consumerism that courts will come under increasing pressure to explain and justify their procedures and their decisions. How is this to be done? Judges are ill-equipped to enter the field of public relations and their traditional reliance on the Attorney-General to defend them may not be an adequate safeguard especially if the Government is under political pressure in relation to the issue in question. Indeed, the Judiciary may find itself in conflict with the Executive Government. Judges may have to develop procedures not inconsistent with their need to maintain independence and impartiality for communicating to the public their point of view on some controversial issues. They can, of course, never do that in relation to the merits of individual cases. Even in this area, however, there are steps that can be taken on appropriate occasions to see that the public is given a better understanding of what the court is deciding. Judges should not be above attending to the requirements of proper presentation and explanation of their decisions. Furthermore, on issues relating to court administration and the way in which courts go about their business, the Judiciary is going to have to be prepared to join in an appropriate fashion in the public debate. It can no longer depend on others to put its case."

What reaction did you get from the public to the series of articles and was it the reaction you expected?

The reaction was generally favourable. I was surprised to hear remarks from quite a number of people who were pleased to be given personal glimpses of the lives of judges. For my part, I've never been anxious to give personal glimpses but I was pleasantly surprised with the comments I heard.

What sort of reaction did you get from lawyers to the articles? Was that the reaction you expected?

The reaction from lawyers also was generally favourable, although, of course, many lawyers already knew the sort of information that was published, and would also have been aware of the judicial attitudes that were expressed.

The first article was introduced by a quote attributed to Lord Kilmuir in 1955: "So long as a Judge keeps silent (when off the bench) his reputation for wisdom and impartiality remains unassailable." Do you think that it is possible for Lord Kilmuir's words to have any general application today having regard to the increased exposure of the Court to criticism at all levels, community, media and political?

No. In fact, the Kilmuir Rules have been formally abandoned in the United Kingdom. That is simply a recognition of the trend that I mentioned earlier, that is to say, the increasing public interest in questioning all forms of authority. I happen to think that's a healthy, rather than an unhealthy, trend, but whether you like it or not, it makes the attitude embodied in the Kilmuir principles impossible to sustain.

One of the articles dealt with the issue of bias on the Bench and the question of whether the Judiciary can and should be made "more representative". On the first issue, Mr Justice Clarke said: "I don't think every Judge would say he wasn't biased, and who am I to say he's not correct; but there may be people [Judges] who are biased and probably don't realise it." Is the Court making any attempt to sensitise all the Judges to issues of gender bias and, if so, what steps are being taken in this respect?

Any judge in 1994 who isn't sensitive to the issue of gender bias must be very slow on the uptake. However, the Court is taking steps in this regard and on Thursday and Friday of this week (21 and 22 April - ed) at the conference of judges we are going to have a number of papers delivered to us in order to increase our sensitivity to the issue of gender bias. We will all listen to those papers with a keen interest.

Who is delivering those papers?

We are having a workshop session on the subject "Is gender bias a problem in courts." The session is being addressed by Justice Deidre O'Connor; the workshop leaders are three female judges, Justices Mathews, Brown and Simpson. The commentator is a Canadian judge, Judge Campbell, who is

from the Western Judicial Education Centre in Canada, which has been very active in judicial education on this and related topics. However, your question refers to another subject on which I am also sensitive, that is to say, proposals for a representative judiciary. There is an ambiguity in the concept of representation. It could mean something innocuous, such as mere presence. To ask whether, for example, Presbyterians are represented on the Bench may mean nothing more than asking whether there happen to be any Presbyterian judges. Suppose, however, some person advocating a representative judiciary were to say "Presbyterians are under-represented on the Supreme Court; we need more judges to represent the Presbyterian element of the community". What exactly would be involved in that proposal? Would it be intended that a Presbyterian would decide cases differently on that account? Would it be suggested that part of the role of such a person would be to look out for the interests of Presbyterians; to make sure that Presbyterians were not being badly treated in some way or other? If that were the idea involved in having a greater representation of Presbyterians on the Bench, I think most people would consider it rather sinister. Most women judges that I know would be deeply offended by any suggestion that they should act as though they were appointed to represent the interests of women. The judicial oath requires a judge to decide cases without affection or ill-will. I think that people who advocate a representative judiciary ought to spell out clearly what they have in mind by the concept of representation.

"... there is a much greater level of access to the courts than there has ever been in the past"

The last of the three articles which dealt with the costs of justice referred to a proposal that the Supreme Court should control its own purse-strings in the same way as the High Court and the Federal Court. How do you see the Court's ability to control funding affecting the cost of justice?

I don't see the Court's ability to control funding as having a direct effect on the cost of justice. I don't see it affecting the level of fees that need to be paid to lawyers, or even the level of filing fees. The Court's ability to control funding is related to the constitutional imperative of judicial independence. There is, however, an indirect effect which the Court's ability to control funding could well have on the cost of justice. It ought to lead to greater efficiency in the management of the Court. The modern and generally accepted theory is that devolution of decision-making promotes efficiency. Decisions as to the expenditure of money ought to be taken by the people who are best informed as to the consequences of those decisions. In particular, choices between priorities in relation to expenditure should be made by people best fitted to make judgments on those issues. In that respect the Court's ability to control its expenditure, and the capacity of judges to decide on priorities, ought to result in increased efficiency. That is the theory on which the Federal Government is operating, and I have never heard any explanation from the State Government as to why it is wrong.

What steps should be taken to improve accessibility to the courts?

This is a large subject and it is impossible to give an adequate answer in the context of an interview such as this. There is no single solution to the problem and, indeed, there is a substantial area of disagreement as to what the problem is. In many respects, there is a much greater level of access to the courts than there has ever been in the past. The courts are flooded with litigants. The problem is that community expectations have been raised to a level which cannot be met by the resources governments are willing to make available to the court system. The assumption behind much of the discussion on this topic seems to be that there is, in the community, a vast unsatisfied desire to litigate. If that be true, then satisfaction of that desire is obviously going to require governments to spend a great deal more money on the justice system. If it be right to say that more people ought to have access to courts than enjoy such access at the present time, then that has obvious implications concerning the size of the court system, or the nature of court processes, or both.

The Attorney-General is planning to introduce the Court Legislation (Mediation and Evaluation) Amendment Bill 1994 which is proposed (inter alia) to amend the Supreme Court Act by giving the Court the power to refer matters for mediation or neutral evaluation if the parties consent. What effect do you see the exercise of that power having on the traditional role of the Court?

As long as the mediation, or neutral evaluation, is not done by judicial officers, then what is involved should simply be the availability of a useful facility of alternative dispute resolution which can be taken advantage of by litigants at their choice. This does not involve any interference with the traditional role of the Court, but is an appropriate response to an increasing public demand for some reasonable alternative to litigation, with all the cost and trauma that involves.

What effect do you believe introduction of those amendments will have on the workload of the Court?

It is to be hoped that these measures will promote settlement of cases and, in particular, will minimise the number of cases which ultimately settle, but which occupy unnecessary court time before they settle.

A criticism which has been made strongly this year is that few, if any, common law cases are being heard because the Judges

are mainly sitting on criminal trials. Is there, at the moment, a particular push to dispose of criminal matters?

Yes, there is a push to dispose of criminal matters. I am not willing to preside over a court in which large commercial matters are routinely brought on for hearing in a shorter time than trials of persons who are in custody. In the United States and Canada there are time-limits applied to bringing people in custody on for trial. In New South Wales we go nowhere near complying with those time-limits. In the United States and Canada the consequence of not complying with the time limits is that the accused person must be released. It is imperative that we significantly lower the time taken for bringing people accused of crime on for trial, especially in the case of people who are in custody. There are some courts in the United States of America which have ceased doing civil work altogether in circumstances where they cannot deal with their criminal work in a timely fashion. I make no apology for giving priority to criminal work over civil work. My concern is whether, in the past, sufficient priority has been given.

Is there going to be any balancing exercise carried out when common law matters will be dealt with more thoroughly?

We endeavour, and will continue to endeavour, to maintain an appropriate balance consistent with our obligations in relation to the criminal work. There won't be any special sittings in the foreseeable future, but we will pay careful attention to the needs of our civil lists.

You have spoken on at least two occasions recently within the community as to what is expected of the legal profession. Do you see the Judiciary as having a role in clarifying the ideas of participants in the debate about what is involved in the legal profession and, if so, how do you perceive the Judiciary's role in that activity?

The public are confused as to what they expect of professions in general and of the legal profession in particular. There is little I can add to what I have said on this subject in the past, except that the Bar needs to insist, wherever necessary, upon recognition of the significance of the professionalism. The judiciary has a role to play in this respect also. One of the most important things that can be done is to ensure that the issue of the maintenance of professional standards is constantly kept on the agenda where the future of the profession is debated.

Do you have any views on whether or not barristers should be permitted to practise in partnership with other barristers or, indeed, with any other professionals?

I do not think it desirable to permit barristers to practise in partnership. I think the individuality of the operations of barristers is an important aspect of their independence. I think that it helps to define in a significant way the profession of a barrister. It is hard for a person who is practising in partnership with others to observe the cab rank rule. This has been a source of contention in States like South Australia and Western Australia, where the Chief Justices have traditionally required practitioners to leave firms and go to the independent Bar when taking silk.

Has your perception of the Bar been changed in any way by your observations of the Bar from your position on the Bench?

After 25 years of practice, I had a pretty good idea what barristers were like, and I have not changed that idea.

In past years members of the Bar have been appointed to the Bench as acting Judges. Do you see that as a useful way to reduce court delays or would you prefer to see the appointment of permanent Judges in preference?

I would prefer to see the appointment of an adequate number of permanent judges. However, I despair of that happening in the foreseeable future, and I regard the appointment of acting judges as the next best alternative.

Do you believe that it is appropriate at this stage for the Government to be considering appointing solicitors to the Bench or do you think that it will not be until solicitors have a great deal of proficiency and expertise in advocacy that they should be considered for such appointment?

I have no difficulty in principle with the appointment of appropriately qualified solicitors to the Bench. What constitutes appropriate qualification is related to the work of the particular Bench to which an appointment is made. For example, the appointment to the Equity Division of this Court of an experienced commercial solicitor may be entirely appropriate. On the other hand, it might to difficult to expect a solicitor to handle criminal trial work if that solicitor had not had experience in advocacy. There are, of course, numerous solicitors who are experienced advocates. ❑

Special Sort of Leave

At a recent special leave application the Court (Mason CJ, Toohey and McHugh JJ) called first on the respondents to persuade it that it should not grant special leave. McHugh J expressed a "firm view" to counsel for the respondents from the outset. It was one of those days when the tide flowed strongly. At one stage there was the following exchange:

McHugh J: "Mr Holmes, on the hearing of an appeal you may be able to convince me that that is right but at the moment it seems to me that there is a strong case for the grant of special leave to appeal in this case."

Mason CJ: "You may have better luck with other members of the Court when you are addressing a Court of seven, Mr Holmes ... Mr Justice McHugh may fall ill between now and then. " ❑

Obituary - The Right Hon. Sir Frank Walters Kitto AC, KBE

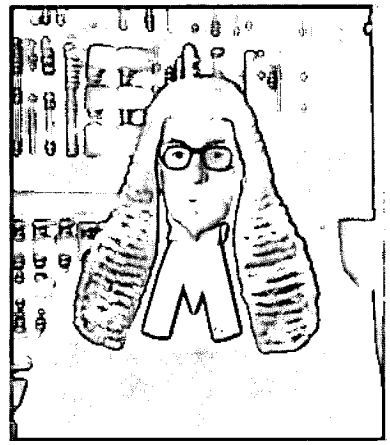
On Tuesday 15 February, 1994, there died the Rt Hon Sir Frank Walters Kitto AC, KBE. He was aged 90 years. Although perhaps little-known to the general public, he was one of Australia's greatest citizens: scholar, advocate, judge, university principal and Press Council administrator.

The son of the Deputy Director of Posts and Telegraphs in New South Wales, he was educated at North Sydney High School, in those days (before the arrival of political correctness), a nursery of academic excellence, staffed by brilliant teachers and producing a long line of famous judges, doctors, scientists and politicians.

He went to Sydney University, where he graduated with a BA (majoring in Latin and Greek, his easy acquaintance with which displayed itself in his distinguished prose style) and an LLB (with 1st class honours) in 1927, a year after Sir Garfield Barwick. His university degrees were attained whilst he was employed in the New South Wales Crown Solicitor's Office.

Three years after graduation be returned to his University in order to lecture in Bankruptcy and Probate, a typical manifestation of his fascination with matters intellectual.

He practised at the New South Wales Bar from 1928 to 1950. Despite the advent of the Depression, in the midst of which he threw his hat in the ring, he readily established his mastery at the Bar, taking silk in 1942 and specialising particularly in any field which constituted an intellectual challenge: equity, probate, intellectual property, taxation law, commercial law, constitutional law, even ecclesiastical law, and all forms of appellate law, although it is said that, at one stage, he actually conducted a common law case. In the late 1940s he appeared in the majority of all appeals before the High Court of Australia.



It was not only in forensic ability that he excelled: he was probably Australia's leading legal writer. He published nothing, alas, but his advices and opinions were famous and masterly. His written submissions to the Privy Council on behalf of the banks in the *Bank Nationalisation Case* were outstanding.

He was appointed a Justice of the High Court of Australia in 1950, and he did not retire until 1970. Whilst obviously independent in thought, his mind in general was much influenced by Sir Owen Dixon, the Chief Justice from 1952 to 1964.

In 1992 the *Australian Law Journal* published as an article a paper which Sir Frank had presented to a judicial conference 20 years earlier, called "Why Write Judgments?". In it may be discerned the judicial attributes he admired and, in fact, attained: learning and intelligence, clarity of thought, brevity of expression, discipline of thought, and felicity of phrase. It is hardly surprising that his judgments are today constantly cited.

Another noteworthy feature of his judicial career is that, like Sir Owen Dixon, he soon demonstrated his mastery of common law, a field in which he had rarely practised.

Sir Frank was also an adherent of Sir Owen Dixon's ideal of a "strict and complete legalism". In 1965, in the *Airlines of NSW Case No 2*, he said:

> "The Court is entrusted with the preservation of constitutional distinctions and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical considerations, or with modern conceptions they may appear to be in some or all of their applications."

In the article to which I have referred he acknowledges that the law must develop, it is not static, but it should be developed "by applied logic from within principles already established", not by stating that the law is whatever the judge thinks it ought to be. He firmly believed that "an understanding of the conceptual foundations of established principles alone provides a permissible foundation for further advance".

Times have changed.

He breathed these principles with a language that was as memorable as it was precise. If the *Oxford Book of English Prose*, in search of stylistic elegance, were to include quotations from the Australian judiciary, Sir George Rich, Sir Frederick Jordan and Sir Frank Kitto would be the most obvious candidates for inclusion.

Although as a judge he was highly esteemed by many people, it must be said that when hearing a case he gave vent to constant asperities by interjecting during counsel's arguments, a practice which made him feared as much as he was respected.

In 1970, when he retired from the High Court, perhaps curiously, he abandoned all interest in law. Although exceptionally well-read, he devoted himself to further reading. He also undertook two more tasks. One was the governance of the University of New England to which he was particularly devoted, and of which he was Deputy Chancellor from 1968 to 1970 and Chancellor from 1970 to 1981.

It gave him great pleasure to steer what was a new University into the paths of scholarship and excellence. When Chancellor, he was an activist and busied himself with even the minutiae of academic decisions, as well as presiding over the deliberations of his Senate.

The other task was the Press Council of Australia, of which he was inaugural Chairman, a job from which he did not retire until 1982. When accepting the post, he said that there were two objects which he set himself: the first was the overriding object of preserving the freedom of the press, and the second was inducing those who exercise that freedom to recognise and use higher standards of journalism. He obviously had greater success in achieving the former object than he did with the latter.

He was married in 1928: his wife, Lady Eleanor, predeceased him, dying in 1982. They had four daughters, one of whom died.

He was, appropriately, showered with honours. He was knighted (KBE) in 1955 and made a member of the Privy Council in 1963. He was created a Companion of the Order of Australia in 1983. In 1982 he was awarded honorary degrees from both the University of New England and the University of Sydney.

He was quiet and retiring, a little shy; reluctant to express publicly the views he certainly arrived at privately; modest with little to be modest about; a potentially great writer who preferred silence. His loss is grievous - for the law and the country, as well as his family. ❑

The Hon. Roderick Pitt Meagher

"Papers!"[1]

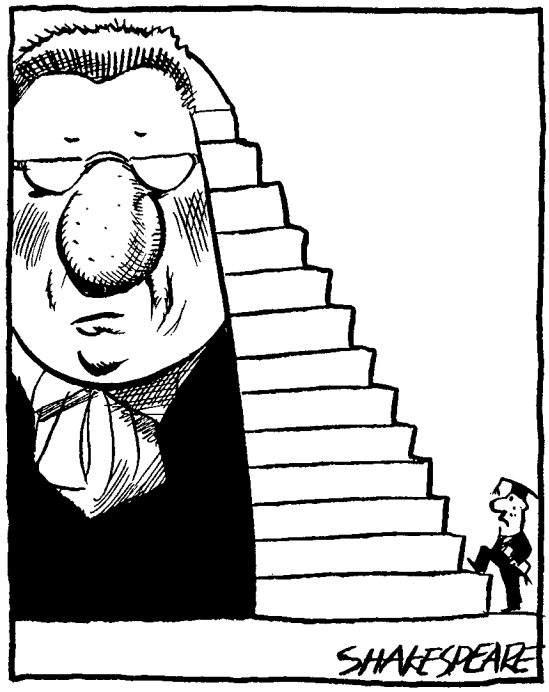
Lee Aitken

"You've got to remember that this ancient Inn wasn't born yesterday. It was born before HM Edward Three. No one's been in a hurry since. You've just got to kick your heels and look as though you like it. We've all been through it. It's good for us in the end."[2]

"The waiting for work is a terrible drawback to a young barrister's life and tends to sour his whole existence."[3]

The Carraway View

Most men[4] commence at the Sydney Bar with the same expectations as Nick Carraway in *The Great Gatsby* enters the New York bond market: "... Everybody [he] knew was at the Sydney Bar, so [he] supposed that it could support one more single man. All [his] aunts and uncles talked it over as if they were choosing a prep school ..., and finally said, 'Why - y-es', with very grave, hesitant faces." While it may once have been true that there was enough work to support the "single man", the Bar, unfortunately, is facing fissiparous pressures from lay and professional groups eager to avenge the imagined or real slights of the last thirty years of practice.[5]



In the old days, before the ravages of the recession, the introduction of paper committals and sentence indications, and the end of much common law work, the sanguine, Carraway, view was entirely justified. There was usually enough "floor work" around to keep the younger and less experienced players in peanuts, and more importantly, to provide them with the requisite forensic training to vindicate a claim to superiority as advocates over the average solicitor. There is less small work now as solicitors keep more of it for themselves. (It is here that the bar has failed as an institution since it has allowed a strong media perception to develop that all its members overcharge[6] without bringing any real craft to bear, an impression sedulously fostered by those with vested interests against the bar.)

A new mood seems to be sweeping the Street. A diaspora of sorts has begun as certain chambers follow the courts' move to other parts of the city with an inevitable downward pressure on demand for tenancies. This, in its turn, affects the price of chambers, for many of which there is at present no market because of an absence of buyers.

Subtle barriers to entry (notionally introduced to meet 'consumer expectations') are being erected to make it more difficult to commence into practice. In this, as in all life's travails, it helps to keep a sense of perspective. The ebb and flow of legal work, because of legislative or economic change, has frequently in the past[7] resulted in the collapse of a sandbar which has thrown the newer swimmers into roiling economic waters.

The best time to commence at the Bar?

Look back 30 years. A distinguished jurist, now gracing a superior Court Bench, once related a monitory tale over lunch when the economic rigours of practice were mentioned. Had he gone to the Bar one year later, so he explained, he would have had no practice at all because of now long-forgotten changes to the Landlord and Tenant legislation, and criminal work. As a result, much as now, the more senior juniors were forced down into the Magistrates' Courts and the neophytes went out backwards. And it was ever thus!

A cursory perusal of every volume of legal memoirs published from 1850 onwards speedily convinces the browser that a slow start at the Bar is guaranteed - and, of course, in the old days a pupil paid a premium to sit in his master's Chambers.

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1. The title derives from the poignant picture drawn by Henry Hawkins while waiting for work at the top of five flights of stairs in a woebegone eyrie in The Temple: he listens expectantly for the footsteps and the knock on the door: "Papers! Anyone who has ever waited for work to arrive will know how I felt" - Brampton, *Reminiscences* Vol I.
2. Herbert Getliffe to his pupil in Snow, *Time of Hope* (1949) p 247.
3. Lord Maugham, *At the end of the day* (1938) p 59.
4. On the vexed subject of misogyny at the Bar, see the author's "Bars and Bras" (forthcoming).
5. If things get too tough one could think about joining the DPP; in the Report of the Joint Committee on *The Midford Paramount Case and Related Matters* it was revealed that the main case officer on a huge Customs prosecution was someone who had had two years' service after one year with a Sydney law firm (para 10.50). "It was claimed by the DPP that 'two years experience was substantial" (para f10.51).
6. See Parris, *Under my wig* (1961) p 203: "The public is fed with fantastic figures of what Queen's Counsel earn."
7. Cp Parris op cit p 204 who spoke of a "slump in litigation" in England in the early 1960s and prophesied that merger would be the English Bar's only salvation - that has not yet occurred.

"Stall-fed" juniors [8]

The only notable exception, then as now, are juniors with connections. Sir Arthur Underhill[9], for example, when commencing at the Bar, was gratified that "... on my first day I found some six cases for opinions or instructions for drafts sent by my father." He was "not unnaturally elated at this ...".[10] His delight increased when an uncle by marriage "sent ... numerous cases on shipping, insurance and commercial law, subjects with which I had no previous acquaintance whatsoever."[11]

It is on this principle that H H Morris KC answered his own rhetorical question: "Shall I send my son to the Bar? The secret of success at the Bar is attorneys - attorneys - attorneys. If your son is fit for nothing better and he has a fair supply of attorneys then by all means send him."[12] Now, one cannot complain if nepotism or connection gives some favoured junior an easy start; God's bounty is dispersed indifferently and His largesse with connections is more than compensated for by His sense of humour in distributing outstanding physical attractiveness[13], great perspicuity, or sheer doggedness, all of which prove more useful in the long run than the evanescent pleasures of a practice based solely on connection. It is better to begin, as Sir Patrick Hastings long ago remarked, "at the very bottom ... in a case that did not matter, in a Court [one] could not find; no friends [can] help..., the patronage of kind relations is merely transitory...".[14]

A threnody in all memoirs of early years of practice is the absence of work in the early days. The vital thing is not to repine. As Lord Macmillan notes, "... (W)hile in these first years the prospects of success are apt to seem remote and high hopes seem doomed to frustration, the worst thing to do is eat one's heart out in idleness".[15] (Lord Macmillan suggests the possibility of publishing and writing to eke out one's time and a bare living. Sir Patrick Hastings obtained entrée to Sir Charles Gill's chambers by producing, at great mental expense, an unreadable monograph on money-lending legislation over his summer Vacation.[16] Nowadays, the utility of writing anything may be doubted, particularly if the aim is to build up a practice. It is a sad but self-evident fact that the number of players who actually <u>read</u> anything that is written in the more ephemeral of the proliferating number of journals is very small indeed. Few men will be briefed on the basis of lucid half-page in the Law Society, or some equally august, Journal. Perhaps a concerted PR campaign based upon extensive Law Society publications <u>plus</u> lunchtime performances at the larger shopping malls would have better results).

