Bar News

The journal of the NSW Bar Association

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Spring/Summer 1994

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Views expressed by contributors to Bar News are not necessarily those of the Bar Association of New South Wales.

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

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.

NB. The article *"The Attrractiveness-Leniency Effect"* which appeared in the Autumn/Winter 1994 issue of *Bar News* was written by Peter Tillman.

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in this issue ...

New Procedures in the Court of Appeal

The President of the Court of Appeal, the Hon Justice Michael Kirby, AC, CMG, has drawn the Bar Association's attention to proposals to reduce the backlog in hearings in the Court of Appeal.

The Judges of Appeal have decided to take a number of steps to reduce the backlog which has increased with the growing workload of the Court.

The President has sought the co-operation of the Bar in the initiatives of the Judges outlined below.

A recent analysis of filings in the Court of Appeal registry has shown that, as at 25 August 1994, there were large backlogs in three identifiable categories of appeals awaiting hearing:

Supreme Court Quantum Appeals	113
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Compensation Court Appeals	246

Quantum Appeals

The recent enactment of Section 46A in the *Supreme Court Act* 1970 permits the hearing of quantum appeals by two Judges of Appeal assigned by the President if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle. It is intended, during November 1994, to call over the Common Law and District Court quantum appeals with a view to isolating those which do not raise a disputed issue of general principle and which are otherwise suitable for hearing in March 1995. In respect of those appeals which do not raise an issue of general principle, the Court proposes to sit two Divisions of three Judges, commencing on 6th March for approximately a month. It is intended to list four quantum appeals before each court each day. The expectation is that, allowing for settlements, by April 1995 the existing backlog of quantum appeals will have been heard and judgments given.

To prevent a new backlog accumulating, a changed procedure is envisaged for quantum appeals filed after 1 January 1995. It is the aim of the Court to hear all such quantum appeals within ninety days of the filing of a notice of appeal with appointment. One Division of the Court of Appeal will ordinarily sit for one week commencing on the first Monday of each month to hear and determine quantum appeals. This will occur from May or June 1995.

To achieve the foregoing reforms the following procedures are envisaged.

(a) An appellant must file with a notice of appeal with appointment:
  (i) A draft index
  (ii) A document in the form prescribed setting out the manner in which the trial judge (or jury insofar as it may be determined) calculated the damages awarded, the aspect of damage appealed against together with a brief statement of how those sums contended for are determined. The document is to be signed by the solicitor and counsel for the appellant.
  (iii) Notification to the Registrar if a transcript of the hearing and judgment is not available.

(b) The respondent must within 14 days indicate on the prescribed form whether it seeks to sustain the judge's damages determination, or if not, the award contended for and a brief statement of the manner in which any amended determination is sought. The document is to be signed by the solicitor and counsel for the respondent. The respondent must also within 14 days indicate whether it accepts the draft index. Absence of objection will be deemed to be acceptance of the index.

(c) If there is any dispute regarding the index, the Registrar will settle the index without the attendance of the parties, on the working day following the filing of the respondent's documents.

(d) The appellant will be required to file appeal books within fourteen days of the agreement to or settling of the index.

(e) Written submissions of the appellant are to be filed and served four working days prior to the appeals hearing week, with respondent's submissions to be filed and served two days prior to that date.

(f) The written submissions of the appellant will be prepared in the form of a draft narrative of facts, issues and argument suitable for adaptation by the Court in proceeding immediately to *ex tempore* judgment. They will, within two pages, set out the essential facts, the issues raised by the appeal, any applicable legal authority and the result for which the appellant argues.

The object of these procedures is to remove so far as possible the causes in delays in quantum appeals, to facilitate their determination by the Court and to prevent backlogs re-appearing in the future.

The proposed amended procedures will commence from 1 January 1995. Appropriate amendments to the Rules and any necessary practice note are presently being considered.

Backlog in Hearing Compensation Court Appeals

To eliminate the backlog in hearing appeals from the Compensation Court, it is proposed that from April 1995 a Division of the Court of Appeal, comprising three Judges, will ordinarily sit for two weeks each month hearing such appeals. Initially it is intended to list three appeals each day. It is anticipated that by December 1995 the backlog in Compensation Court appeals will be eliminated. Once that is achieved, a Division of the Court of Appeal comprising three Judges will sit regularly each month to hear Compensation Court appeals. Procedures similar to those outlined for quantum appeals will be implemented to bring on for hearing of such appeals within ninety days of the trial judge's decision. Appropriate rule changes and any necessary Practice note to

give effect to their reforms are being considered. As the Bar would be aware, where weekly compensation is awarded by the Compensation Court, the Court of Appeal is not empowered to provide a stay. This fact and the nature of compensation appeals suggests the high desirability of expeditious hearings and determinations.

The President has asked that these changes be drawn to the attention of the Bar. The Court hopes that it will receive from the profession full co-operation in its endeavours to reduce court delays, particularly in cases such as have been specified above. Other reforms in procedure are under the active consideration of the Judges of Appeal to improve the disposition of appeals in the general list of the Court of Appeal, outside the categories mentioned above. The Judges of Appeal and the President are always happy to receive suggestions from the legal profession, and others, concerning ways in which the efficiency of the Court of Appeal can be improved, bearing in mind its extremely heavy workload. ❑

Senior Counsel for 1994

The President, Murray Tobias QC, has announced the appointment of the following persons as Senior Counsel, effective 4 November 1994:

Gordon John RICHARDSON (ACT)
David SHAVIN (Victoria)
Neil John YOUNG (Victoria)
Geoffrey Arthur Akeroyd NETTLE (Victoria)
John Timothy RUSH (Victoria)
David Edmund CURTAIN (Victoria)
John Robert SULAN (South Australia)
Ian Gerald Adamson HUNTER (United Kingdom)
Brian Daniel O'DONNELL (Queensland)
Peter Raymond CALLAGHAN
Michael John JOSEPH
Larry KING
John Cecil NICHOLSON
Robert Gabor FORSTER
Peter Richard GARLING
Geoffrey Charles LINDSAY
Ruth Stephanie McCOLL
Malcolm Bruce OAKES
John William DURACK
William Roy DAVISON
Annabelle Claire BENNETT
Lindsay Graeme FOSTER
James Leslie Bain ALLSOP

Industrial Relations Court of Australia

The Chief Justice of the Industrial Relations Court has advised that the Judges have decided to adopt a new régime regarding robes. The catalyst of the change is the number of cases before the Court in which parties appear in person or by a non-lawyer representative of an organisation.