Building a practice

Lord Maugham's fundamental question remains as unanswerable now as it did 70 years ago: "Why, one is tempted to ask, does any solicitor send a set of papers for opinion or brief to a young man when there are many more competent older ones who would be glad to do the work?"[17] His Lordship offers no response to that and the current inquirer will similarly go unrequited. So it is that for a long time one is doomed to be in that group seeking earnestly for work rather than being sought after - "all want someone to discover that they are worth consideration for employment. Then, perhaps suddenly, perhaps imperceptibly, the position is reversed; ... clients begin to want them ...".[18]

Little fish

History also makes clear that when opportunity knocks[19] you must be ready to take it. Serjeant Ballantine's advice to the beginner is completely apposite: "Never return anything at the Bar - I never do!".[20] Lord Hewart counsels "Do not neglect the day of the little fishes."[21] Henry Hawkins tells the tale of returning a criminal brief because "there was nothing to be said by way of defence, but I learnt a lesson never to be forgotten". The Circuit leader, Rodwell, was happy to pick up the brief which Hawkins had spurned:

> "My curiosity was excited to see what Rodwell would do with it, and what defence he would set up; it was soon gratified. He simply admitted the prisoner's guilt, and hoped the chairman ... would deal leniently with him. I could have done that quite as well myself, and pocketed the guinea."[22]

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8. Henry Hawkins, *Reminiscences* Vol 1, p 67: "All blessings go with them; I never envied them their heritage. They are born to briefs as the sparks fly upwards. ... men who have never had to work their way seldom rise to eminence or to any position but respectable mediocrity. They never knew hope, and will never know what it is to despair, or to nibble the short herbage of the common where poorer creatures browse."
9. Underhill, *Change and Decay* (1938).
10. Id. 68.
11. Ibid.
12. H H Morris, *The First Forty Years* (1948) p 131.
13. This, without undue immodesty, is the author's strong suit.
14. Hastings, *Cases in Court* p 23.
15. Lord Macmillan, *A Man of Law's Tale* (1953) p 39.
16. Hastings, *Autobiography* p 87: "... I must confess that of all the tasks I have ever undertaken probably this was the most wearisome."
17. Maugham op cit 59.
18. Hastings op cit p 20.
19. The fairy stories are legion of the well-argued District Court motion, taken up at the last minute, and argued after much lucubration, which results in a huge debt-recovery practice from impressed solicitors (see, for example, memoirs by Lord Haldane, Sir Patrick Hastings and Lord Goddard - a Privy Council appeal, a fraud case, and Saturday morning(!) bank advice respectively. Compare, howver, Serjeant Ballantine, *Experiences* p 32: "I cannot say I burnt much midnight oil. No attorney, late from the country, ever routed me out and thrust a heavy brief into my hands, a circumstance which we have heard has so often been the origin of the success to eminent lawyers."
20. Given to Montagu Williams QC as recorded by him in *Leaves of a Life* (1890) p 89.
21. Jackson, *The Chief p 36.*
22. Hawkins op cit p 69.

Furthermore, it is unwise to assume that it will be possible to remedy gaps in one's legal knowledge in that quiet time before work begins to arrive. As Lord Cairns pointed out to the young Lord Guthrie, "Many men ... go to the Bar with the idea that they will get nothing to do for the first few years, and have plenty of time to read. But ... in point of fact men do soon get a chance. They are not prepared for it. They make a mess of it and are shelved for life."[23]

The right stuff: studied calm

Even for experienced former solicitors, it can be something of a trial to actually be "in the saddle" and in charge of a matter, with all depending upon fine line call judgments. What approach, then, should one take to the legal problem and the court? Studied calm. Although it may not be easy to emulate, it is suggested that Richard Bethell represents a beau ideal for those aspiring to a modern equity practice in his treatment of the court (though perhaps not one's fellow practitioners):

> "The Courts of Equity were at that time a very close borough, occupied by comparatively few practitioners who were acquainted with the subtleties of Chancery procedure. The machinery was cumbrous and slow, and a long experience was needed by those who would understand its working. There were few treatises on the various heads of practice, and still fewer reports of decided cases. ... Into this narrow circle Richard Bethell made his way with a calm assurance which startled those who had breathed its atmosphere for years. Their astonishment grew apace when, in a short time, they found the newcomer elaborating principles and assuming a knowledge of points of practice after a fashion to which none but the more venerable practitioners had hitherto aspired. He did not appear to desire any social intercourse with his professional brethren, nor to consider whether they were willing to bear his rather spinous humour."[24]

"The breath of an unfee'd lawyer"

At the start of a barrister's practice some firms, which should know better, adopt bold stratagems to obtain the dubious comfort of a counsel's opinion. Volumes of documents will arrive but without a backsheet and an opinion is then sought from the improvident. Baron Brampton counsels against truckling with any of this: "... there were a good many ... men who never got their fees at all from some attorneys; these gentlemen (the attorneys) patronised the poor pleaders by way of giving them 'a turn' as they called it, out of good nature. They never showed me that benevolence, because I determined from the first to have only business arrangements with my clients - no love - on my side, and no 'accommodation' on theirs".[25]

Bars and bars - nequid nimis

It is best, at the beginning, to keep a clear head and avoid alcoholic extravagance. Gone are those happier times when one could safely follow the precepts of Harold Morris's clerk - "May I suggest to you, sir, to make it a rule never to take any alcoholic stimulant of a morning before half past ten."[26] Although Dickens tells us that what Stryver and Carton "drank together, between Hilary Term and Michaelmas, might have floated a king's ship"[27] that does not conduce to confidence in either instructing solicitors or the court.

The keys to success
Clerking

Harold Morris, in his memoirs,[28] notes three things required for success at the Bar: the first is a good clerk; the second "is to make friends with all the members of the bar whom you meet"; the third is "advertisement". Unfortunately, good clerks are a nearly extinct species. A "good" clerk is one who actually clerks his or her floor - that is, is available to recommend upon a persuasive basis to the disinterested caller a counsel of whom that caller has never heard but who, upon the clerk's recommendation, the caller is prepared to instruct. As floor loyalty has broken down, so the possibility of such clerking has diminished. Many "clerks" now are mere factotums, ready to ensure that listings are attended to and conferees met but unable to give a recommendation upon which anyone will act. Proper clerking is worth (and paid) its weight in gold since it ensures that the newcomer at least gets a run.

Clubbability

Little need be said of clubbability; it is either in one's personality or not. If it is, it makes bearing life's forensic tribulations all the easier.

Advertisement, Pears Soap[29]
and "that most heinous sin of Huggery"[30]

But how to get a start without connections? Anciently, there were strict prohibitions against that most heinous sin of Huggery which has long been at the top of a long list of breaches of etiquette which a barrister must not commit. This was particularly so in the old days when there was an enormous

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23. Orr, *Lord Guthrie* (1923) p 26.
24. *Life of Lord Westbury* pp 40-41.
25. Hawkins op cit p 18.
26. Harold Morris, *Back View* (1960) p 117.
27. Dickens, *A Tale of Two Cities*, "The Jackal".
28. Harold Morris, *Back View* (1960) p 118.
29. To succeed at the Bar, Morris's third requirement was "Pears Soap" - advertisement.
30. "Mr Dayrell to be presented [at the Bar Mess] for that most heinous sin of Huggery by dining with an Attorney when his brethren were assembled at the George. Guilty, a bottle free": the entry in the Midland Circuit Record for 1773 noted by Sir Frank Mackinnon in his wonderful book of bricabrac, *On Circuit* (1935) p 163.

social chasm between barristers and mere common attorneys.[31] (One may add, by way of aside, that it may well be a forced attempt to continue this notional division in present day social conditions which has led to the concerted attack on the Bar by political and professional foes.)

Serjeant Robinson in his *Reminiscences* notes the "imperative rule, before railways were generally established, that no member of the bar could enter a circuit town by any public conveyance ..." for fear of inadvertently mixing with attorneys[32].

All that has now changed. Chambers are daily besieged by "professional marketers" who, for a modest fee, will design brochures and "package" the "product" which the particular Floor may offer to solicitors. Several brethren have also considered the possibility of a half or quarter page in the quality press. All these changes came as a thunderbolt with the overnight revocation of the relevant Bar rules against advertising and touting generally.

Lord Macmillan recommends, following Dr Johnson, that anyone advising a budding junior would "have him inject a little hint now and again to prevent his being overlooked."[33] Until very recently, any attempts to manufacture and apply a little "Pears Soap" was mightily disdained. All that has changed, but at what cost? The supplying of services is particularly open to "puffing" statement and for reasons explored below, the mere statement of price is unlikely to be helpful to the potential consumer, or to lead to any increase in the demand for the supplier's services.

The future?

Now, of course, if the general public interest in access to counsel is taken too far there may be consequences which even the Trade Practices Commission in its far-sighted wisdom has not fully foreseen. Consider an American foretaste of what may shortly be the position in our own humble jurisdiction.

In *Bonfire of the Vanities* Tommy Killian is showing his client, Sherman McCoy, the precincts of the New York criminal court building in Downtown New York - merely transpose the scene to Downing Centre and relevantly alter the ethnicity of certain of the players - do we confront the future?

"Have you ever been here before?"

"No."

The biggest law office in New York. You see those two guys over there? He motioned toward two white men in suits and ties roaming among the huddles of dark people. 'They're lawyers. They're looking for clients to represent.'

'I don't understand.'

'It's simple. They just walk up and say, "Hey, you need a lawyer?"'

'Isn't that ambulance chasing?'

'That it is. See that guy over there?' He pointed to a short man in a loud, checked sport jacket standing in front of a bank of elevators. 'His name is Miguel Escalero. They call him Mickey Elevator. He's a lawyer. He stands there half the morning, and every time somebody who looks Hispanic and miserable walks up, he says "Necesita usted un abogado?" If the guy says, "I can't afford a lawyer," he says, "How much you got in your pocket?" If the guy has fifty dollars, he's got himself a lawyer.'

'What do you get for fifty dollars?'

'He'll walk the guy through a plea for arraignment. If it actually involves working for the client, he don't want to know about it. A specialist."

Fees and the elasticity of demand

A most peculiar and persistent feature of the recent Bar Readers course was the constant pious adjurations from most speakers not to charge too much! (This must be counterbalanced with the sage advice of a senior clerk not to charge too little when briefed with Senior Counsel for fear of making the respective fee-notes lopsided.) But as Lord Maugham notes in his autobiography, "The most remarkable feature about the Bar is not that they cannot sue for their fees, but that it is so difficult at the outset to earn any."[34] Why, then, would one not charge the absolute limit whenever anyone was so ill-advised as to give one work?

Although the fact has completely escaped the economic rationalists, it is painfully clear, is it not, that the volume of work which an individual attracts bears little or no relation, within limits, to the fee charged; put econometeloquently at the very bottom, there is absolutely no elasticity of demand: suppose you charge $40 per hour plus sandwiches for resisting a complicated 459G notice; that will not mean that work floods into your chambers.

On the contrary, solicitors being simple men will tend to value you at your own worth and you will likely languish at that level forever.[35] Your fee would only have any relevance if the market were fully informed (which it never will be for reasons explored above), sufficiently skilled to judge the level of service being offered, and price were the sole determinant of choice of the provider of the service.

Now, at the lowest level of work, price should be the sole determinant since one man's skill will be about the same as any others. But since style is indistinguishable from product, every man is in effect his own monopolist and will charge what he can get from the market.

Market segmenting

This segmenting of the market leads to intra-Bar dissonance on fees and advertising. Anyone who has spent six or seven years before the mast, and who has painfully acquired a practice, will be most reluctant to see full, or any, fee

31. Mackinnon records the following "indictments" which illustrate Huggery: dancing with an attorney's daughter; bringing an attorney in his chaise; dancing with an attorney's wife; dining with an attorney.
32. Mackinnon op cit pp 166-167.
33. *A Man of Law's Tale* (1953) p 39.
34. Maugham, *At the end of the day* (1938) p 53.
35. See the author's "Stars and Bars" for a full analysis of the "monkeys and peanuts" syndrome.

advertising introduced. Why? "Because it's not the way we have usually done it, it's not done, etc, etc." In reality the introduction of full fee advertising will undercut to a certain extent the goodwill and connections which have been painfully garnered over the preceding five or six years and will reduce its value since in terms of sheer skill there may not be a huge difference between someone of five years call and an experienced solicitor who has heeded the Bar's siren call. (Schadenfreude for the problems experienced by the raw beginner is replicated in the case of the fourteen year man when he contemplates applying to be Senior Counsel or risk being forever consigned to the "paper" end of the Equity Division. Of course, taking silk is not without its own risks.)

The irrelevancy of paper qualifications

For similar reasons, one can perceive a general reluctance to make paper qualifications and previous experience readily available to the inquirer. Of course, mere academic qualifications are of no use whatsoever in acquiring a practice. (For just such a reason I recently counselled a young barrister against mentioning his doctorate on his card, advice subsequently confirmed by the doyen of Sydney's barristers' clerks. It is salutary to remember that the only man ever to win both the Eldon and Vinerian Scholarships at Oxford University finished his career, not as Chief Justice of the Victoria, or the Commonwealth, but as the warden of Trinity College, Melbourne).[36]

The law and the Kuhnian paradigm: smoke and mirrors

Let us cut to the chase: the real problem with the present concerted assault upon the law and its finest practitioners is that it reveals too plainly what the thoughtful observer has known in his bowels all along - we are engaged in a fairly complicated but not too difficult social science which is easily accessible to an informed and educated layman.[37] To talk of legal practice as if it were akin to brain surgery, nuclear physics, or the highest levels of pure mathematics is nonsense. In this most hierarchical of professions the wisdom of ancients is often accorded the status of Holy Writ: consider, without disrespect, Sir Garfield Barwick's view of law as science: "The common man who thinks that the law is commonsense might be right if he watched the consummate lawyer at work in all his deep simplicity, and with that ease which conceals the great learning behind the apparent simplicity. But nevertheless the law is a mystery...".[38] This strikes the seasoned ear as a little too liturgical description of even a special leave application, let alone moving a matter from Monday to next Tuesday before a listing officer.

If you are dealing with a science, or mathematics, the discoveries are inevitably made by young men. In law, on the other hand, the perquisites go to the liverish, those who have hung on, learnt human nature, and have a wide knowledge of men, judges and affairs. It follows that you cannot "discover" anything new about the law at all: there is no Kuhnian paradigm to break unless you are a Lenin sort of lawyer and, up early one morning, decide to overthrow the entire State.

Someone like Lord Denning, who moderately reconfigures a few of the working concepts, is greeted as an innovator. But you cannot be a legal Isaac Newton: if you appear in the Court of Appeal one fine day and suggest that the law of tort should be permanently suspended and replaced by a law of obligations of your own making you will be taken in hand by a tipstaff and made the subject of a care order. Once accept the absence of scientific knowledge, and for these purposes doing things with rules or "smoke and mirrors" hardly counts, and disdain from a misinformed public is sure to follow.

Lobotomies and litigants in person

A simple example will demonstrate why the law has lost whatever "mystique" it once enjoyed among the credulous: if you were to hand a trepanning instrument to an educated, sober and unsqueamish layman he would not for one second contemplate opening the skull of the unconscious patient. If you hand the same layman an Act of Parliament, or a wills precedent, and ask him to explain either of them to a court as litigant in person he will make a fair fist of it and will be surprised that anyone could be paid $5,000 a day for doing so. (Was not Horatio Bottomley in his days, when appearing for himself, more than a match for most counsel sent against him?)[39] That, in a nutshell, explains why the legal profession in general, and the Bar in particular, is wide open for a cheap media shot.

The dislocation between the hard science and the "money" ends of the law and medical professions is illustrated by the respective treatments medical and legal university staff attract from practising colleagues. In medicine, to be a theoretical player you must be attached to some great teaching hospital where you confront and write copiously about the most complex medical problems upon which you consult in your specialty. (You may, of course, make more money running your "24 hour carbuncle clinic" up the Parramatta Road but at the international conference you are not remotely a contender).

In law, on the other hand, the campus is usually regarded by a practitioner as the province of the halt and the lame - only

36. Lawson, *The Oxford Law School 1850-1965* p 119.
37. It is this feeling which is behind the drive to make certain aspects of practice (such as conveyancing, will-drafting(!) and debt collection) a free-for-all in which qualified and unqualified alike will compete for work.
38. The passage is set out in extenso in the Frontispiece to Marr, *Barwick* but no precise citation is given to it by the author.
39. Marjoribanks, *Marshall Hall* p 132 describes the success which Bottomley and Marshall Hall with respect to defending libel actions for John Bull by having Bottomley appear as litigant in person, thus "enjoying to the full the licence always allowed to the litigant in person ...". This continued until Douglas Hogg, later first Lord Hailsham, hit upon the stratagem of suing the publishers alone which meant that Bottomley could take part only as a witness.

in the last few years have our own judges,[40] who previously adopted the English model, begun to recognise the contribution made by the writers of treatises.[41]

The new law schools and a message for practitioners

The view which the Federal government through its minions in DEET takes of the value of "legal educators" (and by inference, the legal system) may be seen by the fact that a law[42] professor, twenty years ago, earned as much as a District Court judge, and now earns half that amount! Yet, although he does not perceive it, that is a bell which tolls for the legal practitioner, however little he thinks that the academic world affects him: in that drop in academic salary, the legal practitioner should see the studied disregard of his own skills and position. Combined with this devaluation of the skill involved is a great opening up of access to legal education - as many lawyers are in training as are now in practice and each new "university" strives to add a law school to its training; it is, after all, an easy Faculty to establish since all that is required is a foundation grant for the library and few retired operators to teach what they can remember. The impact of this is slowly filtering through to the professional level. There is an indirect control over the solicitor's profession in the sense that there is a limited number of places available at College of Law and Workshop and all sorts of limited practice restrictions are now imposed before a full certificate can be granted[43]. The Bar has faced a similar problem and is subtly adding "barriers" by increasing the time which must be spent in the Bar Reading programme. (A suggestion by the author to a senior legal educator that a better response would be to withdraw accreditation from law schools which did not cover enough evidence, practice, and procedure to satisfy the rigorous standards of the Sydney Bar met with a guarded response. The whole question of Bar entry is going the way of New York where any punter with an LLB in his knapsack can arrive, do the BAR BRI course for seven weeks and then sit the Multi-state and NY examinations. No doubt the Trade Practices Commission would approve. At present the Bar would lack the internal resources to operate in such a way but that could easily be resolved with sufficient funding under persuasion from a Supreme Court bench responding to "public interest pressures" to ensure a satisfactory standard of advocate.)

Work habits or are you Heyman Drewer?

Let us assume you have garned a practice. You will be working tirelessly, servicing those solicitors who instruct you, sure in the knowledge that if you do not do so there are "...whole nestfuls of others with their beaks open, waiting to be fed."[44] And now the great paradox will strike you - you are "successful" because every waking moment concerns some questions of crop liens, or avals. Yet, you have no time to do anything else.[45] In his famous novel, *We, the Accused*, Ernest Raymond portrays the very model of a successful barrister. His paragon strikes a familiar chord with anyone attuned to the workings of the Sydney Bar. Heyman Drewer KC is the prosecutor of Presset, the accused and this is how he succeeded at the Bar:

> "A man who, secretly to his own surprise, has achieved the whole of his ambition is always as healthy and happy as a child at play. ...He had nothing [to begin] on his side but his dour Scotch will. Still, the will had set his mouth, emptied his eyes of gaiety, and driven him to London. In his early days of devilling in London, when he watched the great men come and go, and endured their ill-temper and their snubs, he had often been near to despair; but the good Scotch will had clenched his fists and advanced his jaw .... Frustration fanned a fire of determination, and he worked as no one else; and the work did not tire him, because his ambition was driving him; nay, the work kept him well, because it was release... he outdid all other juniors in his preparation of a case. 'Not a loophole' was his motto; 'not a weak link'. And soon one of the great men perceived this, and was glad to have him as his junior. The great man stretched down a hand

40. The demystification (and consequent commercialisation) of judicial office is a separate topic in itself. Long gone are the days when one would "revel in the glory of being a judge". It attracts no knighthood or other honorific, upon appointment or retirement. It is now subject to constant ill-informed media sniping and its emoluments are capped by a Remuneration Tribunal. It is no wonder that certain retired officers seek to make money upon retirement to "top up" their pensions, nor that the Attorney cannot attract anyone to the post and has to advertise; if he seeks a cause he need look no further than the government's constant denigration of the legal profession.
41. See, for example, the recent statements of Kirby P (see, for example, his Honour's references in Equiticorp Finance Ltd (in liq) v BNZ (1993) 11 ACLC 952, 990 to the academic discussion of economic duress) and Steyn LJ (see, for example, his Lordship's discussion in Surrey County Council v Bredero Homes Ltd [1993] 3 All ER 705, 714 on the third principle of restitutionary recovery) in which both have acknowledged the importance of academic discussion. In this, of course, the English courts are now drawing much closer to the Continental position where the jurist is the key developer of the law - whether this means that our judges will become more like civil servants (as is the case with Continental judiciary) is an open question.
42. A medical professor has a clinical loading and the opportunity for private practice, as well as access to the latest publicly-funded technology which is necessary to conduct research. None of these applies to the law professor.
43. In Western Australia, for example, where formal articles are still required to be served, 47 applicants were still without a training post from the 1993 intake in early 1994.
44. Parris, *Under my wig* p 204.
45. This is because the successful or fashionable man will take the lion's share of the work - The Earl of Birkenhead's aphorism on work at the bar was repeated frequently throughout the recent readers' course. For those who have forgotten it, it goes mutatis mutandis like this - "There are 1,500 barristers at the Sydney Bar, there is enough work for 1,000, and it is all being done by 500".

and pulled him on to the first step. ... He worked; how he worked! He sought no social life and made few friends, for he grudged the time; he went to few theatres, less concerts, and never an art gallery, for, if he returned from his chambers at seven o'clock, it was with plenty of work in his hands to fill the hours from dinner to bed. And gradually his well-known thoroughness secured him briefs that involved a mastery of detail; and the money came with them, and more and more thrilling labour into the small hours, but less songs and less friends. And he counted himself a happy man!"

There are many Heyman Drewers walking Phillip Street. This sort of image has long been encouraged by the hard men of the profession. But where are the snows etc? Sir Valentine Holmes[46], the "legendary"[47] Wilfrid Hunt - who remembers anything of them now? Willes Chitty, the most famous practitioner of his generation, overworked to such an extent that he was eventually compelled to retire as a Queen's Bench Master[48]. Many a local Silk can be found at the end of a long Term quivering with overstrain which is only partially relieved by a sojourn in Bali. Too much of such a regimen leads to a triple by-pass, alcoholic excess, or being found face down at your desk with a stogey in your mouth. Yet, of course, there is no other way. The very definition of "success" is to be completely overworked.

Art and artefact

It is a sobering fact to remember that, pace those who would treat the matter more spiritually, the practice of law is a mere craft, like any other and that of the great exponents of it a fair criticism is that "... Outside [their] craft in which [their] competence [is] immense, [they are] as simple and unsophisticated, as insensitive and commonplace, as many great legal minds."[49] The daily practice of law, whether it be in a court arguing a case, advising in conference, or writing an opinion, is aimed solely at the production of an artefact, good for here and now but likely immediately to be overwhelmed by the tide of events. The pressure of practice leaves little time for reflection, or deeper analysis.

Furthermore, for most business clients the legal profession is nothing more than a nuisance. Sir Neville Faulks records in his autobiography his meeting with a very senior member of a mercantile family:

> "I was kept waiting quite a time before I was shown into the presence. It was made quite plain that the great man, whom I had not the slightest desire to see, and of whose existence I was unaware, was very busy indeed. I have never been so heavily patronised in my life ...".[50]

For the same reason, it was said of Nubar Gulbenkian that he dispensed with all his counsel over time except for Cyril Radcliffe and in the end he tired even of him. The failure of the Bar institutionally to confront directly allegations of inutility and venality has resulted in the position in which we now find ourselves where the debate is largely directed by those with malign intent who find a ready reception in the media.

With respect to the end product, pressure of time and business is such that only a specific amount of attention may be safely devoted to analysing any question. (As a very junior counsel one has time to set virtually any problem as a libretto but that time must soon pass else one goes under through financial inanition.) Gone is the time when one could emulate Mr Lee, the conveyancing counsel (when that title meant something) at whose feet Lord Westbury learnt his craft: "He would settle and resettle his drafts, recast and revise his opinions, and discuss the point of a case with his pupils with perverse iteration, 'hunting and winding it through all possible ambages', hauling and tugging it till it would yield no further doubt or difficulty."[51] There is, in short, little time for art.[52]

Sauve qui peut

It is a powerful Chinese curse to be "living in interesting times". Despite the aspersions which they may cast upon its individual members[53], there is no doubt whatsoever that the boys of the old brigade take a very great pride in the Sydney Bar as an institution. A strong oral tradition exists, handing on from one generation to the next tales of the derring do and imbecility of an earlier time. One may claim, without grandiloquence, that an independent bar is one of the few groups left able to resist the continuing encroachment of executive power - no doubt this is a salient cause of the fire which it has lately drawn. If its members now break rank in an endeavour to maintain individual "market share", or offer a full "amalgam" service which, of necessity, will undercut the need for a separate bar at all, or sell out by taking the poisoned chalice offered by large enterprises to offer "in-house" services, all may be lost institutionally. Whether the Sydney Bar will continue as it was before or is, though its members do not realise it, in the middle of a vast structural reformation with calamitous consequences for the fringe players is at present only a matter of speculation. This much is true - powerful opponents are circling and it will, as always, be better to hang together than to hang separately. ❑

46. Sir Valentine Holmes was in virtually every big civil matter in the English courts for a period of 25 years from 1925 to 1950.
47. Per Hoffman J in Re Beatty [1990] 1 WLR 1503, 1508.
48. See Alexander, *The Temple of the Nineties* pp 104-105: "During the sittings of the Courts he rushed about the courts or interviews clients without admission all day long. From about 10 pm and for long hours afterwards he read briefs, drafted pleadings or wrote opinions. Saturday and Sunday hardly afforded any relief. It was nerve-wracking work and it took its inevitable toll."
49. Raymond op cit p 324.
50. Sir Neville Faulks, *A law unto myself* p 125.
51. Nash, *Life of Lord Westbury* Vol 1 (1888) pp 37-38.
52. Only real artists, like Sir Frederick Jordan, wear well judgment-wise. The contributions of many higher on the judicial totem pole have been forgotten within a generation.
53. Many of the comments which one hears from experienced players bring to mind that famous comment of Lord Macnaghten when some issue of judicial incompetency arose. A committee of the judges began its report "Conscious as we are of our own deficiencies ...". Some worthy complained that he was not aware of any deficiency whereupon Lord Macnaghten felicitiously changed the opening to "Conscious as we are of the deficiencies of each other ...".

Capital Gains Tax
Damages Award Implications of "Choses-in Action"!

Compensatory damages awarded by a court or settlements entered into by parties to litigation may be liable to Capital Gains Tax pursuant to Part IIIA of the *Income Tax Assessment Act* 1936, as amended (the "Act"), if the damages were awarded or settlements occurred after 24 June 1986.

There have been amendments to the definition of "asset" for the purposes of Part IIIA and accordingly, what constitutes an asset must be considered by reference to the dates the amendments took effect.

What is caught?

The legal adviser to parties to litigation who seek as relief an award of damages should attempt to ascertain whether those damages are likely to be:

(i) assessable income under s.25(1) of the Act; or
(ii) assessable capital gain under s.160Z0(1), if the "asset" involves a chose in action under Part IIIA s.160Z(a)(iii) of the Act: or
(iii) subject to the exemption provisions of the Act.

Is a "right to sue" liable to CGT?

The question whether a "right to sue" is an "asset" for the purposes of Capital Gains Tax - s.160A (a)(iii) - ie, a chose in action - has been dealt with in the main as regards Part IIIA of the Act since 24 June 1986 in the following cases:

(a) *Hepples v FCT* (1991-1992) 173 CLR 492 and 550;
(b) *FCT v Cooling* (1990) ATC 4472;
(c) *Provan v HCL Real Estate Pty Ltd* 24 ATR 238;
(d) *Tuite & Ors v Exelby & Ors* 25 ATR 81;
(e) *Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd & Anor* 25 ATR 192;
(f) *Reuter v Federal Commissioner of Taxation* 111 ALR 716;
(g) *Namol Pty Ltd & Anor v A W Baulderstone Pty Ltd & Ors* 18 IPR 1; see also at 119 ALR 187.

If the chose in action arose on or before 25 June 1992, the matter is governed by the earlier definition of "asset" in S.160 - the chose in action will not be an asset. It is not a right of a proprietary nature, as was required under that earlier definition - see *Hepples* and *Cooling*. If, on the other hand, the chose in action/right to sue arose after 25 June 1992, it is clearly an "asset" as stated in s.160A (A)(iii) of the *Income Tax Assessment Act* 1936.

What should be done?

I would commend to fellow colleagues to address the issue of the exposure to a capital gains tax liability of any unresolved litigation commenced since 24 June 1986, but in particular, litigation commenced since the amendment to S.160A of the *Income Tax Assessment Act*, in respect to an "asset" dealt with after 25 June 1992. For the sake of caution, fellow colleagues should have their solicitors engage a qualified and experienced taxation adviser to advise whether Part IIIA of the Act in relation to any litigation in which a barrister is retained may give rise to a taxable capital gain. In so doing, they will be able to avoid potential exposure to a claim on their professional indemnity policy.

Barristers should ensure that, in relation to claims for damages, the pleadings include a claim as part of the damages the sum which may be the tax payable under Part IIIA of the Act. A claim should be made on behalf of a plain tiff for:

(i) a declaration of the liability of the other party or parties to the proceedings to pay the capital gains tax that would be incurred by reason of the plaintiff's success in the proceeding; and
(ii) an indemnity from the other party or parties to the proceedings in respect of that capital gains tax liability; or
(iii) an undertaking from the other party or parties to the proceedings to pay that capital gains tax liability.

Alternatively, consideration should be given to joining the Commissioner of Taxation as an additional party to the main proceedings such that any declarations as are made in relation to the Capital Gains Tax issue will be binding upon the Commissioner.

Also, when advising on the terms of settlement or form of minutes of orders, the exposure of the judgment to the capital gains provision of the Act should be taken into account and, if appropriate, an indemnity obtained from the other side.

In all matters, barristers should be aware that tax obligations may be being incurred because the effect of the transaction or arrangement may ultimately result in a capital gains tax liability to a party. Barristers should be alert to the possible capital gains tax implications of advice they given and communicate that to the client.

What is not caught?

The Act excludes transactions or actions involving "assets" that are <u>not</u> within the ambit of Part IIIA of the Act, namely:

(i) compensation or damages received in respect of personal injuries claims and defamation suits: s.160ZB(1);
(ii) receipts from winnings from bettings, lottery, gambling or other games of competition: s.160ZB(2);
(iii) insurance recoveries in the form of moneys received or replacement assets under a policy of insurance: ss.160ZZK and 160ZZL;
(iv) moneys received under other policies of insurance or policies of assurance: ss.160ZZH and 160ZZI. ❑

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Cambodia

David Higgs examines the history of Cambodia and the wars which have destroyed the Cambodian legal system and suggests ways in which the Australian legal profession can help in rebuilding it.

Australia has a close association with Cambodia. On 23 November 1993 the Secretary-General of the United Nations appointed Justice Michael Kirby as his Special Representative for Human Rights in Cambodia. The Australian Government was one of the countries most active in pursuing the peace settlement in Cambodia.

How can we help?

At the University of Sydney there is the Centre for Asian and Pacific Law, the Director and Associate Director being Professor Alice Tay and Ms Conita Leung, respectively. They have just returned from Cambodia. The Centre hopes to promote its exchange programme for students from Cambodia and other parts of Asia, together with its other specialised courses to be conducted at the University in Sydney and abroad for practising lawyers and government officials as well as students. Also, they are assisting AILC (the Attorney-General's Australian Indo-Chinese Legal Committee of which Professor Tay is a member) in finding someone to go to Cambodia, Laos and Vietnam to establish and co-ordinate a continuing legal education programme in those countries. Preferably, the candidate would have at least 15 years' legal experience. The candidate would also need to be sensitive to the needs of the Cambodian people. The Centre accepts donations, volunteer time and legal textbooks and reports for assortment and distribution to Asia. It is located at 173-175 Phillip Street, Sydney. Telephone (02) 225 9275.

The Australia Cambodia Foundation has acquired recently land for a new orphanage at Battambang. A local architect has been engaged to develop plans for a new building. Construction costs (excluding furniture and fittings) will be around $A50,000 - far in excess of available funds. The Chase Manhattan Bank has donated $US15,000 to the Foundation. The number of children accommodated at the temporary orphanage in Sisophon has risen recently from 29 to 42. The Foundation seeks to find an individual sponsor for each of the children. The address of the Foundation is PO Box 37, Milsons Point, NSW 2061. Telephone and fax number (02) 954 5784. The Foundation has no salaried staff, no rented premises and no paid office-bearers and no other significant overheads.

There is a special need for the children of Cambodia to be supported. More than one-third of Cambodia's population of approximately 9.1 million people is below 15 years of age. 20% of the population is under four years of age. Life expectancy at birth is 49.7 years. Approximately 65% of the adult population is female (compared with 50% in 1962) reflecting the toll on the male population due to war, civil disturbance and the ravages of the Pol Pot era (1975-1979). There are approximately 188,000 orphans living outside orphanages. The shortage of male labour has also led to a reliance on child labour with its accompanying impact upon school attendance.

History

The recorded history of Cambodia starts in the first century AD with the Kingdom of Funan whose territories at one time included parts of Thailand, Malaya, Cochin-China and Laos. Based upon the Mekong Delta and a well-developed irrigation system, Funan was prosperous and traded with China and India. Its culture, religion and administrative structure were heavily influenced by Indian culture of that time and this influence has remained as an identifying characteristic of the country's culture. The majority of the population are Khmer. The Khmer monarchy is generally dated from the reign of King Jayavarman II (802-850) who founded his capital near Angkor and proclaimed himself Universal Monarch. The empire reached its peak during the reigns of Suryavarman II (1113-50) builder of Angkor Wat and the Buddhist King Jayavarman VII (1181-1219). Thereafter, a slow decline in the empire followed, caused largely by continual wars with the Thais and Chams. In 1432, after repeated Thai attacks, Angkor was abandoned, in part, because of the destruction of its irrigation system and the capital was moved to an area near the current capital of Phnom Penh. The temples at Angkor are a special tourist attraction. The most famous temple, Angkor Wat, in 1992 became part of the World Heritage List.

From 1432 Cambodia came under increasing pressure from both of its much larger neighbours, Thailand and Vietnam, and by the late-1700s found itself virtually divided between the two. This conflict was ended with the establishment of a French Protectorate in 1863. Tensions between Cambodia and Vietnam still exist.

In 1941, Norodom Sihanouk was appointed King by the French. Independence within the French Union was achieved in November 1949 and full independence in 1953. To avoid the limitations of his role as constitutional monarch and to qualify for political leadership, Sihanouk abdicated in favour of his father in March 1955 and founded the Popular Socialist Community Party which won all seats in the Assembly Elections in 1955 and 1958. After the death of his father in 1960, Sihanouk was elected Head of State.

Over the past 23 years it hasn't been fun to be Cambodian.

During the 1960s Cambodia was caught up reluctantly in the Vietnam War. Also a pro-communist insurgency movement which Sihanouk called the Khmer Rouge (the Red Khmer) became established, increasing instability. From 1969, secret American bombing of Cambodia killed an estimated 600,000 Cambodians (the aim of the bombings being to destroy Viet Cong sanctuaries). In 1970 Prince Sihanouk was deposed by a right-wing military coup led by the then Prime Minister,

Lieutenant General Lon Nol, who headed a pro-American group. Sihanouk went into exile in Beijing and formed a Royal Government of National Union (GRUNK) which was supported by the Khmer Rouge.

The popularity of the Khmer Rouge began with American bombers dropping over 100,000 tons of bombs on rural Cambodia during the first six months of 1973, nearly twice as many as were dropped on Japan for the whole of World War II. Many young Cambodians left their villages for the jungle to join the Khmer Rouge guerillas. Meanwhile, GRUNK forces (with the help and training of the North Vietnamese Army) waged war on Lon Nol's Government and by March 1975 his forces controlled less than 10% of the countryside. Phnom Penh fell to GRUNK forces on 17 April 1975. The new ultra Maoist-Government was initially headed by Prince Sihanouk as Chief of State, but he resigned and was placed under house arrest in April 1976, whereupon Khieu Samphan and Pol Pot became Head of State and Premier respectively.

The Pol Pot régime is estimated to have killed 1 million people (some say 3 million) either by starvation or execution. People were divided into two groups - namely the "old" (from the cities) and the "new" (Khmer Rouge and farmers). The "old" were executed. The victims included "intellectuals", defined as anyone who wore spectacles, monks, professional men and women, members of the former armed services and anyone defined by the Khmer Rouge as having "foreign influence" such as knowledge of English or French words.

Whereas the Khmer Rouge and North Vietnamese had combined forces beforehand, from 1970 onwards there was increasing distrust and bitterness between the Vietnamese and Cambodians, particularly as the former pursued their objectives in South Vietnam. This culminated in a Vietnamese force of 200,000 invading Cambodia on 25 December 1978. Phnom Penh was captured on 7 January 1979. The People's Republic of Kampuchea (later renamed the State of Cambodia) was proclaimed. The new Government pledged to restore freedom of movement, religion and the family unit.

In 1989 the Vietnamese withdrew from Cambodia. Following the withdrawal, there was an escalation in fighting.

On 23 October 1991, following a decade of protracted negotiations, four Cambodian factions, together with 18 Member countries of the United Nations, signed the Paris Agreements. Problems arose in relation to the implementation of the settlement, particularly arising from non-co-operation of certain Cambodian factions including (but not only) the Khmer Rouge. The key element of the peace settlement was the establishment of UNTAC (UN Transitional Authority in Cambodia), which was responsible for creating a neutral political environment conducive to free and fair elections. This task involved the UN in the civil administration of Cambodia during the transition period - being a completely new type of UN operation. Importantly, the terms of the settlement included a commitment by the external powers to end all military assistance to factions in Cambodia. During this period, Cambodian sovereignty was embodied in a Supreme National Council (SNC) made up of the four Cambodian factions under the Chairmanship of Prince Sihanouk.

Recent times

The UN-sponsored elections held 23-28 May 1993 were a great success, despite violence and unrest prior thereto. A total of 4,267,192 voters cast their ballots representing 89.56% of registered voters. About 95% of eligible voters registered to vote. In all, 20 political parties participated in the elections. On 29 May 1993, the UN Secretary-General's Special Representative, Mr Yasushi Akashi, declared that the poll had been free and fair.

The elections provided Cambodia with a 120-member Constituent Assembly to draft a Constitution and form a Government. One of the first acts of the Constituent Assembly was to nullify the effect of the 1975 coup which deposed Prince Sihanouk and declare him Head of State. It was subsequently decided to reinstate Sihanouk as King, the position from which he abdicated in 1955.

The two major Cambodian parties to gain the most seats in the elections were FUNCINPEC, the royalist party led by Prince Ranariddh (son of King Sihanouk) and the Cambodian People's Party (CPP) of the Phnom Penh Government (which had been installed by Vietnam in 1979) led by Mr Hun Sen. FUNCINPEC captured 45.47% of the votes (58 seats in the Assembly), and CPP captured 38.23% of the votes (51 seats in the Assembly). Hence, a coalition was necessary for a Government to be formed. In late June 1993, these parties, together with a third party (the Buddhist Liberal Democratic Party) agreed to form a coalition interim administration called the Provisional National Government of Cambodia (PNGC).

On 24 September 1993, the Government was formed and the Constitution promulgated. The Constituent Assembly became the National Assembly and two Prime Ministers, Prince Ranariddh and Mr Hun Sen (known as the First and Second Prime Minister, respectively) were appointed. Norodom Sihanouk was elected King by the Crown Council and ceremonially installed with his wife, Monique, as Queen. The form of government is a constitutional monarchy. In October 1993 the new Government took occupation of its UN seat.

Sihanouk's role in the rebuilding of Cambodia is important. Over the period until late January 1993 the level of internal violence was escalating. The violence diminished thereafter, in all likelihood due to Sihanouk's call for an end to internal strife and his threat not to return to Cambodia unless violence ceased. Unfortunately, he suffers bad health. Succession to the throne does not automatically go to a child of Sihanouk. There are a number of contenders. His successor has not been determined.

Khmer Rouge

The influence of the Khmer Rouge has diminished greatly. They have demonstrated their inability to intimidate or frighten the Cambodian people away from the ballot box. In 1979 they issued a formal apology to the people of Cambodia for having attempted to abolish the main religion of the country, being Theravada Buddhism. Over the Pol Pot period

(1975-1979) religion was prohibited and Buddhist monasteries were destroyed and their monks executed.

Even so, King Sihanouk has said that he regards the Khmer Rouge "as being part of the national Cambodian community" and has publicly contemplated the Khmer Rouge as having an advisory role to the Head of State or to the Government. In mid-July 1993 the Khmer Rouge returned to their Phnom Penh compound which had been vacated precipitately in April of that year. In a letter of 30 September 1993 to Mr Khieu Samphan, the nominal President of the Khmer Rouge, the two Prime Ministers placed conditions on participation in round-table discussions which had been proposed by Sihanouk. These were that the Khmer Rouge recognise the new Constitution, recognise the legitimate Government and decree that the Khmer Rouge as a "group" would negotiate with the Government under the chairmanship of the King. At the conclusion of a visit to Phnom Penh on 1 and 2 October 1993, Khieu Samphan said that the Khmer Rouge recognise the King and the Constitution. Recognition of the Government, however, has not been forthcoming.

On the military front, the Khmer Rouge continues to hold several areas in the central and western Provinces. An offensive was launched in August 1993 by the Government against these positions, followed by an amnesty appeal by the two Prime Ministers. About 800 to 1,000 Khmer Rouge troops and officers were reintegrated into the Army. Initially successful, this amnesty programme has been marred by reported corruption involving high-ranking Government officials. Ill-treatment of defectors in a Government recruitment centre has occurred and there have been reports of arbitrary killings and attempted killings of several defectors after they have surrendered. Recently, the Khmer Rouge stronghold of Pailin fell to Government troops with little resistance. The ultimate success of this operation will depend upon whether or not Government troops can hold Pailin during the wet season which lasts from May until October, during which supplies and other support can be cut off easily in the event of there being an attempt to recapture the city by Khmer Rouge guerilla forces. A common pattern of Khmer Rouge operations is to abandon positions and recapture them later on.

The constant turmoil jeopardises Cambodia's recovery. There is an official unemployment rate of about 30% and even greater under-employment. About 80% of the population is classed as being below the poverty line. Employed staff routinely work 12-14 hours a day, seven days a week for very low wages. Most public servants have a second job in order to supplement their income. Agriculture employs about 80-85% of the workforce and constitutes about half the GDP. Despite this emphasis upon agriculture, the country has moved from being a net exporter of rice in the late-1960s to a net importer. The main exports are timber and rubber. The main imports are fuel, construction material, beer, tobacco and consumer goods. A major problem in the development of Cambodia is the presence of land mines which have been laid and continue to be laid by all sides. They cost $US15 to install and $US1,000 to remove. There is estimated conservatively to be 8 million (plus) land mines laid in Cambodia (a startling figure when compared to its population of just over 9 million). The country has the dubious distinction of having the highest level of war-caused amputees in the world.

Legal system

When Cambodia attained full independence in 1953 it retained the French legal system which had been imposed during the period when it was a Protectorate of the French Republic. This was all changed in 1975 when the PDK (the Khmer Rouge) abolished all laws and institutions such as courts, with the result that the rights of people were determined by arbitrary administrative decisions. In 1979 the Vietnamese-backed PRK came to power. Attempts were made to rebuild the legal system upon a basis where the Executive exercised control over the legal and judicial process. In May 1980 there was established a Revolutionary People's Court in all the Provinces. The implementation of any legal system was impossible due to inadequate or no legal texts on civil law, including contracts and property, criminal law and procedure, rules of court, evidence, labour law and immigration law. Institutions such as the police and court staff were not fully organised or properly functioning. The rule of the arbitrary prevailed all too often.