The Judges have become concerned that such a person may feel at a disadvantage appearing against an opponent robed in similar fashion to the Judge. Accordingly, the Judges have decided that, as from Monday 18 July, 1994 counsel should be requested to appear unrobed. The Judges will wear a new, specially designed robe, but no wig. ❑

Opening of 1995 Law Year

Members of the Bar are invited to attend the Annual Inter-Church Service to mark the Opening of the 1995 Law Year in respect of the western region of Sydney which will be held in St Patrick's Catholic Cathedral, Parramatta, on Monday 30 January 1995 at 9.30 am. The speaker will be Miss Freda Whitlam AM, MA, Dip. Ed. MACE, formerly Principal of PLC Croydon, and formerly Moderator of the New South Wales Synod of the Uniting Church of Australia.

This is the fifth such Service, the prior speakers being Keith Mason Esq. QC, Solicitor-General for New South Wales, the Hon. Sir Ronald Wilson KBE, CBE, the Hon. Mr Justice P W Young of the Supreme Court of New South Wales, and the Reverend Father Brian Lucas, Archdiocesan Secretary, Catholic Archdiocese of Sydney. ❑

Letter to the Editor

Dear Editor,

In the "Barbytes" column of the Autumn/Winter 1994 *Bar News* it was suggested that Compuserve Pacific, a commercial computer bulletin board, is a useful means of locating suitable expert witnesses from the United States and Canada for use in litigation in New South Wales.

Your readers may also benefit from knowing that the recently formed Australian Plaintiff Lawyers' Association (APLA) operates an expert database containing details of a great number of Australian experts in various fields. APLA is a national organisation of barristers and solicitors which caters to the needs of those who conduct personal injury litigation on behalf of plaintiffs. It is run along the same lines as the Association of Trial Lawyers of America (ATLA), and the English Association of Personal Injury Lawyers (APIL).

Experts are included in APLA's database only upon the recommendation of other APLA members who have some knowledge of their skills and performance in court. The identity of a suitable expert is readily available to members by a call to APLA's Sydney office on (02) 262 6960.

Peter Semmler Q.C.,
President, Australian Plaintiff Lawyers' Association

From the President

In my last editorial for *Bar News* I commented upon my first 100 days in office, referring to it as a period of some considerable turmoil. The following 265 days have not been much different. Details of the causes have been chronicled in my column in "Stop Press" over the year.

This edition of *Bar News* reproduces a speech I made at the Noosa conference of the Australian Bar Association last July. It was delivered with some trepidation, much like my President's Column in my first "Stop Press". However, it apparently struck a chord with some of our interstate colleagues as I was subsequently asked to attend the annual dinner of the South Australian Bar Association and to provide a shortened version of that speech. This was done in the context of that Association giving consideration to adopting the New South Wales Bar Rules, particularly those relating to direct access. What I said caused some consternation, especially among the more senior members of that Bar but, generally, I understand it was reasonably well received.

The Queensland, Victorian and West Australian Bars are also giving consideration to adopting the New South Wales Barristers' Rules. The ACT Bar has already done so. Each would be subject to some local variations bearing in mind that none of the States or Territories referred to have provisions equivalent to some of those contained in the NSW Legal Profession Reform Act. At the Law Council Meeting on 10 December next, it is likely that the constituent bodies will resolve that our Advocacy Rules should become the National Advocacy Rules.

As members are aware, the General Council of the Bar of England and Wales also has a reform program which is now well under way. The policy unit established by the General Council recommended that, on the issue of direct access, the functional approach of the NSW Bar should be adopted. Ultimately, the Council rejected any form of direct access for the time being but it is anticipated that the issue will be revisited before the end of the year.

The NSW Barristers' Rules seem to be working well. There is a deal of fine tuning still to be done, particularly with respect to the issue of fee disclosures on which we are working in co-operation with the Law Society. As a consequence of submissions received, there is some refinement to be carried out to Rule 75. A revised version will probably be adopted in the near future. This will clarify various aspects relating to what a barrister can or cannot do when accepting instructions direct from a lay client which should reduce any confusion amongst those who are accepting direct access work. All these teething problems are being assessed and further research is required. In the New Year our collective experience will be analysed. Where appropriate, amendments will be sought to the Act or our rules redrafted.

The year has been a memorable one, but I think a considerable amount has been achieved for the Bar at both State and National level. There is still more to be done and I am confident that the new Bar Council will continue to be as progressive about the issues facing the profession and as proactive on community issues as the 1994 Council has been. Both are important in consolidating the resurgence of the NSW Bar as an institution which has earned and is, therefore, entitled to respect. ❑

Chief Judge Staunton C.B.E. Q.C.

Richard Bell interviews with the Chief Judge of the District Court, his Honour Judge Staunton C.B.E., Q.C.

Q. *Chief Judge, the profession and public are conscious of change within the structure of the profession and the judiciary. Those changes significantly involve the District Court. One of the recent changes is the increased jurisdiction limit to $250,000. What effect is anticipated?*

A. The increased threshold will increase civil filings that might otherwise have been lodged in the Supreme Court. The extent of this is not known precisely at this stage and may depend upon the level of costs sanctions as may be within the scope permitted of the Supreme Court by the changes made in the *Legal Profession Reform Act* 1993.

Q. *There is often a focus on the broad range of civil and criminal matters that are the business of the Court, but are there developments in recent times that affect the mix of Court business?*

A. Civil matters in the Court include not only actions at common law and in equity, the latter to a minor extent, but also matters in which the Court is given jurisdiction by various statutes. These include complaints against police officers brought under the *Police Service (Complaints, Discipline & Appeals) Amendment Act* 1993; complaints against medical practitioners under the *Medical Practice Act* 1992; complaints against veterinary surgeons brought under the *Veterinary Surgeons Act* 1986 and appeals under the *Victims Compensation Act* 1987. Appeals lie from decisions made under the *Freedom of Information Act* 1982, the *Dentists Act* 1989, the *Fisheries Management Act* 1994 and the *Gaming and Betting Act* 1912. Consideration is presently being given to extending the Court's equitable jurisdiction.