At the time of the arrival of UNTAC the judiciary was not independent and courts were subjected to direction by the Executive (Ministry of Justice, Council of Ministers, local politicians and administrative authorities) and to pressure by the Police and the Ministry of National Security. Access to defence counsel was virtually non-existent and there was no properly functioning forum for appeal. Understaffing, lack of adequate resources, dysfunction due to poor qualifications and organisation and often also corruption hampered the work of most courts, resulting in the prolonged detention of suspects without trial.

Also, during UNTAC's administration, problems were encountered in charging public servants with corruption. Four arrests of public servants were made by UNTAC during the transitional period. In the first two cases a Special Prosecutor sought to bring charges against the accused in the Phnom Penh Municipal Court. Following the hearing of the first of these cases by the Court, the Minister of Justice instructed the President of the Court that he was in error in hearing the case, and that should he continue to "violate the law", he would be "punished". As a result, the Judge declined to hear the Special Prosecutor's application in respect of the second prisoner.

Fortunately, there has been some advance of the legal system since the transitional period. Recently, one of the four people arrested by UNTAC, namely the former Deputy Director of the Battambang Prison, has been convicted and sentenced to one year in prison and ordered to pay compensation to the families of his victims.

Even so, the legal system is much in need of rehabilitation. By reason of a poorly-serviced legal system, the prisons have become inevitably overcrowded and unhealthy. In the absence of effective supervision by the courts, few prisoners have been

released except through payment of bribes to prison authorities. In a recent visit to Cambodia in January of this year by the Secretary-General's Special Human Rights Representative, Justice Michael Kirby, complaints were made by prisoners of their complete ignorance of when their long-delayed cases would be heard. A distracted judge in Battambang agreed with the prisoners' complaints but pointed out that he had few colleagues to help with a crippling workload. He had even run out of paper with which to record decisions.

Consequently, the people still have little faith in the ability of institutions to dispense honest and impartial justice.

An important element of the new Constitution is the establishment of a framework for fundamental human rights, the separation of powers and the independence of the judiciary.

Even though the independence of the judiciary is recognised in principle, provisions that will guarantee its realisation are lacking. The judiciary is not guaranteed either salary or tenure and the grounds for the removal of judicial officers have not been specified. Some provisions of the Constitution are yet to be implemented. For instance, the Constitutional Council, envisaged in Chapter 10, and the Supreme Council of Magistracy envisaged in Chapter 9, have not been established yet. This delay has prevented the reorganisation of the judiciary, particularly with regard to appointment of judicial officers and the establishment of the Appeal Court and has given rise to confusion about procedures.

The judges are poorly paid, receiving about $US20 per month. This wage is insufficient to keep a family. Often wives of judges must go to the market to sell produce to support the family. Judges often accept gifts from winning litigants to supplement their salary or to ensure that matters are expedited. In addition to poor payment, judges are subject to physical threats and have difficulty in having their judgments enforced. There is little (if any) precedent.

Bribery and corruption is a way of life. Teachers often extort money from parents to have their children admitted to school. Likewise the police and military are poorly paid and supplement their income by extortion.

Even though the legal system as it exists is largely based upon the French model (the model being fragmented by war), the development of the law is to be determined by Cambodia. The French have a significant presence in Cambodia - and historic and cultural ties. The first Prime Minister, Prince Ranariddh, is a French-trained lawyer holding a position as a lecturer at the University of Aix-en-Provence in France. The French Government has been generous in its financial support of Cambodia and in providing trained personnel.

Even so, there is a place for common law lawyers in Cambodia. The King has publicly indicated that, in his view, Cambodia's future is more with the English-speaking countries than France. Prince Ranariddh is certainly open to Western ideas. He speaks fluent English and has excellent relations with Australia, and in particular our Foreign Minister, Gareth Evans. It is important that Cambodia develop its own legal system. That aim is better served if Cambodia is exposed to a range of legal systems.

To that end recent courses have been conducted to train judges. Eminent jurists from all over the world have volunteered their time to teach at these courses. The courses are popular. Such a course conducted towards the beginning of this year was attended by 132 judges of Cambodia.

Regardless of which system of law Cambodia adopts, Australian lawyers have a part to play. It is to our advantage to assist in this determination. A confederation of independent legal practitioners from a variety of countries (whether common law or civil) within Asia and the Pacific Rim is desirable so as to promote the future of our independent legal system as well as that of Cambodia. For example, our own independence is enhanced in the event of us being able to agree with other independent legal organisations as to the minimum requirements for laws governing the legal profession. Inevitably, our legal system will be reformed from time to time. Reform always carries with it the risk of the rights and safeguards of citizens being diminished. Obviously, that is not the aim of such reform. Hopefully, the legal profession will be reformed in the future so as to give greater access to the public without compromising present rights and safeguards. In order to achieve that end, an international association of Law Societies and Bar Associations would be helpful; as would be the personal participation of members of the legal profession in community activities such as Cambodia (but not confined thereto). ❑

Too Particular

Lawyers are obviously not all attuned to plain English. The plaintiff in a recent case claimed that there had been representations by the defendants as to the existence of covenants to protect the view of the house they were selling.

Particulars (see below) were given, and, no doubt, were intended to show that the covenants, if they existed, would have permanently protected the view. That was apparently too easy to say.

"The said representation was material to the value of the dominant tenement.

Particulars

A significant component in the value of the dominant tenement was the view of Sydney Harbour (Port Jackson) and its environs obtained therefrom. The servient tenements lie between the dominant tenement and Sydney Harbour. The existence of covenants to the effect represented by the defendants binding the servient tenements and appurtenant to the dominant tenement would to the full extent permitted by law assure the existence of that view obtained from the dominant tenement in perpetuity."❑

"...an Ornament to this Bench"

A profile of retired Chief Judge of the Compensation Court, his Honour Judge F R McGrath AM, OBE

One of those in the front rank of judicial distinction, Compensation Court Chief Judge Frank McGrath, warned of "forces which are completely inimical" to the independence of the Bench at his recent retirement ceremony.

His Honour's retirement ceremony on 16 December 1993 was an occasion of special note. For the first time in the Court's distinguished tradition, the Chief Justice and President of the Court of Appeal sat on the Bench of the Compensation Court to mark Chief Judge McGrath's farewell. Also present were the Chief Judge of the Industrial Court, the Hon. Justice Fisher, Chief Judge of the Land and Environment Court, the Hon. Justice Pearlman, Chief Judge of the District Court, his Honour Judge Staunton, and Chief Magistrate, Mr Ian Pike. There were many other distinguished judges, practitioners and representatives of the Executive among the body of the Court.

Chief Judge McGrath was the subject of memorable valedictions from his Honour Judge O'Meally RSD, of the Compensation Court and presiding member of the Dust Diseases Tribunal, and President of the Bar Association, Tobias QC, and Mr John Hunt, representing the Law Society.

(l to r) Chief Justice Murray Gleeson AO, Judge O'Meally RFD, Chief Judge McGrath AM, OBE, Judge Moroney

ButJudge McGrath's reply sparkled wisdom. After noting the existence of inimical forces, his Honour said:

"There have been a number of glaring examples in both politics and in the press which demonstrates the desires of some very strong influences in the community to destroy judicial independence under the banner of alleged judicial accountability. Sir Alfred Stephen, on his retirement, issued the following warning: 'I would beg those who may be disposed to think lightly of judicial office or its work to be assured of one thing - that nothing but evil can result from deprecating either.'

"In many cases widespread ignorance has been shown of the basic principles of the separation of powers which is the cornerstone of judicial independence. It is trite to say that judges must have security of tenure and security of salary. Subject to a referendum, the Government has moved to entrench security of tenure in the constitution of this State.

"I believe there is more to judicial independence than these two matters. In my view, the judges of the various courts must have control of, and responsibility for, the administration of their own Registries. The various courts should have control of and responsibility for their own day-to-day budgets, subject only to the overall supervision of the Auditor-General.

"Finally the judges of the various courts should have a major voice in the location and design of the courts in which they are expected to sit. They should not be directed by the Executive into unsuitable locations, having regard to the needs of the court, nor should their wishes be ignored in relation to the particular allocation of space within the court buildings, or overridden by reference to some preconceived standard to which all courts are obliged to submit. What is suitable for one court is not necessarily suitable for another."

Chief Judge McGrath was the longest-serving judge currently sitting in the nation when he retired. He commenced membership of the Workers' Compensation Commission in 1966, being appointed Chairman in 1982 and was appointed first Chief Judge of the Compensation Court when it was constituted in 1984. About this, his Honour said: "With the drastic proposals which were made by Government at the time I was appointed as head of the jurisdiction, it was generally felt that I would be the last Chairman and Chief Judge, and that before I retired I would be presiding over the funeral of this Court."

His Honour said: "As it has developed the Court has become one of the most efficient courts in the land and has been to the forefront in the development and utilisation of all modern means to ensure that justice is not delayed, and is swiftly but fairly administered."

Last year, the Compensation Court disposed of 18,085 matters. Applications filed totalled 19,709.

Of Chief Judge McGrath's career as a practitioner, Tobias QC said: "Your Honour was admitted as a solicitor of the Supreme Court in 1950 and then as a barrister in 1951. You moved onto the fourth floor of Wentworth Chambers when it opened in 1957, in company with many illustrious members of the Bar such as the late Justice Lionel Murphy, Neville Wran QC, his Honour Mr Justice Fisher, the late Mr Justice Sweeney. That floor has had a remarkable judge rate. Your Honour was the first appointment from that floor to the Bench and you were one of 17 judges who have now been appointed from that location." Tobias QC noted his Honour's "extremely busy practice at the Bar".

The Bar Association President had noted that his Honour was "articled to Mr Cec O'Dea, of J J Carroll Cecil O'Dea & Co, and there was no more able, wiser, or for that matter wily, solicitor than that gentleman of very fond memory. He was a great character with a personality that is regrettably missing from the modern profession. The experience of working with Cec O'Dea must have been invaluable to you."

His Honour had graduated with Bachelor of Law degree from Sydney University in 1949 with the Pitt Cobbitt Prize for Constitutional Law. That had followed taking First Class Honours in the Degree of Bachelor of Arts with the University Medal in History in 1942. His Honour graduated with Honours in History in his Master of Arts in 1946. Tobias QC noted that

Chief Judge McGrath had his secondary school education at Canterbury Boys' High School "which immediately put you at odds with accepted doctrine with respect to judges in this country who are all assumed to have been the products of the non-Government education system, at least according to the Federal Attorney-General's discussion paper on judicial appointments and, I notice in this morning's paper, Mr John Marsden, and after all, one assumes they must have done their homework".

The Chief Judge worked vacations as a "blacksmith's striker" at Morts Dock where his father was employed as a shipwright.

He had been a member of the Balmain branch of the Federated Ironworkers' Union of Australia and was involved in extraordinary union struggles of that time. Chief Judge McGrath had been made secretary of the branch. According to Tobias: "This was a traumatic period as there was a great deal of violence on the waterfront, where your Honour was at times engaged in your secretarial duties. Although no coward, you were also no fighter in the pugilistic sense, and thus needed the protection of a bodyguard, but this notwithstanding, you were severely assaulted in June 1945."

Mr Hunt, speaking for the solicitors, also remarked with reverence his Honour's participation in union affairs of the time. He said: "Your contributions over the years to the successful campaign in the Federated Ironworkers' Association deserves, I suggest, appropriate recognition and acknowledgment, not least of all because it was made against the background of bullying, insults and actual physical violence." Mr Hunt noted that "you never lost a reinstatement case. The significant feature was that you had the carriage of many of those matters when you were still an articled clerk."

Of the 1950 ballot case, leading to Mr Short taking office in the union, Mr Hunt said: "You had the conduct of the case in the office of the solicitors, but you ultimately became the star witness as well. In the words of Mr Justice Dunphy: 'The X-ray vision of Mr McGrath detected indentations on certain ballot papers consistent with the actual marks made on the paper above it in the stack, an indication that the same person had filled in many ballots.' " Mr Hunt said: "This was a crucial element in the case. The interesting thing is that your Honour detected it with the naked eye, others needing a magnifying glass to see the same marks."

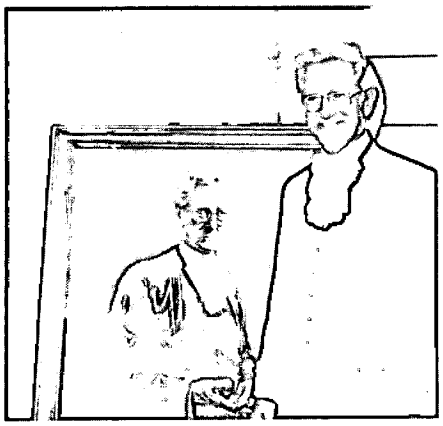
The ceremony heard of the Chief Judge's musical accomplishment, enthusiastic sailing, golfing and lawnmowing. According to Tobias: "You also hate gardening, which I find commendable, but love lawnmowing which I do not. It is asserted that your definition of gardening is running the lawnmower over whatever is within reach and so reducing it to ground level. You have thus recently purchased a new lawnmower so as to give further vent to this peculiar activity in your retirement."

Tobias QC noted that his Honour had applied to the University to read for his Doctor of Philosophy in History, the proposed thesis topic being the Legal and Philosophical Implications of the Constitutional Conventions.

Mr Hunt praised his Honour's grasp of the law, patience, whimsical sense of humour and "total intellectual integrity".

Of Chief Judge McGrath's humour, Mr Hunt said: "It did not flash out in many a golden phrase yet who can forget your comment concerning a very prominent citizen who was suing an even more prominent citizen for the alienation of his wife's affections. Your Honour observed that the case would never come to trial. 'The aggrieved plaintiff was mitigating his damage in the most delightful manner.' "

Mr Hunt said: "You have, sir, been an ornament to this Bench. You have been a highly active, literate adjudicator. You have brought to the Bench certain attributes which make for a good judge, and others which are the hallmarks of any highly respected man or woman."



Chief Judge McGrath at the unveiling of the portrait of him to be hung in the Compensation Court.

According to Tobias QC: "Your Honour's temperament, legal skills, integrity and most importantly, humanity and compassion, have ensured your Honour's place not only in the history of this Court but in the history of the judiciary of this State. You have served the community with skill, dignity and selflessness, and we thank you for it. The Bar wishes you a long, happy, healthy and productive retirement and on 30 October next year, a very happy Golden Wedding Anniversary."

His Honour Judge O'Meally said: "Chief Judge, your colleagues on the Bench have depended upon you for leadership and help, and in these you have been staunch and constant. Your experience and knowledge, when sought, have always been made available to us. One never sought your advice without receiving a patient hearing.

"The tangible record of your work in court is embodied in your judgments which now you leave to posterity, and the intangible spirit of collegiality which was inherited from our predecessors you have maintained and amplified."

Chief Judge McGrath said: "Such success as I have achieved would not have been possible without the loyal support of my colleagues, the dedication of all levels of staff, the sympathetic support of the medical profession, and both branches of the legal profession.

"In the words of Mr Justice Pring, on his retirement: 'I have tried to do my duty. No man can do more nor should do less.'

"In handing over the helm to whoever will be my successor, I leave this place with pride, satisfaction, and a storehouse of very happy memories.

"With my sincere thanks to you all for a most fortunate life, I bid you all farewell." ❑

Anthony Monaghan

New Hand at the Helm

Recently appointed Chief Judge of the Compensation Court, the Hon. Judge M W Campbell QC, answers questions put by Anthony Monaghan for Bar News.

"As little as a year ago I would have thought that I should politely decline the opportunity that you have extended. However, having regard to the recent observations of Sir Anthony Mason that it is now appropriate for judges to be more forthcoming than has hitherto been the custom, I have formed the view that it is my duty to answer your questions as best I can.

"Some of the questions are not easy to answer, as no doubt you had in mind. There are a number which I do not think I should answer because it seems to me that judges should still be extremely careful not to make any observations which could even remotely be taken to refer to particular persons whether they be judicial officers or members of the profession."

Your predecessor, Chief Judge McGrath, was the first Chief Judge of the Compensation Court. What is your regard for his achievements?

"I have a very high regard for the many achievements of Judge McGrath, as he formerly was. You are interested no doubt in those that relate to his position as Chairman of the Workers' Compensation Commission and, thereafter, first Chief Judge of the Compensation Court. When Judge McGrath was sworn in as Chairman of the Commission the then Attorney-General, Mr Frank Walker QC, observed that the Commission was in for very difficult times.

"That observation was if anything an understatement. Throughout the difficulties in change of structure, change of legislation and change of approach to the payment of compensation for injuries to workers that followed, Judge McGrath held firmly to the paramount need to preserve the independence of the Commission and then the Court and to ensure that the Court, when it was established, was a true Court going about its business in an appropriately judicial manner and with at least as much independence as enjoyed by any other court in this State. The fact that he succeeded in those endeavours is to my mind his greatest achievement so far as the Court is concerned. There were, during Judge McGrath's time of office, real questions as to whether or not the Compensation Court would continue as an integral part of the system of justice in this State. There was, I think, general agreement by the time he retired that no such doubts or questions remained. It was also a major achievement that, throughout the upheaval, the Commission and then the Court continued to dispose of its workload with efficiency and despatch."

Why did you depart the Supreme Court to take the office of Chief Judge of the Compensation Court of New South Wales?

"The easy answer to this question is to adapt the reply of the mountain climber and say 'because the job was there'. I have always regarded the work of the Compensation Court as important and worthwhile and I was offered the opportunity to lead the Court in the performance of that work. Administration has been a long-time hobby of mine: in the Army, in other outside organisations, upon the Workers' Compensation Commission and with the Compensation Court. I knew that if I accepted the appointment I would have as much administrative activity as I could possibly desire. After eight years on the Supreme Court, in which I heard at least one of most sorts of cases likely to come my way in the future, I thought it sensible to indulge my hobby. I also knew that to be a Head of Jurisdiction and a member of the Judicial Commission would open a window on aspects of judicial life which had but rarely come my way in 18 years as a Judge."

At your swearing-in ceremony, you made reference to the Court as "a personal injury Court". Do you see the Compensation Court taking responsibility for adjudication of motor accidents, occupier's liability, medical negligence, dust diseases and other causes of action arising out of personal injuries? What sort of jurisdictional limits might be appropriate? What would be the advantages of such a change? What would be the disadvantages?

"It should be understood that the answers to this question are personal observations of mine. Whether the jurisdiction of the Court should be extended is a matter to be determined by the Government and Parliament and involves the consideration of a wide range of issues. Amongst other things, the view of the Courts which presently exercise the relevant jurisdiction are very much to be taken into account. I have long believed that it would be sensible to use the specialist skills of the Compensation Court to deal with cases involving personal injury. When I was previously a member of the Court it seemed to me unfortunate that industrial accidents often led to two separate pieces of litigation, one before the Compensation Court and one in either the Supreme Court or the District Court.

"I still hold that view, although I understand that, by reason of the legislative changes which have occurred since that time, a small number only of common law actions are being commenced following industrial accidents. A difficulty at that time and now is that, although it could be done easily enough, there are perceived to be difficulties in conducting jury trials in the Compensation Court. It may be that this problem will solve itself as the extreme difficulty of directing

juries in accordance with the recent legislation may lead to a situation in which their use is by common consent abandoned. It would seem to me that the structured provisions relating to payments under the *Motor Accidents Act* would fit very conveniently with the type of work presently being undertaken by the Court. Questions would no doubt arise as to sharing of the funding of the Court and, perhaps, as to the possibility of delaying the resolution of workers' claims. I do not think that such difficulties would be insoluble.

"Dust diseases are presently dealt with by the Dust Diseases Tribunal and, having regard to the recency of its establishment, it would be difficult to argue that its jurisdiction should be placed with the Court itself. Of course, the Judges of the Tribunal are themselves members of the Compensation Court. Matters of occupier's liability, medical negligence and other causes of action involving personal injuries seem presently to me to be less suitable for addition to the jurisdiction of the Compensation Court, although that is not to say that I do not think that the Court could adequately deal with such work."

In calendar year 1993, the Court disposed of a little over 18,000 matters listed for hearing. If there was an increase in the Court's jurisdiction, surely there would need to be an increase in its judicial personnel. Do you agree?

"There would be no purpose to be served by increasing the Court's jurisdiction unless it was adequately resourced to deal with that increase. I would think that further judicial personnel would be necessary if, for example, the motor accident work was to be carried out by the Compensation Court."

Proceeding upon the assumption of an extended jurisdiction, would you see advantage to the Court in developing distinct lists for the types of matters being brought before such a Court?

"To answer this question is rather like counting one's chickens before they are hatched. Assuming that there were to be the addition of common law industrial accident cases and motor accident cases and that there were not to be jury hearings, I would presently think that there might be separate lists during the case management process but that, once ready for listing, cases would simply be listed in turn before the available judicial officers."

What do you see as the future of the Bar? What is your attitude to the concept of direct professional access to barristers practising in the workers' compensation jurisdiction? What do you think of the notion of trade unions briefing barristers directly? What do you think of the notion of insurers briefing directly?

"It is not easy to give a firm answer to this question. I have confidence that there will continue to be a specialist body of advocates. Whether legislative changes will compel, even more than is presently contemplated, a fusion of some sort is something that I do not think anyone can answer now with certainty. I remain of the view that, generally speaking, the most efficient way for significant litigation to be conducted in the interests both of the litigant and of the disposal of cases is for there to remain a division of work between the solicitor in the matter and the barrister along substantially traditional lines.

"Litigation in the Compensation Court is presently conducted in a generally efficient way. I say 'generally' because where human beings are involved there will always be errors. I do not think that it would be conducted more efficiently or more cheaply, if the litigants dealt directly with the barristers or if trade unions or insurers did so. The work of preparation of a case on the one hand and, on the other, advice relating to that preparation and the conduct of the case are different and require different skills and experience. I see no advantage in altering the way in which the legal representation of litigants before the Compensation Court is presently arranged."

If you had in mind procedural improvements in the Compensation Court, what would they be?

"The Compensation Court was one of the first courts to use a modified form of case-flow management. From what I have observed in the past few weeks it operates with reasonable efficiency. I do not presently think that any significant changes are likely to be of advantage, although the List Committee of the Court keeps its procedures constantly under review."

The Attorney-General has flagged legislation providing for Senior Judges of specialist tribunals such as the Compensation Court joining on a case basis the Court of Appeal in determining appeals from the specialist tribunal. How do you regard that prospect?

"From a personal point of view, with considerable pleasure. As I observed in the remarks I made when being sworn in, the work that I should particularly miss was the collegiate work of the Court of Criminal Appeal. I do not think anyone who has not held judicial office can truly appreciate how lonely the performance of the functions of that office can often be. To sit with other judges who share the responsibility and to engage in collegiate discussions relating to the matter before the Court is both pleasurable and helpful. That is not to say, of course, that each judge does not have to come to his own conclusion. Should the proposal be adopted, an invitation to sit upon the Court of Appeal when dealing with appeals from the Compensation Court would offer, from my point of view, a welcome opportunity to again sit upon a collegiate court."