Q. *What are the most recent observations of change?*

A. There has been a considerable increase in filings under the *Police Act* and the *Medical Practice Act* and there seems no reason why work from these two areas will decrease. As the judges for all this work are drawn from the list of judges rostered for causes work in Sydney, it becomes difficult to maintain an adequate number of judges to deal with what I may call the ordinary civil cases.

I believe this problem will increase unless additional judges are appointed.

Three acting judges are to be appointed for each of the second terms of 1994 and the first term of 1995 in order that the old personal injury cases (the GIO "tail") can be cleaned up.

Q. *What is the future for arbitration in the District Court?*

A. Arbitration has operated very successfully in the Court since 1983. Up to the end of June 1994, 7,432 matters had been dealt with under the general scheme and 11,449 matters under the Philadelphia system which has operated since 1987.

Arbitrations have also been carried out at certain country places, as demand for them has been shown.

Obviously, arbitration has become an important adjunct to the Court's ordinary hearings and I expect will be continued in the future.

However, this depends upon the provision of funds for the payment of arbitrators and this has been a problem to some extent in the past. Whether it will be in the future will depend upon the Government's acceptance of the success of the scheme and the availability of funds.

Q. *What is the position with the Court's criminal lists and the Sentence Indication Scheme?*

A. Criminal trial lists have been reduced by the introduction of firmer listing procedures and a lot of sustained pressure of the judges. I expect this to continue so that by 1995 or 1996 these lists will be in a much more acceptable state so far as delay is concerned. This will enable time standards to be achieved and an altogether more acceptable time delay between committal and trial.

A matter of great significance is Sentence Indication hearings. This sunset legislation may be expected to be extended, given the perceived success of the scheme.

The results are encouraging. Between 30 April 1993 and 20 May 1994, 489 applications were made.

In 356 cases the sentence indication was accepted and only 78 rejected. Other applications were rejected by the presiding judge and 43 were withdrawn.

On the trial time estimates given to the Criminal Registrar there was a saving of trial time of 425 weeks. Of course, many of the 356 acceptors may have eventually pleaded guilty; but the fact remains that in 356 matters the expense of mounting a trial was obviated.

Q. *Is any particular time frame important for practitioners in the Sentence Indication process?*

A. It is important for practitioners to attempt to be in a position at the first arraignment of an accused to indicate whether a sentence indication is sought.

Q. *Chief Judge, in recent times have you noticed changes in community perceptions that have affected the Court's mix of listings?*

A. There seems no doubt that a better informed community has affected the filings, particularly in relation to the statutory complaints that I have referred to and, in particular, those against police and medical practitioners.

Q. *Historically, what shifts have you noticed in terms of the broad nature of the business of the Court?*

A. The Court's workload, which once was in the order of one-third criminal work and two-thirds civil work, has been reversed and is now in the order of two-thirds crime. A large part of this concerns sexual offences. It is also plain that the increased drug problem in the community has affected the workload of the Court.

Q. *Has there been any particular focus on alternative dispute resolution in recent times?*

A. Apart from pre-trial conferences and arbitration, mediation and Early Neutral Evaluation have engaged the attention of the Court. No attempt has been made to introduce mediation, due principally to the problem of funding it. The Court has introduced Early Neutral Evaluation only recently, so there is no experience of its usefulness.

Q. Chief Judge, you are approaching retirement at the end of the year. There have been a number of Judges who have become active in legal practice and dispute resolution upon judicial retirement. Do you have any such plans? Do you have a view on post-judicial roles?

A. No, I have no such plans. As to post-judicial roles, there is a number which, I think, are compatible with the standing of ex-judicial officers. These include serving as acting judges, membership of government tribunals and in additional dispute resolution. The resumption of the practice of law may be included although not, I would feel, involving the appearance before the Court from which the judge resigned or retired, or the instructing of lawyers in that Court.

A. At this time, how do you reflect upon the evolving role of the judiciary in the community over the time of your appointment?

A. Events of various kinds involving the judiciary over the last twenty three years have brought a degree of public interest in the judiciary, and perhaps individual members of it, which did not exist at the time of my appointment. In a democracy every branch of government should be seen to be accountable and fulfilling its designed function. The actual role of the judiciary during this time has changed by reason of and in response to the demands cast upon it. There is now necessarily more involvement of the judiciary in the management of court business for the purpose of the more efficient, more economical and quicker disposition of cases, both civil and criminal.

Q. What particular changes do you think likely in the role of the judiciary and the profession in the future?

A. I think it likely that the role of the judiciary in the future will continue to be more interventionist for the purposes of achieving that to which I have just referred. The profession will continue to change in adapting itself to these conditions. I hope the important and significant role of the advocate will be maintained whether by lawyers practising exclusively as advocates or by those who continue to practise as solicitors. For the latter, however, I think it will need to recognise that the attainment of skills of advocacy will require particular application, study and dedication.

Q. Will you miss the Bench? And the Bar?

A. Yes, very much. I have enjoyed my time as the Head of a Jurisdiction which has grown in that time from 24 to 58 Judges, and the jurisdiction, both criminal and civil, of which has increased very greatly. They have been challenging times giving great personal satisfaction and reward. As for the Bar, like most Judges, I was genuinely sorry to leave it after 20 years of its hurly-burly. I have no intention of not keeping in touch with it and its interests. Fortunately, Associate Membership of your Association enables this to be done. ❑

Double Dutch

Mr Hughes QC:	"If you wanted the funds partly for the nightclub, and partly to pay interest to the bank, why didn't you write that or cause that to be written on the loan application?"
Answer:	"I have property as collateral. I have the right to apply how the fund was going to be used."
Q.	"Will you not answer that question?"
A.	"No."
Q.	"You won't."
Interpreter:	" 'No' means not to reply, sir."
Mr Hughes QC:	"Is that the only answer you will give to my question?"
Mr Gyles QC:	"I object. That is really extremely confusing. There is obviously a double negative involved."
His Honour:	"Yes, by the time it gets through the translation ..."
Interpreter:	"I might add, sir, that in the Chinese language there is no double negatives, which makes it very difficult, particularly on our part."

(*Son Hou Enterprises Pty Limited & Anor (Receiver & Manager Appointed) v Bank of China & Anor*, cor. Cohen J., 27 September 1994) ❑

W(h)ither the Bar?

Murray Tobias Q.C. addressed the future of the Bar at the ABA Conference held in July 1994.

W(h)ither the Bar? - the title of this paper postulates two questions. The first, will the Bar survive? The second (which can only be relevant if the first is answered in the affirmative), what is the Bar's future: in what direction is the Bar headed?

In short, my answer to the first question is, yes, the Bar will survive notwithstanding the attacks upon it from without, and, I should add, from some elements within. The answer to the second question is, I think, more complex. There is no doubt that the Bar is undergoing change but it is a change for the better. It is change which will ensure the Bar's survival and, in particular, its continued relevance. So the direction in which the Bar is headed is upwards but our progress rests on our willingness to jettison those things about ourselves which are irrelevant to our survival but detract from our image and the positive aspects of our functions.

But why change? It is unnecessary at this point of time to chronicle the attitudes of solicitors, the media, politicians and the public towards the profession in general and the Bar in particular. They are well known. Regretfully, few are interested in the positive contribution which the independent Bars play in the due administration of justice. We receive no brownie points for the pro bono work we perform; we receive no credit for the fact that for decades the common law Bars have been accepting personal injury cases on a "no win, no pay" basis; we receive no recognition of the massive amount of voluntary time, energy and skill that we devote to the airing of issues of public importance involving the administration of justice and the law generally. Thus, for example, no politicians, least of all those in opposition, are prepared to acknowledge the unpaid assistance we provide to them by commenting upon draft legislation, Government reports or discussion papers. Our comments enable them to publicise any injustices which such legislation or reports might perpetrate upon those who can least defend themselves. Yet, those who criticise us are the first to seek our assistance when they themselves are in trouble and that, of course, includes the Government of the day and those individuals who constitute it!

"... Those who criticise us are the first to seek our assistance when they themselves are in trouble..."

We are told in practically every press or media report about the greed of barristers; we are informed that we all earn $7,000 per day, 365 days per year; we are told that we are elite, arrogant, rude and insensitive. Stereotypical attitudes abound!

At the conference of this Association held in London in July 1992 the problem was put thus by Sir Anthony Mason:

> "The plain fact is that, in contemporary society, people are not prepared to accept at face value what professional people tell them. That attitude, coupled with the ostensible shortcomings of the legal system, has generated a debate about the legal system which is quite fundamental in its reach ... The virtues of an independent Bar are not as widely accepted as they used to be ..."

In that address the Chief Justice went on to extol the virtues of an independent Bar. Recognising the idealism and the concept of public service which were its basic tenets and calling for their conscious renewal, he nevertheless exposed the Bar's current vulnerability in this cryptic message:

> "Unfortunately, the public perception of the Bar does not match the Bar's perception of itself."

Why has this happened? How has the Bar's image and status in the community suffered such a decline?

I believe it is primarily our own failure. For over 20 years, certainly in New South Wales - but I suggest right around Australia too - the Bar has failed to address the increasing questions in the community's mind about its function and attitudes. Often we have not even recognised that such questions existed - or if we perceived the doubts, dismissed them as unimportant or irrelevant. We failed to join in the public debate. Worse, too often we let it be known that we held the debate in disdain as superficial or unprincipled. By this response we disparaged those who did participate. By our failure to join the debate in any substantial way, we left a vacuum for our critics to fill with distortions and inaccuracies. Much of the criticism of the Bar is stereotypical and deserves exposure for that reason alone. But, regretfully, many of the criticisms, some of which I have mentioned above, are true. We do regard ourselves as an elite, that is, as a special group of intellectuals. At times it appears we imagine ourselves untouchable. In a fashion which antagonises others, we can often appear to assume that we have exclusive right to the high moral ground. Some of our members do exhibit a tendency to greed. Unfortunately, it is they who attract the attention of the media rather than the majority who struggle to make a living or who earn no more than other professionals of their age and experience. No attention is paid to those, particularly at the criminal Bar, who are earning the bulk of their income from legal aid briefs or from briefs at fees significantly below those being earned by their less numerous colleagues at the commercial Bar. But we do have a tendency to be arrogant, rude and insensitive to our solicitors and their clients. Not unnaturally, they do not like this. What is more, they should not have to tolerate it. It is not difficult to illustrate the bad habits of barristers. We have all been guilty, at some time or other, of one or more of the following:

- dumping briefs at the last moment often because of taking on too much work or in the hope that the brief will settle (and it doesn't), or that the current case will finish before the next is due to start;
- accepting a brief and then returning it after receiving a better (and, no doubt, more lucrative) offer;
- leaving preparation to the last moment in the hope that the case will settle resulting in unreasonable last-minute demands on solicitors which should have been dealt with earlier by counsel;
- failing to read the brief, particularly before a conference to advise;

- arrogance and rudeness to solicitors and/or clients by treating them as inconsequential or even as idiots;
- overcharging including "double-dipping" where a daily fee is charged for a case which has settled and the full fee is earned for the same day on another brief.

The foregoing touches on the major matters about which solicitors legitimately complain. But there can never be any excuse for discourtesy especially where we are dependent upon solicitors for work and, ultimately, for payment.

With the increasing impetus towards alternative dispute resolution, the Bar needs the solicitors more than the reverse. Simply put, we are there to serve them and their clients. They are entitled to courteous and efficient service. The failings I have identified above involve, essentially, examples of bad manners. Each is unacceptable. Each has contributed to the attitudes now exhibited by solicitors, the media, politicians and the public towards the Bar and which, if we are to survive, must be addressed and addressed quickly. We have lost much goodwill and we must strive to recover it. I believe that we have the will to change our attitudes towards others and, if we do so, they will change their attitudes towards us. The Bar will then be seen for what it truly stands for. In changing our practices for the better, we will regain the respect of those with whom we deal. In the process, we will regain our self-respect as well as our proper, albeit privileged, position in the eyes of the community we are committed to serve.