The major substantive legislation occupying the Court is the Workers' Compensation Act 1987. If there were provisions of the Act which in your view should be amended, what are those provisions and why should they be amended?

"I have not sat upon the Compensation Court for long enough for it to be appropriate for me to make comments upon possible amendment to the legislation."

Would there be advantage in consolidation of the other Acts with which the Court is often concerned?

"I do not think so. Judges are accustomed to dealing with claims under a variety of Acts and sometimes consolidation can lead to more difficulty than it solves."

The immediate future of the Court is apparently a change in location, from Citra House to adjacent the Downing Centre. What is your view on the accommodation arrangements being planned at the new Court House?

"The Court is presently engaged in extensive negotiations and discussions as to the accommodation in the John Maddison Tower. I do not think that it would be appropriate for me to comment whilst the subject is under discussion."

Considering the praise received by your predecessor upon his retirement, what are the achievements and other highlights you would prefer people to remark upon on your retirement?

"The question assumes that there will be achievements and highlights. I suppose there will be some, as there will also be failures and low spots. When the times comes some warm words will be much appreciated, but I would hope that the speakers will be able to refer with sincerity to a job well done."

And at that far-off time, what do you think you would like to say to the third Chief Judge of the Compensation Court? The fourth?

"So much has changed, and will change, that to answer this question in any meaningful way is very difficult. I expect, however, that I will adopt the old army phrase and say 'you'll be sorry'. On a more serious note, if advice is sought, it will almost certainly be to stress the fundamental importance of maintaining the independence of the Court and its Judges and its deserved reputation for disposing of large numbers of cases efficiently and with a minimum of unnecessary trauma and disturbance." ❑

Solicitor's Correspondence

(The winds of micro-economic reform are chilling - it seems that ordinary care and skill is to go unrecompensed.)

> "As part of our review of this matter and as little has happened over the past several years, we request that Counsel return his brief and, if appropriate, a memorandum of fees for any outstanding services." ❑

Brief Note on Overseas Criminal Law

Criminal lawyers are well experienced with the difficulty encountered in joint trials where each accused has confessed and set out their actions in a lengthy record of interview. Almost always they implicate the co-accused. Judges are required to tell juries that they may not rely upon the record of interview of the co-accused as evidence against the accused. As a matter of practicality the question must always arise whether juries are able, or do, in fact, ignore completely such material when dealing with the first accused.

In Singapore the court is entitled to take into account evidence in the confession of the co-accused when dealing with the primary accused. Section 30 of the *Singapore Evidence Act* says:

> "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

Until recently there was some belief in Singapore that the section only meant that the court could take into consideration the co-accused's confession and not use it as strict evidence or, indeed, base a conviction upon it. That view has been rejected by the Singapore High Court when it dismissed appeals in May of 1993. The written judgment was given in December 1993 and made available to the media in February 1994.

Three accused - Chin Seow Noi, Chin Yaw Kim and Ng Kim Heng - were jointly tried in the High Court in October 1992 and were sentenced to death. They chose to remain silent when the defence was called. Each had made confessions implicating themselves and their co-accused. The trial judge had held that s.30 of the *Evidence Act* did not allow the co-accused's confessions to be used as evidence against the accused in the same way they might be used against the co-accused ie., against the person who made the confession. The Singapore Court of Criminal Appeal said this was incorrect. The Chief Justice, Yong Pung How, said:

> "The natural interpretation of s.30 is that it allows that the conviction of an accused person to be sustained solely on the basis of a confession by his co-accused, provided of course that the evidence emanating from that confession satisfies the Court beyond reasonable doubt of the accused's guilt. And no other interpretation will emasculate s.30."

The position in Singapore now is that the co-accused's confession is evidence which may be used against the primary accused and, indeed, it must follow that an accused can be convicted on the evidence of that confession even where that may be the only evidence provided the confession is persuasive enough to convince the Court beyond reasonable doubt of the accused's guilt. ❑

Brian Donovan QC

"Brides of Shame"

On 19 April 1994 a publication of the Inter-Church Steering Committee on Prison Reform, *Prison - Not Yet the Last Resort*, was launched in Sydney. Peter Hidden QC and Michael Adams QC took part in the work of the Committee.

The report is accompanied by a six-page summary targeted at politicians, judges, magistrates, the media, correctional authorities and others with hoped-for influence on the New South Wales correctional system. Amongst recommendations made by the Committee are:

- Support of a bipartisan approach to prison policy to remove "quick fix" pressures for higher punishment from the media;
- Call for review of the *Sentencing Act* and reconsideration of remissions for good conduct;
- Emphasis upon support by the prison system, not more and longer deprivation of liberty;
- Increase in the provision of educational programmes for prisoners;
- Assistance by the Judicial Commission to judicial officers to make them more aware of the range of sentencing options other than imprisonment;
- Special attention to overcrowding and lack of humane visiting facilities for affected women prisoners, particularly those with children; and
- Introduction of urgent measures to reduce the number of Aboriginal Australians in prison.

Launching the report, the President of the Court of Appeal, Justice Michael Kirby, drew attention to the historical origins of New South Wales as a prison settlement. He pointed to the historical tension between reformers and hardliners. He said that when Governor Macquarie had decreed that emancipated prisoners were to receive a basic wage to provide for their dignity, he was assailed both in the colony and in London for his reforms. But, in fact, he contributed notably to the success of the Australian settlement. Justice Kirby said that similar enlightenment was required in every generation.

The average prison numbers have risen in New South Wales from 4,124 in 1988 to 6,500 today. This was an increase of more than 50% in five years. In part, at least, the increase was attributable to the operation of the *Sentencing Act*, which had abolished remissions and parole and substituted determinate sentences. The result was a rapid increase in the prison population. It had required the building of five new prison facilities, some of them to be run by private enterprise and some at a considerable distance from the family and friends of prisoners.

Justice Kirby pointed out that, at current rates of increase, New South Wales would celebrate the Olympics with nearly 10,000 prisoners. This was extremely expensive, both in emotional and social terms, and also in sheer *per capita* costs.

The judge drew attention to the imprisonment rates revealed in the inter-Church report. They showed an increase in the number of prisoners per 100,000 of the population from 90 (1983) to 147 (1993). Although levels of crime in the State had remained relatively stable, rates of imprisonment were growing significantly. New South Wales was now a high imprisoning community. In Victoria in 1991 the equivalent rate was 69.1. In Western Europe equivalent rates averaged between 40 and 50 prisoners per 100,000 of the population.

So far as Aboriginal Australians were concerned, they were 18 times more likely to be incarcerated than other Australians. Within their own population the rate per 100,000 undergoing imprisonment was 1,738. Justice Kirby said that it would be ironical if, before 2000, this figure reached 1,788. There was an urgent need to follow up the report of the Royal Commission on Aboriginal Deaths in Custody and to address the special problems of Aboriginal prisoners and the causes that led to their anti-social conduct and punishment.

Justice Kirby said that prison was required as the ultimate punishment for many offenders, but there was an urgent need to provide effective alternatives to prison throughout the State and to reduce the unnecessary use of imprisonment where non-custodial alternatives would suffice.

Justice Kirby closed his speech at the launch of the inter-Church review by quoting the poem by Oscar Wilde in the *Ballad of Reading Gaol* (1898):

> "Every prison that men build
> Is built with bricks of shame
> And bound with bars lest Christ should see
> How men their brothers maim."

The work of the Inter-Church Committee was supported by a grant by the Law Foundation of New South Wales. ❑

On the Ball

Jenkyn: Q. And isn't golf your weekend recreation?
A. Yes, sir.

His Honour: Q. What's your handicap, Mr Sevenoaks? At golf, I mean.
A. It's 15, sir.

Jenkyn: Q. My God. Can you give me some lessons?
A. I can put you onto a bloke who will.

(Cor. Herron DCJ, *Sevenoaks v GIO*, 1 March 1994.) ❑

Barristers and Marketing

Following the abolition of the Bar's rules relating to advertising, Bar News *invited Michael Skinner, who has considerable experience in marketing, to contribute some personal views on how a barrister might respond to the brave new world.*

Introduction

Now that the Bar Council has formally abolished all the rules dealing with advertising for barristers this seems a relevant time to make some comments on the way in which members of the Bar may approach the prospect of advertising. Having spent my early years after Oxford in marketing and advertising, I wish to make the point that advertising would need to be one aspect of a co-ordinated programme of marketing. Unless the advertised member of the Bar just wishes to feel good by seeing or hearing an advertisement mentioning his or her name, the purpose of a member of the Bar advertising himself or herself would be as part of an orchestrated activity to market themselves.

Stars and Other Luminaries

Can you really imagine that Sir Edward Carson or Sir Norman Birkett would have advertised themselves even if the then applicable rules would have permitted them to do so? What would they have said? Would Sir Edward Carson have said that he was the man who asked Oscar Wilde "Was that the reason why you did not kiss him?". Or would Sir Norman Burkett have said of himself that he did know the 'co-efficient of the expansion of brass'.

Of course, we cannot image them doing it. One reason, I suspect, is because we cannot imagine that they would have had any need to. They were, in modern parlance, stars. They were regarded, no doubt, as two of those people who were the very best in their field. If you are a star, or if you are regarded as one of the leading lights of the Bar, then I would find it extraordinary if you would want to read on about marketing and advertising for other members of the Bar. If you have so many briefs in the kinds of cases in which you enjoy being involved then your cup runneth over and you have no spare capacity and no desire to change the nature of your practice. Take my advice. Do not read any further.

Other Non-marketers

There are three other reasons commonly given to me when I conduct seminars in marketing for law firms (which are always attributed to other partners) for not trying to apply a marketing approach:

(a) There is no need for it

Members of the Bar, in my experience, often find that they are being driven to reach a professional deadline. It may be, for example, because there is some Limitation Act guillotine. But whatever the reason, there is a struggle to get defined instructions in order to meet some particular Court deadline. This is seen to be a short-term and acute "professional" problem which is felt to be of a higher priority than achieving a long-term goal to affect the nature of one's practice. Because the member constantly has a series of urgent deadlines there is not seen to be any need for marketing.

(b) It is inappropriate

It is commonly said that "My work is good enough" or "My reputation is all I need". The belief is that if you are a professionally competent member of the Bar you will receive your just rewards and in consequence there will be enough of the right kind of briefs to satisfy you without stooping to the "snake oil" salesman's ruses to drum up business. With such a view, you would not believe it appropriate to be involved in marketing yourself.

(c) Not enough time or money

Marketing is commonly seen as an ancillary or collateral activity to the substantive and main professional activity of practising the law. Consequently, while it is thought appropriate that money and time should be spent on reading the latest law reports or buying legal texts, in the scheme of things such activities will leave insufficient time or money to apply to the activity of marketing.

If you fall into any or all of the above three categories please do not read any more of this article. I have no wish to convert anyone to apply marketing to their professional practice or to encourage anyone to do so. If those views or any of them match your own, you may need read no more.

Marketing and Advertising Individual Members of the Bar

This article is concerned with how individual members of the Bar might consider marketing or advertising themselves and is not concerned with how (say) a number of barristers on a floor might market or promote themselves.

Zen Marketing

I use the expression "Zen Marketing" to describe the act of marketing when the person concerned does not know that he or she is doing it. A synonymous expression is "unconscious marketing". I remember a story of how St Francis of Assisi was said once to have been asked by a junior colleague for a

sermon. St Francis agreed. St Francis and his young colleague walked together in silence around Assisi. His young colleague asked St Francis where was the sermon. St Francis said "That was the sermon". The moral of the story is that in everything we do we are in fact presenting ourselves to the world. Another illustration of "unconscious marketing" is taken from Molière, who wrote:

"Par ma foi?
Il y a de quarante ans que je dis de la prose sans que j'en susse rien."

In *Le Bourgeois Gentilhomme*, as you know, the character is saying that for 40 years he has spoken prose without knowing it. These two homely stories are told to explain that in its most general sense members of the Bar may arguably be said to be marketing themselves even though they may not be consciously doing so. What are the kinds of ways in which this may be being done? A marketing consultant could (among others) give these answers:

- Where you have chambers.
- The type and style of your furnishings.
- Your forensic style.
- The nature of your practice.
- Whether you lecture, write articles or books.

Planned Marketing Contrasted with Zen Marketing

What I have called "Zen Marketing" is consistent with the view which is commonly held that providing a professional service by itself and with nothing more will bring its own rewards. Planned marketing is based upon the view that you can by your conscious acts make a difference to the kind and size of practice which you have. An essential corollary in a profession where we are all sole practitioners is that, since we are all different and idiosyncratic, what one member of the Bar sees as being successful will not necessarily be seen in that way by another and, similarly, what one member of the Bar may believe is appropriate to promote himself or herself will not be so seen by another member. A further consequence is that it is unlikely that there could be a single blueprint according to which all members of the Bar can promote themselves individually. Of course, the Bar as a whole could as a body promote the profession but that is a different matter. If you believe that you are able to promote yourself so that you can affect the volume of the work which you do, to increase it, and to affect the nature of the work that you do, so that you then practise in the area of your choice, then you need to consider the issue of what can be done.

Restrictions on Marketing and Advertising

In this article I am not concerned with what restrictions are placed on the profession either by statute or by our association. I am approaching the topic from general principles which apply in other walks of life to see whether or not those principles could be applied, if members wish, to their own professional practices.

The Scepticism of the Bar

Perhaps because of our experience and training and, in particular, because we have cross-examined so many so-called "experts", most barristers have a very healthy scepticism of advice given by others, particularly specialists. Their own advice, of course, is always correct. In preparing to cross-examine an expert, or after having cross-examined one, it seems quite common that we believe we know as much as the expert about his or her field of activity and we are surprised at how mundane are the principles upon which he or she operates. When the expert field is not one of the more abstruse sciences but is related to matters of everyday interest (who can forget the problem of the expert on ladders?) the more we find the principles expressed by such an expert to be unenlightening. When applying so-called principles of marketing to our profession, I would expect that most of us would say that we knew such matters already and they are in fact not enlightening. However, even though such is our response to these truisms, it is useful to remember that such marketing truisms seem to apply to everybody else but apparently not to us.

A Model of the Selection Process

Before formulating what should be done by the individual barrister to promote himself or herself, he or she would need to have his or her model of how they will likely be selected to provide their work in the future. Unless they have a totally chaotic non-causative model of how they will be selected, the barrister will at least have an implicit model of how he or she will be selected to provide their services. Without such a model it is impossible to plan how you can improve on what otherwise would be the natural consequence of what you are doing already. Therefore, the first truism is define what is your model of how you will be selected for work in the future.

The "Mickey Rooney" Syndrome

Those of us who are interested in old Mickey Rooney and Judy Garland films will remember that there normally comes a time in their young lives when Mickey Rooney and Judy Garland face what appears to be an insuperable problem of raising funds. To overcome this, one or other of them says "Let's have a concert". In my experience much of what passes for marketing seems to fall into the "let's have a concert" category. That is to say, there is lots of colour and movement, people exert themselves to perform and fairly frequently quite a lot of money is spent.

The natural enthusiasm, which a group endeavour of this kind generates, creates a subjective feeling derived from this worthy effort that there will be a reward commensurate with the activity. But unless, of course, what is being done by this promotion is designed to affect the model which you have of how you are selected, then it is merely a displacement activity and one which, if it has a poor result, will depress the protagonists and inhibit them from further activity.

Money

I would only make one recommendation about the amount of money which may be spent on marketing and advertising. I used it years ago and I have never found it bettered. It has an acronym. The acronym is FOTT. This stands for "Foot on the till". Do not spend one cent until you are sure that you have some conscious rationale of how that one cent spent will return to you more than one cent. FOTT normally prevents "let's have a concert". It is always disappointing to be a kill-joy, but if you really think that spending money on fancy stationery, brochures and paid advertising will provide a better return than you would otherwise have, then you ought to have some method by which you can judge if this expenditure of time, effort and money has been worthwhile and a rationale why this will be so.

TQM: A Mystery Explained

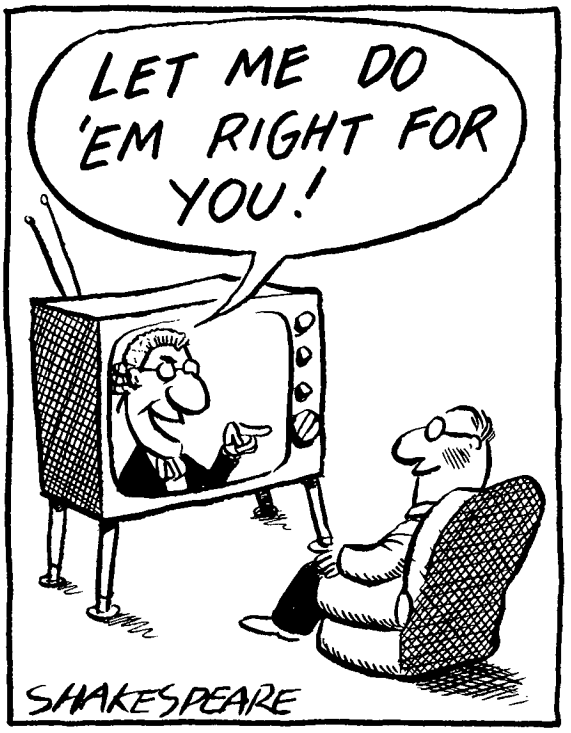
For some years now, people who promote themselves as marketers have been promoting TQM. TQM stands for Total Quality Management. TQM is said to have been an approach generated by the work of Dr W Edwards Deming, an American, who in 1950 went to Japan at the request of the Japanese Union of Scientists and Engineers. In one sentence (and the literature is immense on this topic today) his philosophy was constant and continual improvement. In fact, customarily, commentators make 14 points to describe what this means. Save yourself the money and do not go to any discussion of or seminar on TQM. For present purposes a useful summary of the writing on the topic is reduced to the following:

(a) constant and continual improvement;
(b) improve in small steps;
(c) satisfy the needs of the situation (as barristers we have additional criteria to meet than merely being effective); and
(d) see if the improvement works and improve again, and so start back at (a).

Good advertising kills lousy products. If the person who is marketing his or her services cannot perform them, having promoted himself or herself suggesting that he or she can perform satisfactorily, such a member will find his or her marketing efforts counter-productive. It is common for people who advise in the advertising industry to advise their clients to improve their products. Although none of us, naturally, could possibly need improvement, a third party consultant marketer would generally encourage us to look at the quality of our performance before any step is taken to market it.

Eighteenth Century English Philosophers

The classical English philosophers of the eighteenth century were empiricists. Empiricism is the touchstone of good advertising and marketing. You have a model of how you think you would be selected in the future. You take some activity to affect that model. You evaluate whether it worked or did not. You then adapt what you did or take some totally new step in the future, based upon the empirical results of what you have done. As I have said, you could take a purely happenstance view that things happen randomly or that (put shortly) virtue is its own reward. On the other hand, you could take the view that you can consciously affect the nature and amount of work which you will be asked to do. If you take this latter, radical view then you will need to judge what you have done and then have the intellectual toughness to change it if it does not work.



Rudyard Kipling and the Bar

Rudyard Kipling is no longer fashionable, but he did provide one model which is translatable to our profession. In *The Elephant's Child* he wrote: "I keep six honest serving men. They taught me all I know; their names are What and Why and When and How and When and Who."

If you ask these six simple questions of your marketing and advertising activity you will accomplish, in my opinion, as much by yourself as you will by any other professional help. They are directed to the six fundamental activities for your self-promotion. The questions will no doubt be answered in a different way by different members of the Bar. It is therefore quite unhelpful to suggest to intelligent and creative professionals what the answers may be.

1. Who?

At present the Bar is having its own internal debate about who should have access to it. Before you can decide what your marketing and advertising approach should be, you need to decide who will be both the clients and also the specifiers. By a specifier I mean someone who says to his or her client that they should use your services. At present, using this terminology, solicitors are specifiers. Until it has been finally resolved who will be our "clients" in the future it is impossible to decide what would be the appropriate and most effective way to market your services.

2. What?

Having decided what kind of practice you wish to have and what services you wish to offer you need to decide what it is that you wish to tell the decision-makers who will decide whether or not you are selected for future work. Generally, you cannot tell everything about yourself that you believe will attract the appropriate kind and level of work which you wish to do. You have to select which qualities you wish to promote, bearing in mind whatever restrictions there are or will be placed upon your advertising and marketing.

3. Where?

We tend to think in terms of paid advertising in the press and on television as the way in which advertisers approach their target market. But, of course, the medium through which you promote your services not only could include these two media, but also direct mail, sponsorship, telephone contacts, the radio and (vide *Chapelton v Barry Urban District Council* [1940] 1 KB 532) deck chairs on a beach. Your criterion of where you should promote yourself should be decided by your model.

4. How?

How is it best to contact the people who you believe will be most helpful to you? Is it by some face-to-face conversation, is it by correspondence, is it by paid advertising or is it by some form of public relations?

5. Why?

This is always a difficult question, but why should the prospective client select you? Barristers are, of course, naturally diffident about their qualities, but in this line of activity it is necessary to be able to express why you should be selected for work so that that proposition can be put to your defined target audience.

6. When?

You have to decide when is the most appropriate time that you should promote yourself. For example, does the tax adviser promote himself close to the end of the financial year because he or she believes that that is when the selection of a barrister is made? Should that marketing approach be made at the beginning of a new financial year, giving the idea time to grow and flourish so that when the work is required that particular barrister is more likely to be selected?

The answers to Rudyard Kipling's six questions are clearly very personal and, I would imagine, very different between members of our profession. The fact that such answers are so likely to be very different from each other reinforces my view that a Procrustean approach, whereby there is only one answer to the problem no matter what the problem is, is likely to have no chance of success.

Conclusion

If marketing is the conscious act of self-promotion, then providing members of the Bar are permitted to do so, conscious self-promotion should bring no less success to barristers than it does to other professions. Whether or not such conscious self-promotion is acceptable or appropriate for members of our profession is a question that raises a fair degree of heat on both sides and, for the avoidance of doubt, I do not wish to be taken as expressing any view on this question. A personal frank self-assessment using the questions I have posed should provide members of the Bar who wish to promote themselves with a practical and inexpensive start. ❑

Observations to (Recently-admitted) Counsel

- Your life as a Barrister will revolve around two things and two things only - briefs and cheques.
- If 10% of the Solicitors who promise to brief you do so you will probably succeed at the Bar.
- There is no such thing as a "simple" matter - otherwise you wouldn't be briefed.
- The importance of the "principle" increases in inverse proportion to the quantum.
- Do not worry - the evidence will be right on the day.
- The sweetest words to your ears will become "I don't wish to hear from you Mr Millard". Resist the temptation to do a John Fahey leap when it's said.
- If your client wins - it's as a result of your eloquent brilliance.
- If your client loses - the witnesses let you down or the magistrate/judge is an imbecile.
- On average, the positive/optimistic Barrister wins 50% of his cases.
- On average, the negative/pessimistic Barrister loses 50% of his cases.
- Never, ever, engage in punter's post mortems; but you will!
- The amount in the Solicitor's cheque never seems as much when you finally get it as when you originally sent the memorandum of fees.
- Everybody you meet will know more about being a Barrister than you do - especially if they do not have a law degree and have never seen the inside of a court.
- You should put $1 in a moneybox every time someone asks "how can you represent someone when you know they're guilty?" - you'll be able to retire by the time you're 40.
- If all else fails - read the brief.

❑ Philip Gerber

The Australian Advocacy Institute: Workshops for the Scottish and English Bars

The Australian Advocacy Institute under the Chairmanship of Mr Justice Hampel presented advocacy workshops for the Scottish Faculty of Advocates on the weekend of 6-9 January and for the English Bar at Grays Inn on the weekends of 13-16 January and 20-23 January 1994.

The workshops were greeted with enormous enthusiasm by the barristers and judges who participated. Many senior lawyers, leading judges and advocates from both Bars were involved. The Lord President, Lord Hope and the Lord Justice-Clerk, Lord Ross of the Court of Session in Scotland attended the Scottish workshops and in England a number of senior judges, including the Right Honourable Lord Justice Kennedy, attended the teacher training workshops as prospective advocacy teachers using the Australian system. The Australian system has developed three particular characteristics generally. These characteristics are:

1. extensive practical advocacy presented by the pupils, including opening address, leading evidence-in-chief, cross-examining and closing address;
2. use of case analysis and preparation for performance as an advocate, as distinct from preparation of the case; and,
3. emphasis on demonstration by the teachers in the teaching groups rather than more abstract instruction.

The training in the United Kingdom has not used these methods of advocacy teaching. In the English training programme there has usually been only one day of training where the pupils actually examine witnesses or address the Court.

In the middle of 1993 John Sturrock from the Faculty of Advocates carried out a study tour of the methods of advocacy training in the common law system for the purpose of implementing a new training programme for the Scottish Faculty of Advocates. He attended workshops carried out by the Institute in Australia and subsequently the Institute was invited to present workshops in Edinburgh. At the same time the Grays Inn training programme has been undergoing extensive review under the leadership of Michael Hill QC and the Institute was invited by him to give a series of workshops at Grays Inn during the same visit. The team involved from the Institute was the Chairman and three of the members of the teaching committee, Brian Donovan QC from New South Wales, Felicity Hampel, barrister from Victoria and Julian Burnside QC from Victoria.

The Scottish workshop took place at the common room of the Law Library at Parliament House, the home of the Faculty and the Courts. The practice workshops took place in the courtrooms in the Parliament House which was opened for the Parliament of Scotland on 31 August 1639 and remained for that use until the Act of Union.

The Institute provides as part of its course a variety of different types of workshops including trainee advocate workshops and trainee teacher workshops. These have been discussed in previous articles. The workshops in Scotland were trainee advocate workshops. They were varied, however, to involve members of the Scottish Bar in the training so that they would be able to use the Australian system after we left. Usually this would be done by use of teacher training workshops. The modified workshop stretched the resources of the Australian team because, although we were primarily presenting training for 24 Scottish devils, we were also presenting both by instruction and demonstration, the technique of teaching to the senior members of the Faculty.

On Thursday 6 January Mr Justice Hampel described the developments of training in advocacy skills in Australia over the past 20 years and the establishment of the Advocacy Institute. He also described the Victorian Bar Reader's course. Mr Burnside QC, the Vice-Chairman of the Victorian Bar Reader's course, provided further detail about the current state of that course. Brian Donovan QC described the present state of the New South Wales course and Mrs Felicity Hampel discussed the use of the video review system as a teaching method for workshops in Australia.

The workshop proper commenced on the Friday when Mr Justice Hampel explained, by reference to the model cases and their analysis, what the trainee advocates were expected to achieve. The Institute teachers and the trainee advocates gave demonstrations. We used the sample cases of the injunction application in *Porcine v Royal Bridge Water Golf Club* (adapted to application for an interim interdict under Scottish law as *Prendergast v Royal Bridge Water Golf Club*), the sale of liquor prosecution of *Bier v Jones* and the larceny case of *Police v Canning*.

As in Australia, the students were broken into groups of eight. There were three groups. One Australian instructor was allocated to each group. The instructors were rotated after each session so that each group had at least one training session with each Australian instructor. Mr Justice Hampel took overall supervision. He conducted several general sessions, case analysis sessions and provided individual instruction in the individual groups from time to time.

Apart from the Australian instructor, each group had two senior Scottish advocates as instructors and one as the judge in the courtroom session and one Scottish instructor in the video room for private video instruction. During the first session the student received instruction solely from the Australian instructor in the open session and private instruction from the Scottish video instructor in the video session. In the second session the Scottish instructors were invited to comment in open session and by the third and fourth sessions they were taking an active part with some guidance from the Australian instructor. Each of the Australian instructors made extensive use of demonstration to the students. In the third session Scottish instructors were asked to demonstrate. This was an important development for three reasons. First, it involved the Scottish instructors more closely with the student. Secondly, it broke the ice for the Scottish instructors in their practice of

demonstrating and, thirdly, it allowed the Scottish instructors to demonstrate how it would be done where there were variations between Australian and Scottish practice.

In addition to Scottish instructors, a number of advocates attended as observers and these senior advocates were rotated so that they became instructors in later sessions. Other senior advocates acted as judges and were involved in commenting from the Bench. Overall, a very large number of Scottish barristers were involved.

Although among some of the locals there was a little reservation at the start of the workshops, by the end there was universal enthusiasm with many senior advocates commenting on the fact that they had approached the exercise with reservations but had found the methods stimulating and exciting. The warmth and support from all who took part indicated the enormous success which the project achieved.

Apart from the training itself, the project caused many counsel to reflect on their own techniques. In my own group I asked Neil Murray QC, a leading advocate in criminal law, to demonstrate a particular way of cross-examining on a prior inconsistent statement. Access to the prosecution brief in Scotland is more limited than here or in England and there were some local peculiarities. Mr Murray's demonstration showed the support which the Scottish Bar gave to the workshop when, without notice, he took up the problem and gave an illustration of one manner in which the cross-examination could be carried out. This then led to a discussion between the Scottish advocates as to what other methods could be used. These included the problems of hypothetical questions and putting the evidence of one witness against another. While such analysis was advanced for the devils themselves, the reflective debate among the senior Scottish practitioners was a most enlightening contribution to the project.

It is, of course, impossible to acknowledge all those of the Scottish Bar who gave their support so enthusiastically but a special acknowledgment must be given to John Sturrock and Isobel McColl who organised the whole project at the Scottish end and whose boundless faith in us was certainly an inspiration, particularly in the early stages when, speaking at least for myself, there was some nervousness in coming to terms with a different and unknown legal culture, one which I discovered had the same traditions and approaches as ours and whose variations were relatively minor.

During the following two weekends the team gave teacher training workshops at Grays Inn. The teacher training workshops have been well developed here and that protocol was used in London. In these workshops the purpose is training the teachers. Instead of pupil groups of eight there were groups of only three pupils. From the start the trainee teachers were involved in reviewing the pupils. In each group there were approximately eight trainee teachers. The pupils performed their advocacy presentations. These were addresses and examinations of witnesses. The pieces were taken from the model case. The trainee teachers then provided a short review. At the end of each review the teaching instructor provided a review of the trainee teacher. The Institute's methods are to have the trainee teacher provide reviews which are then subject to instructor reviews. The trainee teacher is involved in the case analysis and preparation for performance. The trainee teacher must demonstrate the point to the pupil.

The workshops at Grays Inn involved separate groups of English judges and barristers at each weekend. In Australia, trainee teachers from the teacher workshops will go on to teach initially in conjunction with more senior teachers from the Institute. As this was not possible in England, the procedure of the teacher training workshops was varied to allow for more emphasis on the trainee teachers doing practice reviews. There were also demonstrations by the pupils on general sessions which showed how far the pupils could improve their advocacy performance, even over a single weekend workshop.

There were three groups of trainee teachers. Each was allocated to an Australian instructor. The instructors were rotated so that each teacher-training group had at least one session with each Australian instructor. The Chairman provided instruction in the general sessions, particularly with emphasis on case analysis. He also provided individual instruction in the groups from time to time.

Not surprisingly, even for many of the senior barristers and judicial members, similar flaws in teaching technique occurred as arise in Australia: First, the tendency of the trainee teachers to lecture the student; second, an attempt to correct everything in one go. The Institute's method, confirmed by research both here and overseas, shows quite conclusively that one point only should be corrected, with perhaps two in exceptional circumstances. Trying to cure more only confuses the student. Again, the research shows that general discussion of the problem is relatively useless. The point must be made clear to the student in one short sentence at the very start of the review. Failure to do this may mean that the whole of the instruction becomes lost. It must be made clear to the pupil why the item needs correction. The student must be shown how to correct it. Almost always this requires demonstration and direct involvement of the student, even sometimes asking the student to repeat a particular part of the practice piece. The teacher's demonstration must be short.

Although there are many more members of the Inns of Court than the Faculty of Advocates, the warmth and excitement created by the Institute's workshops was just as great as in Edinburgh. An indication of the interest and support can be seen from those who participated as prospective teachers. These included the Rt Hon. Lord Justice Kennedy, the Hon. Mrs Justice Bracewell, the Hon. Mr Justice Brown, the Hon. Sir John Mummery, his Honour Judge Paul Clark, Master Nigel Murray, James Goudie QC and Michael Lawson QC, Chairman and Member of the Inner Temple Advocacy Committee, James Hunt QC, Member of the Grays Inn Continuing Education Committee, and Michael Sherrard QC. Many of the participants were Benchers of their Inn.

The integrity, and indeed humility, of these judges and advocates must be recognised and greatly respected. Anyone who has been through an advocacy workshop as a trainee advocate or trainee teacher knows that there is no room for false pride or ego. These workshops are not for the faint-hearted or over-sensitive. They are not for those who cannot

tolerate constructive criticism. It was a mark of the respect in which the Institute was held that such people were prepared to accept, without demur, instruction, sometimes quite direct, from the Australian instructors. Not only that, they accepted it with enthusiasm and support, recognising the importance of the exercise in which we were all involved.

As the workshop progressed, it was heartening to see the rapid change of technique used by the senior trainee teachers. I will remember, for example, the care and sensitivity with which Lord Justice Kennedy rose to review one of the pupils. She had commenced her practice cross-examination with questions to the effect that the witness was an experienced police officer. Very gently he pointed out that such an approach would create hostility in the witness and demonstrated with his great charm how, in a few questions, he could achieve a favourable answer to the point which the trainee advocate sought to achieve. His Lordship used a most sensitive approach to the instruction. His sensitivity to the student could have overawed her and detracted from the directions. But it did not do so. If there was one image that I brought away from those January workshops, it is that image of Lord Justice Kennedy.

It is not possible to acknowledge the contribution of every person who was involved in the English workshops but we must acknowledge the huge contribution made by Michael Hill QC of Grays Inn who was the guiding hand behind the project. Like many others he sees the problems confronting the Bar in England as similar to those confronting the Bar in New South Wales. It is vitally important that we continue the increase in our skills at all levels. The Bar Association's training programme is one of the great successes for us. The Australian Advocacy Institute provides further training at a variety of basic and advanced levels. Last year it provided specialist workshops in appellate advocacy, in expert witnesses (including expert witnesses in accountancy and in medicine), and advanced training programmes. The experience, expertise and talent of the Institute is acknowledged internationally. It is available here for all of the Bar. It is necessary for the continuation of a Bar of excellence, that we continue to develop our advocacy skills at whatever level they may be.

The success and respect that the Australian Advocacy Institute has achieved over the years, as manifested in the success of its workshops in the United Kingdom, is something of which we must all be proud. As we approach the third millennium Australians are becoming known for their talent in various skills and disciplines. The members of the New South Wales Bar can be extremely proud of the contribution to advocacy made by Australians in the world scene and to the contribution made by the New South Wales Bar to the Australian Advocacy Institute. New South Wales representatives of the Institute are Justice O'Keefe, who is a member of the Council, and Brian Donovan QC, who is a member of the teaching committee. Philip Greenwood was previously a member of the teaching committee. The Institute's success, however, must be supported by the Bar's involvement and participation, both to improve ourselves and to advance the welfare of the Bar. ❑

Brian Donovan QC

Restaurant Review - DOV

The name of this café is difficult to pronounce, however it is easy to take there a very enjoyable meal in warm, busy surroundings. "Table attendants", waitpersons or waiters, Millie and Cath told me all there is to know about this popular café at the corner of Forbes and Burton Streets, Darlinghurst.

The owner, Dvir Sokoni, is about to repeat this performance at the Wharf Theatre, No. 4, Pier Walsh Bay. I don't believe theatregoers will be disappointed.

DOV has a limited menu. Soup, onion, the night I went, was popular. However, the real treat is to sample a stunning list of entrées, usually cold cooked vegetables and other treats with lots of fresh salad varieties. Grilled mushrooms with black olives and flakes of Parmesan was my choice. It was a warm dish with large black-under-bellied field mushrooms. Delicious! Other entrées include: Hoummos and Moroccan Eggplant; Chopped Liver (hands up all those who love chopped liver); Rocket and Parmesan - a large salad; Celery Root Tart with a large salad; Onion Tart with same; Roasted Tomatoes; Savoury Tart, and on it goes.

Any one entrée costs $6.50. A mixed plate with something from each item is $9.50. Three persons can graze upon such a plate and feel worried about eating the main course afterwards. Really, some entrées are as big as the mains and you won't have room for more. Share an entrée and move to the next square.

The mains, only two - if you are early. Later on the blackboard is deleted by the one most popular. My choice was from Grilled Lamb Cutlets or Paprika Chicken. The cutlets were sweet and moist and not fatty, arranged around a mountain of fresh creamy mashed potato with a capsicum/eggplant et al ratatouille. Steaming hot and more than you could eat. The mash screamed for a second helping. Mother's was never this good. No lumps and full of flavour.

The chicken paprika had a spark of spice that did not overcome a rich fresh chicken flavour, not greasy and certainly no rubber chicken here. Long green crunchy beans accompanied a half-chicken dish.

If you have room one can select from a range of cakes for dessert. Very rich strong coffee comes at $1.50 in cappuccino form with creamy head as high as beer froth shaken from a can.

It's a café, so expect some noise from the modern hard-surfaced interior, with the noise you get a friendly, efficient and obliging service from Millie and Cath (who wants to be known as "Valeska" - it sounds Russian). Plenty of crunchy bread and iced water is volunteered without charge.

This modest and breezy place is a refreshing change from other eating premises that try to charge for each item of food that makes up a dish. I categorised the food as "modern Australian" (whatever that now is). Millie assured me that it is Israeli food, so now I know. Do try it. It is not a place to linger, others will be waiting for your table, but they are agreeable civilised souls and you will be in good company.

On the way to DOV (pronounced as in the preposition "of") don't be surprised if you see young male and female student chefs in their checked or hound's-tooth trousers and white coats going into the cooking school at the East Sydney College in the old gaol behind the Law Courts. ❑

Peter Kennedy-Smith

Let's Stamp Out the Gavel

Fortunately, I am a calm man. Were I not, my seeing the currently showing cinema production, *In the Name of the Father*, would raise the blood pressure for more reasons than one. The film tells a story of unforgivable injustice brought about by corrupt police. As an illustration of the dangers of accepting "voluntary" signed confessions, when police have the power to detain without arrest, it is salutary.

The film, for me, was seriously flawed by the allegedly London courtroom scenes showing an English High Court Judge pounding away with a gavel like an excited auctioneer, being asked for a "recess" and for permission to "approach the Bench".

The ABC and the *Sydney Morning Herald* and many other Australian media members frequently show the gavel in illustrations preceding or concerning stories about Australian courts and lawyers.

That (in journals and media other than this one) the purveyors of news can be guilty of such ignorance should not surprise us, given that a large part of our profession manages to do so well from the laws of libel and contempt.

That the media's ignorance can be spread to the general community is a vexing matter. When will the Australian media cease passing off the gavel, incorrectly, as a symbol of justice in this country? For gorsake, the gavel in the courtroom is as exclusively and homegrown American as the "continuance" and the popularly-elected judge.

The *Oxford English Dictionary* confirms that it is a United States word, and suggests the appearance of the gavel in American courtrooms as early as 1860. The origin in American courts seems to have been associated with the origin of the gavel's use in the Congress.

This is just a theory, mind, but what seems to have occurred is that when the mace crossed the Atlantic in a generally western direction, it was not good enough for the Americans as a symbol of authority. In *The Gavel and the Mace* or *Parliamentary Law in Easy Chapters* by Frank Warren Hackett (Sweet & Maxwell, 1900) the author lists the duties of the Speaker, as including: *"To use the symbol of the State, in the shape of a gavel, or hammer, wherewith to rap members to order."* He continues: *"As a last resort for the purpose Great Britain arms the Speaker of her House of Commons with a mace, built of solid silver, and reputed to be a terrible weapon at close quarters. Our House of Representatives at Washington has adopted a like emblem of parliamentary authority."*

The American lawyers took to the gavel with enthusiasm.

The American Bar Association first met in August 1878 at Saratoga Springs, New York. According to Gerald Carson, the author of *A Good Day at Saratoga* (American Bar Association, published 1978): *"Despite the overwhelming presence of first class minds well stocked with legal knowledge, or perhaps because of it, some physical symbol of authority was needed to carry on the business of the assembly. For how, after all, can a presiding officer properly discharge his functions without a gavel? But there was no gavel. So the young acting secretary, Rawle, was sent out to a general store, or according to some accounts, a hardware store, where he purchased an ordinary carpenter's mallet for seventeen cents. It performed its first service in the hands of the temporary chairman. Then it passed to ... [the] ... President of the Conference. Then it was handed on, like the torch in the ancient Greek games ... It was used continuously at every annual meeting from 1878 to 1946 and ... is now on exhibition in a glass case at ABA headquarters... The gavel was, for sixty-eight years ... 'our sole regulator'. "*

The extraordinary thing is that it is difficult to find an American attorney who has actually seen a gavel being used in court. Detroit trial attorney, Jean Pierre Ruiz, says: *"I have practised in Detroit for almost ten years and although I have seen them on the bench, I have never seen a gavel being used."*

Washington DC attorney, Lynette Platt, formerly a Canberra barrister and solicitor, has practised in Washington DC for 12 years and has never seen one used. She says of them: *"I think they are more likely to be found in the State Courts rather than the Federal Courts and especially in the boon docks, e.g., Kentucky.*

"Watergate special prosecutors say they saw gavels being used to announce the opening of Watergate hearings but not otherwise. They may also be a Californian thing. Even there I believe they tend to use a gavel head without a handle and only in the low courts where it is necessary from time to time to call order. When I talk to American lawyers I find that everyone thinks they have seen them used, but when they are questioned they cannot remember an instance and certainly never in the Federal Courts. They seem to be present in all Federal Courts as a symbol, sitting on a gavel stand, but are never used to keep order. The whole time I have been in the United States I have only seen it being used once and that was on daytime television in 'The People's Court'. There is no doubt the judge on that program bangs his gavel a lot."

The American people seem keen on the symbolism of the gavel.

The tragically misguided 1960s philosopher, Abbey Hoffman (having tried, unsuccessfully, to levitate the Pentagon in the 1960s) tried unsuccessfully in the early-1980s to buy the gavel which had been on the bench of the trial judge at his earlier trial.

If the Attorneys-General of the States and of the Commonwealth are really concerned about micro-economic reform in the legal profession, they could begin by exhorting members of the press to illustrate items about the law by means of a symbol which does have meaning in this country. The wig is sometimes used (and nothing wrong with that, you might say). Those hurtful purveyors of lawyer jokes might well suggest the $100 note. My clerk, Mr Ken Hatcher, has designed several fax covers for my floor. One of them, I am embarrassed to say, shows the gavel. Another shows a male British judge in what appears to be a frock. The third shows the scales of justice. Whilst it might be thought by some that a male judge in a frock has, as symbolism, some attractions, that is clearly not the one we should use. The scales of justice constitute the one symbol which is common to British, American and Australian courts. There is a statue of the scales of justice at the Old Bailey. Those of us whose education about the American legal system came from *Perry Mason* and *LA Law* will know that the scales of justice are commonly referred to in that country. Many Australian solicitors use the scales on their letterhead. Australian juries not uncommonly have the balance of probabilities explained to them by reference to an imaginary set of scales. It's not novel, but at least it's accurate and it's universal. ❑

S L Walmsley

Courts in a Representative Democracy

National Conference, Canberra, 11-13 November 1994

The existence of an underlying tension between the legislative, executive and judicial arms of government is well known to most observers of the political scene. It is not necessarily a bad thing. In the balance of powers under which Australia's democracy operates, an arm's length relationship, particularly between parliaments and the courts, can operate as an inhibition on abuse of power. It is, however, of critical importance that there be an adequate understanding by these institutions and by the public of their respective roles and functions. Recent history has seen debates about the role of courts in the review and construction of legislation, the interaction between judicial decision-making and the democratic process and the sensitivity of courts to community and other standards. Questions of the way in which appointments are made to the courts, the accountability of judges and the notion that the courts should be able to publicly explain their functions have all been agitated.

On 11, 12 and 13 November 1994, in Canberra, there is to be a significant National Conference held under the title "Courts in a Representative Democracy" at which many of the issues arising between legislatures and the courts will be addressed. Those attending the conference will be drawn from the ranks of judges, legislators, academics, legal practitioners and public servants. The conference is being jointly convened by the Australian Institute of Judicial Administration, the Constitutional Centenary Foundation and the Law Council of Australia. The organising committee comprises Justice Robert French, representing the Australian Institute of Judicial Administration, Professor Paul Finn, representing the Constitutional Centenary Foundation, and Gary Crooke QC, representing the Law Council of Australia. The committee has been fortunate in securing the participation of speakers, commentators and chairpersons who are of national prominence in their respective fields. The programme in which they participate is a particularly exciting and interesting one for those who are concerned about the respective roles of the judiciary and the legislature.