The impetus for change, however, is not confined to our personal attitudes towards those with whom we come into professional contact. We have also been required to reform many of our practices which had for many years been a matter of resentment from solicitors but which remained unexpressed and, on our part, unnoticed.

Approximately two years ago the attitude of many solicitors in this regard changed. We were in the middle of a recession and clients were putting pressure on solicitors to reduce costs. The Bar sailed on as if nothing had happened. True, a large proportion of the Bar was also hit with the recession resulting from a general downturn in litigation in some areas. But in part our loss was the solicitors' gain. Being the first point of contact with clients, solicitors became more circumscribed in the amount of work they referred to the Bar. Direct competition for work developed between the two branches of the professions. One member of the Bar recounted a solicitor who told him:

> "The work's contracting and we want your share".

A senior silk was just as blunt when he observed:

> "Rarely now in matters which come to me after litigation has commenced do I find that a junior counsel's opinion has been obtained. Almost invariably there are, however, lengthy, and no doubt costly, solicitors' letters of advice ... someone from a large firm ... (said) that he was now occupying his time doing mainly advice work of the type that used to be sent to the Bar ... I think that the solicitor's role in mediation is the thin end of the wedge so far as advocacy is concerned ... If a client sees the solicitor arguing his cause at the mediation, he will have little difficulty in accepting that the solicitor is equipped to argue his cause in court."

It was in the foregoing context that, suddenly, we became aware of the antipathy of solicitors and their clients towards the following restrictive practices: the two-counsel rule; the two-thirds rule; the conference rule (whereby solicitors were, generally speaking and with some exceptions, required to attend conferences in the barrister's chambers); the attendance in court rule (whereby a barrister was required to be instructed in court by a solicitor or his or her clerk); the boycott rule - whereby a barrister could not appear with a solicitor - (notwithstanding that solicitors have generally had the same rights of audience before the superior courts as barristers since the turn of the century).

It was put to us that there was no justification for a silk declining to appear with a solicitor particularly in some specialised areas where the solicitor may well have as much, if not more, expertise in the particular subject as the barrister, subject only, no doubt, to the barrister's (allegedly) superior advocacy skills. We were told that it was simply insulting that barristers were prohibited from attending the offices of solicitors and that solicitors and their clients were always required to attend the chambers of barristers for conferences. Although there were functional differences between us the time had long since passed when barristers could claim any inherent superiority over solicitors. They were no longer prepared to tolerate the label - "the junior branch of the profession". Accordingly, the pressure for reform became inevitable and irresistible.

It began in New South Wales. To be precise, it commenced in early 1992 in a letter from the managing partner of Freehill Hollingdale & Page to the then President of the Law Society, John Marsden, calling on the Bar to reform approximately four of its rules. The request was met with aggressive resistance by the then New South Wales Bar Council. Yet, it is noteworthy that each of the basic reforms then called for has now been incorporated into the *Legal Professional Reform Act* 1993 (NSW). The rule prohibiting attendances of barristers at solicitors' offices has now been abolished; so has the boycott rule and the rules prohibiting direct access and advertising. In my view, we are better off as a consequence of these reforms.

I should, however, say this. The distinct impression I have is that the deterioration which occurred in relations between the Bar and the solicitors was generally confined to Queensland, New South Wales and Victoria. The relations between the independent Bar and those who practise in amalgams in the other States and Territories has always been cordial and still is. Some would say that this is due to the fact that in those States and Territories the profession is "fused". I think by this is meant that all members of the independent Bar are also members of the Law Society: further, co-advocacy has always been the rule (although becoming less so in practice) in the amalgam jurisdictions. It is said that these factors explain, at least in part, the good relations within the profession in those places. There is no doubt that the boycott rule or the prohibition against co-advocacy has bred a deal of resentment amongst solicitors in the States where that rule prevails. It is to be observed, however, that where co-advocacy exists, the co-advocate to the barrister is generally a

practitioner who has had some experience in advocacy and often as much as many junior members of the Bar. That has rarely been the case in the eastern seaboard States where solicitor advocates have been the exception rather than the rule. Today, however, more and more solicitors conduct their own advocacy in the Magistrates Courts and some, but relatively few, are specialist criminal advocates.

However, I do not believe that the antipathy that affected relations between the Bars and the Law Societies in the eastern seaboard States can be explained simply upon the basis that it would not have occurred had the profession been "fused" as in the amalgam States. That is far too simplistic. A great deal of the antipathy was generated from the larger city firms of solicitors. The Bar seems to have retained its support from the suburban and country solicitors as well as the small city firms. I think, therefore, that the reasons were twofold. The first was the effect of the recession, particularly upon the megafirms who were highly geared, especially in corporate work which suddenly disappeared. Consequently, they had to find work for many highly-trained personnel if they were not to be made redundant. That new work lay in litigation. The second reason was the attitudinal change on the part of partners of megafirms who were no longer prepared to tolerate the attitudes of many members of the Bar, especially those who still thought that solicitors comprised the junior (and, by implication, inferior) branch of the profession. Those solicitors justifiably considered that their skills and experience were equal, if not superior, to many of those who they briefed.

"There can be no justification for a rule which requires two lawyers when only one will do."

It is in the foregoing context that the Bar has been forced to reconsider its role, and particularly its rules and practices. We have been required to jettison that which we can no longer justify. This process is under way. At its meeting on 16 June last the representatives of the constituent members of this Association, with only one (hopefully temporary) dissent, resolved to adopt the New South Wales Barristers' Rules as the national rules of the independent Bars. Local variations will be accommodated (due to jurisdictional differences) and a set of national guidelines is also in preparation. Those rules were the result of a great deal of consultation, discussion and vigorous debate over six months. Gone are the restrictive practices of which complaint had been made by the Trade Practices Commission. Only one remains, namely, our insistence on retaining the sole practitioner rule. This is not the occasion to debate the merits of that rule except to confidently assert two things. First, as with the cab-rank rule and the functional distinction between barristers and solicitors which constitute the true essence of the Bar, a further touchstone of the independent Bar is the sole-practitioner rule. Secondly, we can be confident that the rule is pro-competitive for various reasons, none of which has been addressed, let alone answered, by those who seek its abolition.

In fact, the only change in the rules which met with any degree of dissension and/or debate at the New South Wales Bar was the abolition of the referral rule. The opponents of direct client access would see this rule as essential to the survival of an independent Bar, but I have no doubt that they are wrong. As was pointed out in the consultation paper issued in February 1994 by the Policy Unit of the General Council of the Bar of England and Wales, the essential distinction between barristers and solicitors is functional: we perform different functions. We will remain different and relevant so long as we retain that distinction. The New South Wales Barristers' Rules, now of national significance, highlight that distinction. A barrister bound by those rules may only perform what is defined as "barrister's work": provided he or she does so, it matters not from whom he or she receives instructions.

It is this type of reform, namely, permitting (but not requiring) barristers to perform barristers' work on the instruction of the lay client that will enable the Bar, and particularly the junior Bar, to effectively compete with solicitor advocates (and I include in that term those who practise as such in amalgam firms). It will enable the very junior Bar to compete with solicitors for advocacy work in the Magistrates Courts, the most productive environment in which a young barrister can learn his or her trade. It enables barristers to advise clients as to whether they in fact need a solicitor. It will enable barristers to retain mediation work for the Bar rather than cede that work to solicitors simply by lack of contact with the client. Barristers can now advise clients on the Bar's comparative costs rather than let stereotypical attitudes of expense and greed prevail. The nature of the work barristers can do will not change (the rules so provide) but the initiative to obtain that work, to direct its course, and to significantly increase the share which is allocated to the Bar will change as a result of increased client contact. But there is an even more important reason and it is economic. The only valid point the Trade Practices Commission made in relation to the Bar rules was its criticism of how the referral rule forces a client who only wants and needs a barrister to also retain a solicitor with the attendant, but unnecessary, cost. There can be no justification for a rule which requires two lawyers when only one will do. Two lawyers are certainly justified where the functions performed by each are required to meet the client's needs. But where those needs can be achieved by the performance of only one of those functions and it happens to be that of a barrister, then no proper basis exists for prohibiting the client from direct access.

The Bars have responded positively to the challenge laid down to them by the politicians. Some Bars have accepted, and others will do so in the not too distant future, many of the proposed reforms and the challenges they pose. We have produced a set of Barristers' Rules which reflect those reforms and which will, I suggest, withstand scrutiny in terms of the application thereto of the *Trade Practices Act* or any other form of competition policy which government may adopt. Having so responded in that positive fashion, and provided we continue to strive for excellence in our chosen field of advocacy and do so in an efficient and cost-effective manner, the Bar will have ensured its survival. It will be more streamlined and more competitive to face the challenges of the next century.

There are, however, two further matters upon which I

wish to touch. Both the Trade Practices Commission and the Sackville Committee would seek to deny self-regulation to the legal profession. It seems that the aim is to vest regulation in a single statutory authority upon which the representatives of the practising profession would be in a minority. It would leave the professional bodies as merely voluntary associations without statutory recognition performing essentially trade union functions.

A related "reform" proposed by both the Commission and the Committee is the abolition of any statutory recognition of the division between barristers and solicitors. It would seem that this "reform" is required in order to encourage more competition in the provision of advocacy services between barristers and solicitors. The idea appears to arise from the assumption that a solicitor advocate does not compete on a level playing field with a barrister. As I understand it, it is asserted that this level playing field exists in the amalgam States where all practitioners are admitted as barristers and solicitors although all do not practise as such. Accordingly, it may be that the so-called "reform" is directed only at Queensland and New South Wales because in Victoria all practitioners are admitted as barristers and solicitors. If the assumption that solicitors compete more equally with barristers who are members of the independent Bars in the amalgam States is correct, then there may be some force in the underlying assertion that, at least in Queensland and New South Wales, the public may perceive solicitor advocates in a different and less favourable light to barristers. However, I have some reservation as to the accuracy of the assumption. It would not, for instance, apply to Victoria. It may apply in South Australia, Western Australia, Tasmania and the Northern Territory where there are small independent Bars but where amalgam advocates are more prevalent. This may be because practitioners do not join the independent Bar until they have practised, often for some years, as an advocate in an amalgam firm. But as the Bars in those States and Territories become more numerous, they may well attract amalgam advocates earlier in their career which will denude the amalgam firms of their advocacy talent and potential. It will, however, involve a process of choice by those who wish to adopt the style of practice as a barrister at the independent Bar. There can be no economic objection to such a trend, if it occurs. Accordingly, the assumption referred to may simply be a product of the historical development of the Bars in the amalgam States. No one seeks to deny that a strong, independent Bar of specialist advocates is beneficial to the administration of justice. Further, the more numerous the Bar the greater will be the competition between its members. From this the public must benefit. What is it, therefore, that requires that this group of specialist advocates known as the Bar should not be recognised in a formal way? Such formality need go no further than empowering the Bar Associations to make rules of conduct binding upon barristers and to issue barristers' practicing certificates. There is no reason why the functional distinction that marks out the work of the specialist barrister from that of the non-barrister or combined barrister/solicitor should not be recognised in the public interest. After all, the public should be aware of the distinction so that they can make appropriate choices.

So far as the level playing field argument is concerned, let solicitors in New South Wales and Queensland call themselves "barristers and solicitors" as they do in all other States and Territories. Such practitioners will be subject to the rules of the Law Society and be issued by the Society with a barrister and solicitor's practising certificate. This is appropriate as such practitioners will, by choice, generally practise both as an advocate as well as a solicitor thus blurring the functional distinction between the two. Those who wish to practise with both functions should clearly be permitted to do so: but those who only wish to practise as a specialist barrister should equally be able to do so. They should be entitled to have that fact formally recognised.