The keynote address on "Separation of Powers" will be delivered on the evening of Friday 11 November by the Chief Justice of South Australia, Justice King, who, prior to his appointment as a Judge in 1975, served in the South Australian Parliament and held a number of ministerial portfolios, including that of Attorney-General. The first session on Saturday 12 November will be concerned with the law-making process. The speakers are Hilary Penfold, Commonwealth Parliamentary Counsel, Kim Beazley MHR, the Minister for Finance and Leader of the House of Representatives and Professor Dennis Pearce, Professor of Law at the Australian National University. They will consider the legislative drafting process, the parliamentary law-making process and problems of quality control in law-making. Commentators for that session are Rowena Armstrong QC, Chief Parliamentary Counsel for Victoria, the Hon. John Hatton MLA, an Independent Member of the New South Wales Parliament, and Professor Colin Hughes of the Politics Department of the University of Queensland. The Chairman for the session will be the Hon. Justice Trevor Olsson of the Supreme Court of South Australia, Deputy Chairman of the Australian Institute of Judicial Administration. The second session on "Courts and the Community" will be chaired by Stuart Fowler, who will then have assumed office as President of the Law Council of Australia. A paper on "Courts, Legal and Community Standards" will be given by the Hon. Justice Sally Brown of the Family Court of Australia, formerly Chief Magistrate for the State of Victoria. The commentator will be Dr Carmen Lawrence MHR, Federal Minister for Health.

The third session, "Courts in a Democracy", will involve two papers, one presented by the Hon. Justice Michael Black, Chief Justice of the Federal Court of Australia and the other by Professor Leslie Zines, formerly Professor of Constitutional Law at the Australian National University. The commentator on Chief Justice Black's paper, which is entitled "The Courts and the Individual", will be the Hon. Fred Chaney, a former Federal Minister and Member of both the Senate and House of Representatives. John Doyle QC, Solicitor-General for the State of South Australia, will comment on Professor Zines' paper which is entitled "Courts Unmaking the Laws". That session will be chaired by Alan Rose, the Secretary of the Attorney-General's Department. There will be a formal dinner on the Saturday night.

The fourth session on the Sunday morning will deal with "Appointment and Accountability of Judges". The speakers will be the Hon. Michael Lavarch MHR, Commonwealth Attorney-General and the Hon. Murray Gleeson, Chief Justice of New South Wales, respectively. Their commentators will be the Hon. David Malcolm, Chief Justice of Western Australia and the Hon. Duncan Kerr, Federal Minister for Justice. The Chairman of that session will be Professor Michael Crommelin from the Faculty of Law at Melbourne University.

The fifth and final session, which will conclude at 1.30 p.m. on the Sunday, is entitled "A Voice for the Courts". Daryl Williams QC, Shadow Attorney-General, will address the topic "Who Speaks for the Courts?". His commentator will be David Solomon, well-known journalist and a former Chairman of the Electoral and Administrative Review Commission established in Queensland following the Fitzgerald Royal Commission.

The last paper of the conference, "Supping with the Devil", will be given by His Excellency, the Hon. R McGarvie, Governor of Victoria, a former Judge of the Supreme Court of that State. His Excellency will discuss the extent to which judges and legislators should communicate directly about the operation of existing or proposed laws and the need for law reform in areas which have come to the notice of the courts.

The question whether judges should communicate with parliamentary committees on other elements of the law-making process will also be considered. Justice C W Pincus, of the Court of Appeal of Queensland and the Litigation

Reform Commission of that State, will be the commentator. That final session will be chaired by Professor Cheryl Saunders, who is the Deputy Chair of the Constitutional Centenary Foundation.

The conference promises to be an exciting and important occasion. The registration fee is $450 for members of any of the participating organisations and $500 for non-members. This figure covers an informal dinner on the Friday night, lunch on Saturday and the formal dinner on Saturday evening, as well as morning and afternoon teas. The conference will be held at the Hyatt Hotel in Canberra. The hotel is offering a special conference rate of $160 per night. Qantas is the official conference carrier and has offered a discount rate of 45% off economy airfares for those travelling to the conference.

Registration forms and brochures will be distributed through the July edition of the *Australian Lawyer*. However, anybody wishing to register earlier than that, can do so by writing to:

Christene Jackson, Conference Organiser
Law Council of Australia
19 Torrens Street, Braddon, ACT 2601

Ms Jackson's telephone number is (06) 247 3788 and her fax number is (06) 248 0639. ❑

Footage in the can!

The Attractiveness-leniency Effect

Stephen Juan ("*Juan on Wednesday*") wrote in the *Sydney Morning Herald* recently:-

> "Research shows that physically attractive people enjoy many advantages over unattractive people in courts of law. It is called 'the attractiveness-leniency effect'. It means that there is a greater likelihood that a physically attractive defendant will be acquitted of a crime. It also means that if convicted, the sentence will be lighter if the criminal is attractive."

What Juan did not say, however, is that the so-called "attractiveness-leniency effect" may work as well for a barrister as for a defendant!

The presence of the phenomenon first came to my attention some years ago when, as a law student, I attended a criminal trial in the District Court. The defendant had been apprehended whilst in the commission of an armed robbery of a suburban bank, having become stuck in wet cement outside the entrance to the bank. There were many witnesses for the prosecution. The defence called no evidence. Counsel for the defence had, however, done his homework well. The defendant had undergone a physical transformation to resemble Don Lane, who, at the time, was Australia's most popular public figure according to surveys taken by the *New Idea* and the *Women's Weekly*. This, when coupled with the defence counsel's skill, not unlike that of a game show host, and teeth like Donny Osmond's, overcame the apparently insurmountable difficulty of the defendant's case. What a combination! After a mere 10 minutes' deliberation the jury came back with a verdict of not guilty.

Building on this experience, I resolved to undertake a poll on the effect of courtroom appearance and found, quite expectedly, that most people regarded attractiveness in an advocate and/or defendant as a friendly, self-assured expression, stylish hair and well-proportioned body, while characteristics of unattractiveness were identified as an unrefined, unfashionable and informal appearance, round face and stout body.

The lesson was obvious: a plaintiff or defendant should be modelled in the likeness of a popular contemporary public figure and, for the barrister, good deportment and personal refinement accounted equally for a well-rounded knowledge of the law and advanced skills in advocacy.

My findings have recently been confirmed in clinical studies undertaken by the American Psychologists Association (see, e.g., Juan's article referred to above), which show that juries are "swayed one way or the other by the physical attractiveness of defendants, plaintiffs and witnesses", often in complete independence of the facts of the case.

What then can a barrister do to take full advantage of the "attractiveness-leniency effect"?

Application of the phenomenon to the client

History is full of instances where ugly defendants have been tried, convicted and executed almost in one stroke. Quasimodo being a good example: I mean can anyone really suggest that an overweight, foul-breathed, dribbling hunchback with teeth resembling a rock formation and with one eye pointing north and the other pointing south received a fair hearing from his peers? If, however, his defence counsel had taken the time to consider the hunchback's appearance it might have been a different story.

The lesson to the practitioner is simple - an ugly client is an unsuccessful client. Therefore, evaluate the client's appearance in conference and, if the client comes up looking like a dud, implement defensive measures of repair. For example, I have found that both judges and juries will respond more favourably to a person resembling a Gold Logie Award winner than someone who resembles a potato - the old "Ray Martin" defendant. While some barristers may think it difficult to convert a potato into Ray Martin, do not despair.

A sharp pair of scissors, a bottle of Grecian 2000, a well-made set of false teeth and an instructing solicitor with a steady hand will do the job in under two hours.

Although, generally speaking, if one puts one's mind to the task there is little, if any, difficulty in transforming the most misshapen and unattractive client into a popular Australian personality - just the other day I was faced with a client whose appearance could be restructured only to resemble that of Alan Jones: regrettably, he lost.

Application of the phenomenon to barristers

Although not the subject of clinical studies, it has become apparent to me that the "attractiveness-leniency effect" has equal application to counsel as it does to the client. Moreover, with the abolition of the "no advertising" rule, qualities in a barrister, such as good grooming and deportment, are ever more important. Which judge or jury would not be swayed by a Larry Emdur over a Les Patterson?

This is not to say that the Bar, as a collective, presents an image of unrefinement. Quite the contrary. However, in my opinion, more must be done to take full advantage of the "attractiveness-leniency effect".

With advocates increasingly required to attend court in street attire as opposed to robes, the tide of fashion is ever rising. More and more sartorial elegance abounds within members of the Judiciary - neckties are often complemented by a matching handkerchief arranged alluringly from the top left pocket of a carefully selected and fashionably correct suit, or chic feminine apparel is thoughtfully accessorised. One can often feel the critical eye of the judge when one rises to

address. Indeed, it has been recounted to me that a particular Family Court Judge refused to hear an advocate solicitor because his jacket did not match his trousers. Pointedly I ask "how long will it be before the Barristers Disciplinary Tribunal and/or the Court of Appeal are asked to determine cases entitled *In re a Barrister's Trousers?*".

In addition to a barrister's personal obligation to good grooming, in my opinion, he or she has a duty to the court, and to his or her client, to ensure that the instructing solicitor is appropriately attired. For example, after having read that a consultant psychologist at Jury Behaviour Research Inc in Los Angeles recommended glasses for a defendant with shifty eyes designed to moderate the shiftiness, I have taken to carrying half a dozen or so frames of various styles into court for every hearing where I am instructed by a solicitor.

On the eve of "deregulation" and historical change the public eye is ever more focused on our profession. Newshounds like nothing more than a "barrister" story. What current affairs programme would not relish the opportunity to pursue a hapless barrister down Phillip Street? Is it not, therefore, all the more necessary that we ensure an appropriate standard of dress and presentation to the public?

Accordingly, I urge the Bar Council to implement the following measures:-

1. As part of the reading programme, pupils must be required to undergo grooming and deportment classes conducted by those members acknowledged as among the best dressed and most refined at the Bar.
2. A committee must be appointed to advise and publish guidelines on what and what not to wear in any given case ("The Appropriate Apparel Committee").
3. A "jury psychologist" should be appointed to counsel and advise practitioners on whether he or she ought to have worn a looser-fitting suit or dress, in circumstances where robes were not required; whether that suit or dress ought to have been in bold colours or pastels; whether or not he or she should have opted for plain fabric or a fabric with stripes: whether or not spectacles were to be preferred to contact lenses.
4. A dietitian should be made available to every member to discuss matters of the girth. (Given the current state of the Bar, maybe two?)

We must keep pace with change!

For my part, as evidence of a personal pledge to the profession, I have committed substantial funds to plastic surgery and cosmetic dental reconstruction, to the acquisition of a co-ordinated wardrobe for any courtroom occasion; I have spent many hours with a copy of *Chitty on Contracts* balanced squarely on my head while cross-examining the cat; and I have undergone a one-week intensive course at the Max Rolley Academy of Voice.

The results?

Well, they speak for themselves. ❑

Round and About

Some police officers must take special courses in circumlocution. In a recent case at Campbelltown, an officer wanted to tell the Court that he had chased three suspects, seen running from the scene of an attempted smash-and-grab. He chased them, first in a vehicle and then on foot before arresting one of them. His account included these gems of verbal precision:

- "I observed three males, all wearing dark clothing, to decamp from ...
- Constable X caused the police vehicle to follow three males ...
- I exited the police vehicle...
- I also climbed over the gate and entered the construction site, becoming in foot pursuit of the three male offenders.
- A short time later ... I again became in foot pursuit of these offenders."

Contrast this with the pithy brevity of the suspect's replies:

Q. What were you doing with your arms in the window of the shop?
A. I'm not answering no f...ing questions.
Q. Who was with you when you did the break-in?
A. I'm not f...ing saying nothing.
Q. Why did you run away from the shop when the alarm went off?
A. I'm not f...ing saying.
Q. Do you wish to read and sign my note-book?
A. Get f...ed. ❑

Self-reflections from a Pond ... A A Robins

Kelly Wright asked me to write a review of the Bar Reader's Course and its aftermath. To be fair to her she asked me to write a review of the course that isn't like this one. What follows speaks only for myself and is a totally unreliable summary of the course. It is also a very odd way to express gratitude. A "white knuckle flier", by the way, is a person whose public terror is in part proclaimed by the visible draining of blood from his lectern-impaled hands. The rest of this is a bit harder to explain in advance. You had to be there.

This is a one-frog perspective on pond life.

Many of you, during the course, did not take notes and did not ask questions. You were asleep. You were asleep for four weeks until the speaker from NIDA asked you to sing "Oh What a Beautiful Morning ".

I was not asleep. I took notes and asked questions.

I don't do show tunes.

Here is what you missed - in question and answer.

PART 1

WE ARE POND LIFE

Who were we?

I'm not sure we ever found out who we had all been in our former lives. *We were too busy.* Nevertheless I am sure we were very interesting.

Well, who were we?

It no longer matters. It is not relevant. It is not admissible.

Who are we now?

In the first few days we found ourselves defined by inference.

Well, who are we now?

We are now elementary pond life. We are delusional. We are a triumph of hope (ours) over experience (theirs). That must come as more of a shock to some than others. *It doesn't shock me.*

Yet we are the white knuckle fliers - the future of the Bar.

How long will it take to fly with pink knuckles?

About five years.

Who are they, who speak to us?

They are tact in action.
They are depending on us.

Are we grateful for the time, effort and learning of the speakers and those three-metre-thick folders of know-how we could never hope to gather *(or carry)* by ourselves?

Yes *extremely* - pathetically, actually.

How long will it take us to read it?

About five years.

Then why are they, *the speakers*, depending on us, *the speechless*?

They are depending on us to be nicer to solicitors and their clients. Remember some of us were solicitors a few weeks ago. Were barristers nice to us?

Why be nice to solicitors and their friends?

We now know that the categories of humility are never closed. We now know why we must be nicer to solicitors. They are the morning sun and the evening star. But they are not pleased with us. They want to drain the pond and reclaim the land for solicitor advocates.

Their friends - who are not really their friends - want to abolish us. They want to drain the pond for lay advocates - little Maoist barefoot doctors of advocacy.

But for now the solicitors and their friends will keep us - some of us - for now, in case we are useful.

How can we be nicer to solicitors?

By not being so condescending for a start, all of us, right now. Stop before we start. Then we can consider market realities and behave accordingly.

There are 25,000 barristers in Wentworth / Selborne alone not counting those on the roof.

There are 25,000 law students who will be released next week. All of them want to do what we want to do and have average TERs of 99.3 and have read all the cases.

There is enough work at the Bar for 103 people and it is being done by our non-judicial speakers plus two or three others who would talk to us but are too busy with briefs too fabulous for our imagination.

What can we do about this?

Nothing.

Nothing? Nothing comes from nothing. Speak again lest you mar our fortunes.

Your fortune

If you really must have money then marry it. Marry someone with a proper job. Marry a litigation solicitor, banker, plumber or dentist.

What should be our motto?

No flicks - no fees - no dog - no fleas.

Fees

The Bar is cheap. It really is cheap. It is dust and dog boxes, not palaces and time sheets. Solicitors have palaces and time sheets. They are very expensive. Why doesn't the public know that?

Is this a communication thing, senior speakers?

No it's not, with respect to the questioner. Our speakers explained the problem. Too many junior barristers have been doing their work for money.

We must provide a service that is seen by the public at large - that part of our public that has been left at large - that we are *both excellent and cheap.* Let's not be mealy-mouthed about this, we are very cheap. All right then , special limited offer - we are *excellent and free.*

Money will come to those who wait.

Then one day, said the speakers, they will have more money than we can imagine.

Flicks

Nothing, we were told and knew already, annoys a solicitor more at 9.55 a.m. on day one of two days' GBH at the Dizzo to discover his barrister has flicked him for a special sitting of the Federal Court on Lizard Island for a fine point of shellfish. That's very selfish. We must promise not to do that and we do. *We are not flickers, not us. We are flickees.*

What is it that barristers can do that solicitors don't want to do?

Advocate and understand the laws of evidence, our speakers told us.

What do we need to know about evidence and advocacy?

Everything, perfectly, now.

What do we in fact know about evidence and advocacy?

A little, imperfectly, before the first hearing date - we promise.

Does this matter?

No, because the law of evidence is about to be changed by a temporary House of Reps voting alliance of the Labor Party, the Mardi Gras Party and the Birthday Party to include everything which is audible, non-heterosexist, gender-neutral or neatly written on coloured paper with little clowns on it.

Will this affect us?

Yes.

Why then after all these centuries are they changing the laws of evidence just when we need it to justify our new existence?

Because as a result of public outcry over sentencing the next wave of judicial appointments will be lay separatist hangers and floggers who left school at 12 and think *LA Law* would be even better if they filmed some executions. *The existing laws of evidence might confuse them.*

Will this make a difference?

We'll have to wait and see. It may make no difference at all.

How can we be nicer to the public?

It can be hard at times but we must always try. 50% of them will lose and blame us. Their solicitors will tell them how to blame us. We will tell them how to blame their solicitors. The other 50% will blame us because they didn't win enough. We must try to be nice notwithstanding or they will nationalise us. Then we will be public servants and we will not have to be nice to anyone.

Was the course just a tad condensed?

One day, which was the first Tuesday, someone asked if it was Thursday. I left my body around about then and by the time I'd decided it wasn't Thursday it was.

By day 3 we were astral planers like Women's Weekly Discovery Tourers Concordeless over Europe, blinking and missing Belgium.

I think the course was just a tad condensed.

A DCM for services to ADR
The Exalted Order of the White Elephant

As some of you know I have been away and this lot puzzled me. Why would anyone receive the Distinguished Conduct Medal for an American Depository Receipt? These days you can't even get a paperweight, let alone a medal.

Then at last I understood what "ADR/DCM" means.

I found the meaning of "ADR" in a gardening book next to aphids. When you go away and find your green tree is now blue there can only be one answer - an infestation of management consultancy. It is incurable. It can only be treated with management consultancy of another strain.

"DCM" means "Don't Confuse Me".

In the end, however, we'll just have to get used to *blue leafed bewilderment* and working at the speed of light.

The NIDA demonstration

At this final point most of you who had slept throughout were woken for a show tune. It was "Oh What a Beautiful Morning".

In fact it was not a beautiful morning it was *an* afternoon of audience participation.

We were shown silly things to do with silly parts of the body including the act of throwing them away. But some parts don't travel. We were told we can project if we can rumble.

We learnt to be trees.

The Burning Bernasconis

As veterans of the mock pleas, mock notices of motion, mock lots of things we faced the moot (arson/insurance) with this knowledge

1. duff advice from a solicitor is not a personal injury
2. if an Arthur Boyd looks relatively cheap it's because Mary did it
3. do not go to Fiji in the hurricane season.

The moot itself was a triumph for all of us *mooters (and some of the Bernasconis)*. We spoke in public in front of a proper judge. We are not dead. That is a triumph.

Upon Leaving the Leagues Club for more graceful grazing in the shadow of the Mid Life Crisis Centre

As we walked away from the post moot bash we heard Kelly rushing back to the Bar Association with the last of our addresses for service memorised. We must all have an address for service for our summonses to attend *CLE*.

These last words came floating from a bench in Hyde Park from a redheaded figure deranged by relief cradling a flagon of industrial-strength claret singing a Kentucky folk song far removed from our now finished course.

"*The speaker* killed a bar in 1923
Practising in courts which haven't seen me
Accepting his *invitation* without a single word
To speak upon a topic
Of which I have never heard."

This was our release point. We were celebrating course survivors, contemplating the fearful Monday. The ne plus ultra Monday - the day of the miraculously stopped train - the Lake Eyre phenomenon - NOTHING - as far as the eye can see.

PART TWO

THE WHITE KNUCKLE FLIER

Monday Day
Ground Zero
Floating on insignificance

Did you ever get the feeling that you wanted to stay just to get the feeling that you wanted to go?

The $2 books

I went to a bookshop with *someone else's* bright idea. They would deck me out in factory seconds. Was I pleased.

Day 2. The terror of not doing anything

This is the Lake Eyre terror. But there is one worse terror than the terror of not doing anything.

Day 3. The terror of doing something

I don't know how it found me, hiding as I was under a QC's second desk, but it did and there it was - chambers work. I beavered, I devilled, I delivered, it disappeared. I haven't seen it since. I think of it as an orphan.

Day 4. The $2 book

Unfortunately the $2 books were now the $2 book - on international law. The law of nations is easy to overlook on the way to the Local Court.

Now I can say things like "The decision to wage war is beyond good and evil".

I can work with that.

"Your Worship Robins for the defendant. Your Worship the decision to lift a strawberry doughnut from the Bayswater Road deli in question is beyond good and evil."

Day 5 - ish. Speaking in Public
The Baptism of Public Bleeding

Number two master found me through four floors across the atrium of cold war air conditioners.

"Just pop up to the Federal Court for a mention. It's a consent adjournment. They want it, just agree. It's nothing to worry about. It might be worthwhile to look at the file. It's a copyright matter. "

I have heard about this kind of thing. I hoovered the file with my nose.

His Honour *Mr Justice Gummow, who is interested in copyright*, wanted to know a little bit about it. He wanted to know everything about it. He wanted to ask me.

"I see. Is this a section 35 matter? "

These thoughts flayed the sealed lips of the white knuckle flier.

"Yes your Honour and no. There are two schools of thought."

Then an amazing thing happened - out popped "equitable assignment of copyright" - all by itself.

I wrote a memorandum.

Then it occurred to me - this is possible. ❑

Compuserve Pacific is a commercial bulletin board. The breadth of its subject matter is overwhelming. There is a 2 volume users guide available from Compuserve and a number of independent publishers also print "How to ..." books dealing with this product.

In order to access Compuserve you need to have a password and registration user ID. You can also acquire, if you are using an IBM Compatible machine, software known as WINCim, which is a graphical navigation tool. The alternative is the mastery of long command names. Apple users are catered for. Charges apply to access to some services in addition to a line charge which varies according to the data transfer rate being used. The line charges were reduced recently and the suggestion is that they will become more competitive in the future.

Compuserve has an immediate usefulness for the bar but its real strength lies in its potential to become an indispensable tool. The immediate usefulness of the produce lies in The Legal Forum, The Research Library and the Legal Research Centre.

The Legal Forum is a "discussion" group. Upon acquiring a user I.D. you also receive a unique number that acts as an address for other users. By using this number you permit people to respond to messages that you might leave in the forum. A message consists of a typed memo. It may be an observation on an earlier message, an answer to an inquiry left by someone else or a question seeking a response from another.

Readers will be aware of the widespread use of United States and Canadian expert witnesses in New South Wales, particularly in product liability and medical malpractice litigation. The finding of witnesses can be a daunting task.

Compuserve permits the user to place a message in the Legal Forum seeking information from other users in respect of appropriately qualified witnesses, including, potentially, a range of views as to their credibility and, perhaps, their likely views based upon experience of their evidence in similar cases. Obviously, information of the last type would require divulgence of privileged and/or sensitive information.