Finally, lest it be suggested that the Bar Association as a voluntary association is good enough, let me remind those who advocate that approach of this. Although the position may be different for purely practical reasons where a particular Bar is numerically small, where the Bar is large as it is in Victoria, New South Wales and Queensland, it is important to maintain a formalised and recognised corporate identity vested with the power of self-regulation. The organisation to which barristers belong becomes of significance not because of any trade union function which it may perform, but because it represents the repository and arbiter of professional standards and conduct to which its members are required to aspire. Moreover, the corporate identity of the organisation and its power of self-regulation provide the vehicle for the application of peer group pressure to maintain high standards of conduct and professional responsibility. In particular, self-regulation by their own statutory recognised organisation is the way the members of that organisation commit themselves to their professional obligations and ideals. Something imposed from without does not have the same force as something voluntarily generated from within. Barristers need to be able to directly participate in and be responsible for devising the values which we swear to uphold. I therefore believe that a Bar Association so recognised, with its traditions and esprit de corps, is more able to encourage and foster the peer group pressure necessary to effectively control a generally idiosyncratic, if not defiant, group of practitioners who have a specialised, and therefore constrained, functional role to play in the administration of justice. A Bar Association which is able to generate not only co-operation and trust between its members but also, and more critically, that high degree of trust required between advocate and bench, makes an essential contribution to the justice system. Without that contribution the efficient administration of justice must inevitably deteriorate. The culture and ethos so required can only be generated by a strong and independent Bar Association whose existence and functions are properly recognised by the Parliament in the legislation governing the structure of the profession. With proper understanding of the role of the Bar and the contribution it makes to the administration of justice, and in light of the reforms made or proposed by Government and to which the Bars have responded in a positive manner, I believe that not only will the Bar survive but also it will be inherently strengthened and thus able to fully satisfy the high level of service which the community will demand of it. ❑

Interlocutory Reflections from an Interim Bench

B H K Donovan QC offers some insights into the life of an Acting Justice of the Supreme Court.

The suddenness of transition from barrister to acting judge leaves one gasping; in my case literally, as I ran from my 9.30 private swearing-in ceremony to St James Road Court in order to start the 10.00 listed matter by 10.30. The swearing-in had an air of protection about it. St James Road Court did not, far from my colleagues on the thirteenth floor of the judicial bunker (it does actually look like that, although, of course, it is not in fact) in Queen's Square.

Much bustle and hurry back stage at the Court, then thud, thud, thud, the door is thrown open and instead of looking up to see the judge enter, I find myself moving across the bench area following my tipstaff to my seat and looking down, not up, to the well of the Court where the two black-clad gladiators are standing ready for combat.

It is a bit like opening night of theatre in my younger days, except for this one I have had no rehearsal. It is rather like "Here's your file, there's your Court, now off you go." This can be a daunting experience in any place. It is more daunting when you find yourself alone in a room miles away from brotherly or sisterly judicial help or support. You might not get any help anyway, but at least you can feel it is close by. In St James Road it feels like it is on the other side of the earth. Now I know how Sir Francis Forbes must have felt as he stepped from his ship into the colony.

"The judicial oath and the desire to do justice weigh heavily."

It is time I explain the purpose of these reflections. They are personal. They probably do not reflect the thoughts or feelings of any other judge. In fact, as I look back, I am not even sure how far they reflect my own. But rarely do we get a glimpse of life "on the other side" and these jottings are just one person's ponderings upon this esoteric experience.

So here I am sitting in a court room 100 years old. It used to be the Banco Court. Generations of Chief Justices have sat here. I am sitting in the seat of Sir Frederick Jordan - well not literally, that chair has long gone and is replaced by one of plastic with grey wool; but metaphorically such is where I sit.

The towering figure of Sir Frederick Darley (of Lillianfels memory) glares down from the wall of chambers. The wall is lined with reproduction portraits of CJs but none glare as he does. He looks enormous. Indeed, when I turn to the next wall, he clearly was; for there hangs on that wall a photograph of Sir Frederick and his six judges of the Court and he, in the middle, sits high and, visually at least, dominates his peers. My estimate of his size is to be proven correct later when, at the swearing-in of Dowd J, I sit on the ceremonial bench wearing Sir Frederick's robes. Fortunately, I am in the chair nearest the door so I only have a little way to walk - stumble or trip - in those vast red robes which have been lent to me for the occasion. I do not fall and no one can see the size of the tent that surrounds me, for I am not a big person.

So on my first day I enter this imposing mausoleum of a court room at St James Road and I am taken aback by its size. I was admitted here as a solicitor 27 years ago and here I called to the bar 20 years ago. I remember it as vast. Now it looks much smaller. I wonder how the crowds squeezed in although, perhaps, the crowds then were smaller too. Size or perception of size is a function of age, perhaps.

I sit. The matter is called. An industrial accident which after two days will settle, but I am not to know that. It is apparent that there are some problems with liability. Reports are tendered. No report, however, from any expert on safety is provided by the plaintiff. I smell danger. I am right. The defendant has one. The defendant has only served it a few days before. The plaintiff says if I admit it he will have to have an adjournment to answer it. But the accident is over 10 years ago. What do I do? The judicial oath and the desire to do justice weigh heavily. In this case I am not sure how I can do justice.

Yes, this desire really is a concern: how to do justice. It may be that the law is a means, the means, to do justice but suddenly I find justice is the end, in a way I did not expect. Like any experienced common lawyer, I look for the middle way. This will involve letting in part of the report, rejecting part (at least for the moment), and reserving rights of tender and adjournment. Terror strikes. I have to give reasons - a mini judgment. Now I had prepared myself to have to do this, but not 15 minutes into the hearing on the first day. Meanwhile the plaintiff is trying to arrange for the expert who becomes available at 3.00 pm. The plaintiff's expert's report is then tendered. By this time the story is fairly clear. The report is based on a story of some variation with that presented in court. The expert, nevertheless, is able to rise to the occasion and provides oral opinion based on the story as it is given to me. The defendant seeks to have the balance of his report admitted and, as there is no longer any reason not to, I admit it.

Thus ends day one.

Next day, we settle down to a case that appears inevitably to be going to the finish. Half way through the afternoon the plaintiff's case suddenly ends. I had not expected it to finish at this point, but I am told all the evidence is in. Both counsel seek some time. As I leave the Court, I say to the tipstaff "Ah, a settlement is imminent" and just as suddenly, shortly after, we receive a message, the case is settled.