By using other forums in addition to the Legal Forum it would be possible to contact these witnesses direct, and, therefore, to ascertain their preliminary viewpoint, instantaneously. The presently employed alternative is to send large amounts of documentation to them for consideration, and then to await a preliminary response. That response may consist only of the observation that more information is needed. The process would take some time. Using Compuserve the process might be completed in a very brief space of time. Instead of a large file of copy documents taking a week to travel to the United States, a file can be uploaded setting out relevant information from which the expert might give a preliminary opinion.

The whole process could be completed in hours or days instead of weeks, and provide very early direction to the gathering of evidence.

The other use to which the forum can be put is the process of locating judgments from the various jurisdictions of the United States on areas of law in this country which are developing behind United States law. In addition, because of the worldwide coverage offered by Compuserve, it may be that responses from other jurisdictions will be received. By leaving a message in the appropriate area of interest a person browsing the forum may be able to assist in locating an unreported judgment or updating the status of an intermediate appellate court's decision on a matter, for instance.

I have seen messages left by one user uploading a file containing an unreported judgment on a subject. In another instance a user sought advice as to the proper process of issuing a claim against a New York university. In matters requiring service of documents or registration of judgments and orders, Compuserve has the capacity to assist in locating those practitioners in North America prepared to act, within a short space of time.

The Research Library consists of a series of databases of articles from journals. A search is conducted by using key words. For instance, a search on the word "negligence" produced thousands of entries. Interestingly, one concerned the liability of public authorities in New South Wales. When the search has been narrowed to an acceptable number of articles which respond to the key words used, then an article may be retrieved in full text.

The number of responding articles obviously varies with the interest of academics and other writers in that subject matter. My experience suggests that practical problems are not as well provided for as more substantive subjects.

The Legal Research Centre provides access to databases of the indices of over 750 law journals. The products of research into the criminal justice system are also indexed, including publications and studies covering criminal justice, law enforcement and criminology. Also available are summaries of legislative, regulatory, judicial and policy documents covering federal taxation and major legal issues in banking and finance.

A search under the word "estoppel" produced 918 responding articles. The database will show you details of the ten most recent, but abstracts of all the responding articles can be extracted (at a cost of $5 each article). Of the responding articles one, "The new law of estoppel", demonstrates the very wide net cast by this, essentially American, product. The article concerns Australia. In addition, the abstract provides details of the author, the journal name and date of publication, and the ISSN number. The article was concerned with *Waltons Stores (Interstate) Ltd v Maher*, 76 ALR 513 and *Australia v Verwayen*, 95 ALR 321, these being the citations offered in the abstract.

By specifying additional legal concepts or words in the search criteria, a more manageable number of responding articles can be found. Searching using the criteria of "estoppel and representation" returned only four articles, two of which were Australian.

The limitation on this service is that it does not provide full text so that, once the article has been located, it is still necessary to find the journal. However, the wide scope of journals covered by the Legal Research Centre permits a very rapid search for articles to be conducted from the comfort of your own chambers. ❑ R Sheldon

Book Reviews

Law of Privilege, Suzanne B McNicol

Law Book Company Limited, 1992 (RRP $130)

Few areas of the law affect the practising barrister so much as privilege. This estimable book is a concise, yet thoroughly researched, monograph. To it a busy practitioner may safely have recourse, confident that the main authorities and the policy arguments which inform them will be set out clearly for him or her.

Chapter 1 provides a clear exposition of the rationale for the privilege, the general coercive power of the court to obtain access to documents, and questions of waiver of privilege and the like. (This last topic, especially that involving "inadvertent" waiver, has been the subject of several decisions since the book was published.)

The main areas of interest for New South Wales barristers will be the large chapters Numbers 2 and 3, in which the author examines Legal Professional Privilege and the Privilege against Self-Incrimination. Subsequent chapters examine the priest-penitent privilege, the doctor-patient privilege, public interest immunity and without prejudice communications.

The book is showing its age a little here (it was published in 1992 and the law is stated as at 15 May 1992) because of the large developments which have occurred recently in these areas. For example, the interesting discussion on whether a corporation may exercise the privilege against self-incrimination pp. 160-170, must now be read in the light of the *Caltex* decision (1993) 118 ALR 392 a result which the author anticipated at p. 170. Similarly, the views expressed on *Waterford's* case ((1987) 163 CLR 54) with respect to the privilege attaching to in-house advice (pp. 76-80) have been recently re-examined by Heerey J. in *Grofam Pty Ltd v ANZ* ((1993) 116 ALR 535). Still unresolved is the issue of the fiduciary's duty to make disclosure with respect to the handling of fiduciary assets, and the fashioning of a "civil immunity" to require disclosure: *Istel v Tully; Reid v Howard* ((1994) 31 NSWLR 298); *Re New World Alliance* ((1994) 118 ALR 699).

Related to this is an increasingly difficult problem concerning the conferral of civil immunity upon a witness as a means of protecting him against possible criminal proceedings. The question has arisen most recently in *Reid v Howard*, where the Court asserted a power to "mould" an order which required the witness to give evidence while nevertheless protecting him. (Compare Sheppard J.'s less than enthusiastic view of this in *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* and the English Court of Appeal's view in *United Norwest Co-operative Ltd v Johnstone* (unreported, 11 February 1994). The High Court has granted special leave in *Howard*.

Happily, the author endorses the eminently sensible conclusion that the incidents of legal professional privilege not be extended to accountants or merchant bankers(!), however that latter occupation is defined (pp. 4-6). As mediation increases as a means of dispute resolution, the question of "mediator's privilege" (examined at pp. 455-461) will become increasingly important.

The index is full; a surprising omission is any specific reference to "copies" of documents (see the discussion at pp. 83-86). The bibliography is also complete (one notable omission is the leading article by Wood, "Challenging subpoenas duces tecum: is there a third party view?" (1984) 10 Sydney L Rev 379) and generally free from error (but surely even Heydon was not publishing in the *Modern Law Review* at the age of four - see p. lv where a 1947(!) article is attributed to him; the error is repeated at p. 26 note 143).

All in all, a very useful book of first reference, so long as the reader then updates from 1992 in view of the tremendous changes to the law and the press of new cases which are decided almost daily in this most practical of areas. ❑

Lee Aitken

Criminal Law News

Butterworths

Criminal Law News is stated by its publishers, Butterworths, to be a criminal law newsletter for NSW and the ACT. It is edited by two very experienced barristers in the criminal jurisdiction, R N Howie QC and P A Johnson.
The periodical has three sections, *Cases, Recent Legislation* and *Articles*. The cases are arranged in alphabetical order and are very easy to find. The case notes, of about half a column each, provide an excellent summary of the central aspect of each case. For example, *R v LKP* is a case dealing with culpable driving. The summary refers to (1) the issue: whether momentary inattention could amount to driving in a manner dangerous, and (2) the conclusion with a reference to the views of the Chief Justice that momentary inattention could amount to driving in a manner dangerous.

In the first issue there are six cases noted on questions of liability, 13 cases on sentence and three cases on trial procedure. The cases on sentence are particularly helpful. Hopefully, no longer will counsel face the Court of Criminal Appeal only to be told that a similar case had been decided a short time before. In the increasing complexity of trial procedure the cases on trial procedure are extremely useful.

In the section dealing with recent legislation the authors provide a useful analysis concerning changes to the law for review of doubtful convictions under s. 475 of the *Crimes Act*. Rather than simply summarising the legislation, the authors provide an extensive analysis of the changes and the effect that they will have on the present state of the law.

The article in the first issue of this newsletter is written by the Crown Advocate, Mr Howie QC. He examines the right to silence, both its history and the present state of the law. The article is short and to the point and is written in concise and simple language.

The newsletter is priced at $115 which is not a large amount in comparison to many present legal publications. The importance of the newsletter is that it is a newsletter of information rather than one espousing any particular view.

In the present state of contemporary law the ability to find information simply and quickly has become increasingly difficult and necessary. Digests and short notes of cases are essential if the busy practitioner is to be aware of the latest developments in any particular jurisdiction. The opportunity to find out the latest law from fellow practitioners has become increasingly limited. It is a dying practice. The sheer volume of law and legal decisions being created each month makes such a process now virtually impossible. It is said that in comparison to previous generations our generation has more information, less knowledge and no wisdom. Wisdom cannot be conveyed through publications such as this, but information can and, with proper information, the discerning legal mind may at least have an opportunity to find the wisdom. I'm going to subscribe. What more can I say? ❑ Brian Donovan QC

Abolition of Dock Statements

The Attorney General has advised that the Crimes Legislation (Unsworn Evidence) Amendment Act 1994 was passed by Parliament on 11 May 1994. It is proposed that the Act will be proclaimed to commence on 3 June 1994.

The Act abolishes the right of an accused person to give unsworn evidence or to make an unsworn statement (commonly known as a "dock statement") in criminal proceedings.

An accused person may now choose to decline to say anything at his or her trial or to give sworn evidence.

The Act does not affect any other rights of an accused person, including:

- the onus and standard of proof ;
- the right to remain silent;
- the privilege against self-incrimination - the accused is not compellable to assist the prosecution in the proof of the offences with which he or she is charged;
- the presumption of the accused person's innocence; and
- the right to make a submission on sentencing.

The Act will apply to the trial of a person charged with an offence on or after the date of commencement of the Act. Any person who has already been charged with an offence at the time of commencement will continue to have the option of making an unsworn statement. ❑

The Good, the Bad and the Bench!

One of the most interesting articles to come out of the plethora of material which comes across Bar News' desk was "The Good, the Bad and the Bench", published in the April 1994 issue of "Legal Business". It reported the results of a survey conducted by the magazine of more than 100 barristers and solicitors of the judges of the High Court of England. The survey revealed who were the most and least popular judges and analysed the number of appeals from their decisions and whether those appeals had been allowed or dismissed.

The article warned that care should be taken to guard against too simplistic an analysis of the appeal statistics, pointing out that such numbers did not account for the complexity of each case, for evidence that had appeared since the previous decision or for the fact that the senior judges and "stars of the Bench" were often given the more difficult cases.

Of all the High Court judges, two judges were most consistently praised by those surveyed: Millett J and Phillips J. A person, presumably a solicitor, described as "the head of litigation at a top 10 City firm" was quoted as saying: "Millett and Phillips are widely recognised as two of the best judges in the land. It's not just because of their outstanding intelligence, legal knowledge, or their courteous nature, but because, whatever their decision, they make both sides feel that justice has been done."

Most brownie points went to judges who were recognised for their consistency and ability to cut through irrelevant material and get straight to the point. Demerits were awarded to judges who were felt to be inconsistent and to lack direction. Those surveyed complained about judges getting bogged down in technicalities and minutiae at the expense of the overall sense of the case. The worst judges, it was said, were those who were either too authoritative and made up their minds in the first five minutes of the case or were lacking in authority and completely incapable of making a decision at all.

In the "heads I win, tails you lose" category, was the comment of a person described as "a head of chambers commercial silk". He pointed out that the old style judges, a number of whom were still around, used to be too nasty and too authoritative and that the younger generation had tried to change. "But while there has been a change in style, many of the new generation are ... too nice and not authoritative enough."

The article is worth reading if you can get a copy. ❑

3rd National General Practice Section Conference

The 3rd National General Practice Section Conference, incorporating the National Property Conference, will be held 24-26 August 1994 at the Royal Pines Resort, Gold Coast, Queensland.

For further information contact Carol Robertson, PO Box 4552, Kingston, ACT 2604. Phone/Fax (06) 239 7600. ❑

6th National Family Law Conference

The 6th National Family Law Conference will be held 17-22 October 1994 in Adelaide.

For further information contact Ms Anne Ewer, Stafford Conference Management, PO Box 232, Kensington Park SA 5068. Telephone (08) 364 3987 Fax (08) 332 8810. ❑

13th AIJA Annual Conference

The 13th Annual Conference of the Australian Institute of Judicial Administration Inc. will be held in Fremantle on Saturday 13 and Sunday 14 August 1994. The Courts Administrators Conference and the Biennial Librarians' Conference will be held in conjunction with the Annual Conference on Friday 12 August 1994.

Further information concerning the conferences can be obtained from Mrs Margaret McHutchison, Administrator, AIJA, on (03) 347 6600 (AIJA, 103-105 Berry Street, Carlton South, Vic. 3053). ❑

This Sporting Life

Tenth Great Bar Boat Race - Record Fleet Produces the Closest Result in the History of the Race

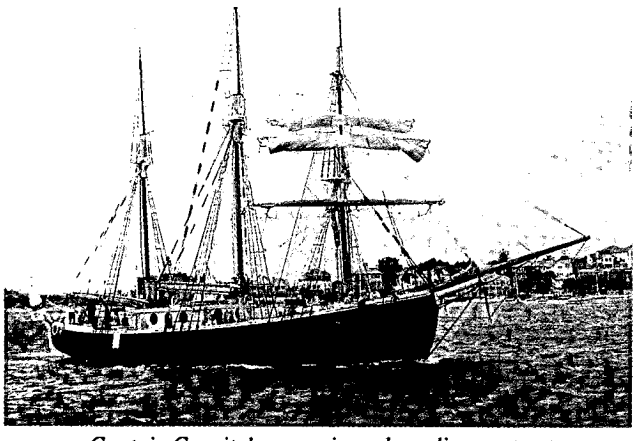
The Tenth Great Bar Boat Race was sailed on Sydney Harbour on Monday, 20 December 1993. A record fleet of 66 yachts faced the starter's gun. Such was the size of the fleet that for the first time it was divided into four divisions. The race was sailed in a 10 to 15 knots south-easterly breeze which produced mostly reaching and downwind sailing. These conditions suited crew who were not seasoned sailors.

The race produced an epic struggle between the Bench and Bar. Solomon DCJ in *Yeromais V*, a wooden-hulled gaff-rigged yacht, won the race and took the Law Book Company Sailing Trophy and the Chalfont Cup by a mere 10 seconds from Morris QC who sailed a similar yacht. The lead seesawed between these two during the course of the race and Morris described the day as one of the most exciting of his sporting life. Such was his exhilaration that he has kindly offered to donate a trophy for annual competition for wooden-hulled yachts in the race.

Following is a complete list of the trophy winners in the race:

LAW BOOK COMPANY SAILING TROPHY

Division I		
Chalfont Cup	Solomon DCJ	*Yeromais V*
The Compo Cup	Morris QC	*Careel*
Gruff Crawford Memorial Panache Trophy	Patch	*Starship Swiftblue*
John Hartigan Shield	Horler QC/Patch	Forbes Chambers
Division II	Peterson J	*Bounty*
Division III	Horler QC	*The Pink Boat*
Division IV	Deggens	*Salvation Girl*



Captain Cranitch preparing a boarding party at the Great Bar Boat Race 1993

Solomon DCJ, winner of the Law Book Company Sailing Trophy Division I and the Chalfont Cup.

The race and the social activities of the day were probably the most successful of the 10-year history of this event. $3200 was raised for the Bar's Christmas Charity, the St Vincent's Hospital Radiation Oncology Nurses' Fund.

It is anticipated that by reason of the size of the race that it may well be sponsored in 1994.

The writer has declined the kind offer of Wheelahan QC for this report to be published under his name this year.

❑ D T Kennedy

Bench and Bar v Solicitors Golf Match 1994

108 players turned out to the annual grudge match between the Bench and Bar v Solicitors at Manly in January this year.

A good turnout from the Bench and Bar enabled 20 matches to be played for the Sir Leslie Herron trophy. Regrettably, I have to report that again the solicitors were successful, 11 matches to 7, with two matches halved.

As usual, as well as the teams event for the Sir Leslie Herron trophy, there were prizes for a range of successes. The results were:

- Winners 18 holes - Phil Greenwood and Rick Seton - 51 points (Bar).
- Runners-up - Ross Golotta and Vince Goluzzo - 47 points.
- Best front 9 - Ed Fritchley and Richard Jankowski - 25 points.
- Best back 9 - John Newnham and Glenn Thompson - 24 points.
- Nearest the pin, 3rd hole - Norm Delaney (Bar).
- Nearest the pin, 18th hole - Glen Eggleton.
- Longest drive (men) John Maconachie (Bar).
- Longest drive (ladies) Janina Jancu.

Self-assessment works for the Tax Department these days and it seems Phil Greenwood has determined it's a pretty good idea for handicapping as well - given his obscene success this year, his view of his handicap is unlikely to coincide with that of the stewards next year.

It was terrific to see a number of women players on both teams this year; hopefully, they will attend in even greater numbers next year.

After the golf, as usual, dinner was enjoyed in the beautiful old Manly club house. Fine weather, the best summertime golf course in Sydney, good company and excellent dining made for a very enjoyable day.

Thanks to the District Court Judges for their wholehearted support of the event, as usual, and to Roger Williams, Solicitor, for his organisation of the day.

Apart from the annual match against the Solicitors in January, a match is played against the Services each year. A club handicap is not essential. Anyone interested in playing should contact the Bar Association and ask for their name to be added to the list of those who receive notice of golfing events. ❑ John Maconachie QC

Bench and Bar v Services Golf Match 1994

Traditionally, the Bench and Bar plays golf against the Services each year in July. We have done so for more than 60 years. Until recently the end of the July vacation was a convenient time for the contest.

Alterations to vacation arrangements, particularly in the Supreme Court, have caused significant problems in the recent past. No Supreme Court Judges now support the event, no doubt because of the disappearance of a fixed mid-year vacation.

Members of the Bar find it difficult to commit themselves to a Friday morning golf match until the very last moment and that makes organisation of the event difficult.

Accordingly, it is time for a change. I have met with representatives of the three Services. We have decided to:-

(i) avoid a July date in 1994;
(ii) seek an eastern suburbs golf course early in Daylight Saving Time;
(iii) hit off between about 2 o'clock and 3 o'clock on a Friday afternoon;
(iv) return to the concept of dining in at the Officers' Mess of the organising Service, or in the Bar Common Room on the occasions when, by rotation, the Bar organises the event.

This year, the Army is the organising Service; Major Beckett has told me that Victoria Barracks Officers' Mess is the likely venue for dinner.

Preliminary planning is directed towards a date in the first two weeks of November 1994.

I hope that the changes outlined above may make the occasion more attractive to members of the Bench and Bar, and in particular the Supreme Court Judges.❑

John Maconachie QC

Tennis: Judge Barbour QC Cup

It may not have been Wimbledon. There certainly weren't any strawberries and cream. Even so, for the two Supreme Court Judges and the thirty members of the Bar who attended at the Strathfield Recreation Club, the 1993 Bench and Bar Tennis on 21 December 1993 was a very enjoyable day in the best tradition of Bench and Bar activities.

In what may well have been a first, female members of the Bar were represented by Cecily Backhouse QC, Anne-Marie Ford and Lisa Stapleton.

Many people want to play and are willing to sign up but insofar as the event occurs the day after the Great Bar Boat Race, a number of competitors are presumably feeling as if they are still at sea and are never seen. In addition, there seems to be a perversity of nature such that if it is not actually raining, the threat of it is always there. Accordingly, numbers are an uncertainty.

This year the pairings as were organised on the day by Stevens QC and Tony Reynolds encouraged close matches. In fact, after six rounds of play to determine the semi-final combatants, only one game kept out the fifth and sixth pairings from making what became all-male semi-finals. Bad luck, Anne-Marie (and Warwick Reynolds).

Babette Smith arrived at the courts in the afternoon to check the form and kindly officiated at the presentation, calling upon her personal store of legal anecdotes as befitted a court-related occasion.

The final was won by Barry Newport QC and Phillip Dowdy, who defeated the combination of Kevin Lindgren QC and Kim Morrissey in a very close game.

As befits an activity of Bench and Bar, prior winning doubles pairs have been from all ranks of the Bar as well as the Judiciary.

Mr Justice Beaumont is in the unique position of both featuring most frequently and, in addition, to have done so in all capacities: as a Junior in 1968, 1972 and 1976 with D J McCredie, J S Cripps and R V Gyles QC, respectively, then as Silk in 1979 with T R Morling QC and, most recently, as a Judge in 1988 with P J Deakin.

The inscription for the inaugural winners of the Cup in 1965 reads "T R Cole and N H McLelland". Each has featured in later years also.

The auld mug inscribed as "Bench and Bar Tennis Cup presented by R T H Barbour" but more familiarly known as "The Barbour Cup", is now filled with the names of the winning pairs but continues to be the Holy Grail for those who play in the Annual Bench and Bar Tennis Day.

The competition this year will be on 20 December, 1994. We look forward to seeing an even greater attendance. ❑

C Stevens QC and Tony Reynolds

Coming Events

1. **SQUASH**
- Winter or early spring
- State Bank facility (probably)
- Teams of three
- Organise a team and contact Peter Taylor SC on 8th floor, Wentworth Chambers.

2. **HOCKEY**
- July or thereabouts
- Barristers v Solicitors
- Killara Oval
- If you are interested, contact Peter Callaghan, Nigel Bowen Chambers.

3. **HOCKEY - Interstate**
- Preliminary discussions have taken place directed to organising a hockey match against the Victorian Bar. The match would probably be held in Melbourne over a weekend. Expressions of interest should be directed to Peter Callaghan, Nigel Bowen Chambers.

4. **GREAT BAR BOAT RACE**
- End of term, December 1994
- Date to be advised.

5. **GOLF**
- Bench and Bar v Services
- Early November
- Afternoon hit-off
- Dinner at an Army Mess, probably Victoria Barracks.

6. **GOLF - KEN HALL CLASSIC**
- Invitation event, much like the Masters
- Money paid to Tony Bannon, 10th floor, Wentworth Chambers, gets you an invitation
- End of term, December 1994
- Date to be advised.

7. **TENNIS**
- Tuesday 20 or Wednesday 21 December
- Venue to be decided
- Doubles, with the successful pair receiving the perpetual Barbour Trophy
- Opponents are matched for skill, as far as possible, to achieve competitive matches
- Women are not only welcome but, according to Clarrie Stevens, are desirable; several played successfully last year.
- Lunch is a feature
- Contact Clarrie Stevens QC.

8. **CRICKET**
- March 1995
- Games are played against Queensland and Victorian Bars, one home, one away
- Games against the Solicitors and the ACT Bar are played in some years
- Contact Peter Hastings QC, Larry King or Peter Maiden.

"Fifteen bobber" for Justice Simpson on her appointment to the Supreme Court and Judge Truss on her appointment to the Compensation Court.

Judge Truss and Justice Beazley

Justice Simpson addresses the gathering

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The Lodge only caters for 10 guests at a time offering service par excellence.

Anna, a London trained chef, is your Hostess. Every meal is a gourmet's delight – fresh local produce provides Rakaia salmon, Mt Hutt venison, home made icecream, accompanied by great local wines. Enjoy a complimentary pre-dinner cocktail around the roaring open fire.

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