End of day two. I am beginning to relax and enjoy this. I have learnt a few things already. It is important to have a purpose on the bench. True it is that I cannot guide the case, but I must know where it appears to be going. I must be prepared to be flexible in order to achieve justice. The rules are available to help to this end, but there are, and will be, times when I have to take a long term approach. I learnt this from the tender of the defendant's expert report which created some difficulties yesterday re the rules. I also have to push to have the case go on and continue. I have now learnt this.

I am also becoming aware of the physical problems of

sitting; problems such as legs. My legs need exercise. I will have to organise a leg exercise régime. They are starting to feel quite weak if I do not exercise them. The thought occurs to me that these sitting conditions may even be in breach of the *Occupational Health and Safety Act*. Next, I notice over the following weeks that I am continually turned to the right in the direction of the witness box. If one moves around from court room to court room this is not so much of a problem, but if you are in one court room all the time the effect on the upper body gradually increases. So neck and torso exercises are required.

I have learnt another trick. I have always been impressed when a judge repeats the last answer or the last words of it when others miss hearing the answer. I am able to do this. But I also find I can do it even if I have not been fully listening to it (or perhaps even not listening at all?). Somehow these words are still available in my subconscious, so I can repeat them immediately if called on to do so - I could not, of course, do this five minutes later.

I undergo some changes of attitude. I started my time with a strong belief that I should have respect and, indeed, reverence for all who come before me. I keep this. But my sense of justice and public duty increases. I become aware that whatever problems arise, thee must be a way to find a solution which will do justice. And I find there is. I am surprised how often a technical problem will resolve itself if I keep my eye on the main issues and ensure the case simply keeps going.

The sense of public duty comes home most strongly while I am duty judge. Part of this role required me to issue, where appropriate, warrants under the *Listening Devices Act*. I issued one warrant to allow use of a device where a young woman was being held hostage. Other judges had issued warrants before. It just so happened that it was while my warrant was in force that the young woman was rescued by police and I felt some sense of satisfaction and felt that in a very, very small way I may have helped in her release.

By Friday of the first week I have settled into a long brain damage case which will require a few adjournments during my tenure and which is finalised at 4.30 pm on my last Friday. During the first week my sense of humour has progressed. I recall Lord Denning's warning: in your first year never say anything during the hearing and never reserve. I resolve to abide by the latter but am unable to restrain myself from the former. The Friday of the first week is my birthday. I wonder to myself, do my judicial powers extend to having counsel sing '*HappyBirthday*', but I dispel such thoughts from mind. They sing it to me in chambers at morning tea in any event, without any exercise of judicial, or other, powers.

In the second week I am presented with a medical negligence claim. One counsel says it involves an extension of *Rogers v Whitaker*. I think to myself, you may think that, but you will be hard pressed to have a junior acting judge extend what the High Court has laid down. His opponent, however, suggests it might be on the cutting edge. Some people might agree. I will not comment further as it is on appeal. By Friday it is time for judgment. It is a most difficult case and I have worried greatly over it during the week. By Friday, however, I know the answer - or at least I believe I know my answer. I know it may not be correct, but it is my view. Before judgment I suggest to counsel that if I was down there (at the bar table) looking at me up here, I would not want me to decide this case. But they ignore my advice.

So at 12.45 pm on Friday I haul the file, the exhibits and the transcript from the far ends of the bench where they have been scattered during the hearing and launch into my first ex tempore judgment. I know it is going to take some hours. I am very worried I will get lost and have to adjourn and reserve and start again. The beginning is very tentative - and very slow. Lunch time - time for me to worry have I done the right thing in launching straight into it. Well, too late to go back now - at least unless disaster overtakes me. Two o'clock and off I go again. I have the order of the judgment in my mind and on a single sheet of paper in front of me with headings, subheadings and points. But that has all to be filled in from 4 days of transcript and bundles of exhibits. "Daunting", I think to myself. "Fools rush in", I think to myself. But I have to continue.

The Friday afternoon drags on . I become painfully aware of my own voice. I sneak a look at the Court Reporter from time to time to see how she is dealing with what is, to me, becoming a long and tedious exercise; the goal of which now is simply to get to the end. At 4.45 pm I have finished liability. I wearily adjourn the Court and say I will finish damages on Monday.

I am unpleasantly aware that I have been the centre of attention. Solicitors making notes of my words, assessing them as if they were gems - to be pocketed with relief if they favour them, to throw back those which are adverse as if they were flawed. It has all been painfully slow. And one party writing down notes. No doubt, ready for an appeal - if not to the Court of Appeal, then to the Judicial Commission. And it's only my first decision.

Nevertheless, as I lay down my voice I realise with relief that it is over. I have got through it and I can enjoy my weekend. I don't. But I think I can. I don't because I end up making notes of other matters I want to put in my revised judgment. Then I wonder how much I can add in the revision - or change - not the conclusion, but the way I got to it.

I thank the Court Reporter who stayed so late to let me finish and leave.

On Monday I finish the damages.

The next case will settle but I don't yet know this. I look down as I enter to see three silks and three juniors. This I find a little intimidating. Worse, there are only two parties but the defendant has two insurers, one for the nominal defendant and one for a driver (whose condition was such that if there is a verdict only against her then the plaintiff may get nothing). The plaintiff is a paraplegic. I note that one of the insurers has only just come into the matter - this part of the case has, indeed, only just been assigned to it by the Motor Accidents Authority. An application for adjournment has been made to the duty judge the day before and been refused with a note that any further application is to go back to that judge. Meanwhile, I have to decide whether there are to be two sets of representation for the defendant.

The parties ask for time. And more time. And more time. I recall judges who force cases on. I am uncertain. I

receive messages that progress is being made. I give yet more time. I worry about "waste of court time" and what if it doesn't settle. It does; half way through the afternoon.

I found sitting as a judge much more interesting and exciting than I expected. I had always been wary of the hours of sitting and the tedium that could occur, especially in the afternoon session. I was surprised. Of course, it may not last if one was sitting continually, but it was surprising nonetheless.

I was also surprised to find how many difficult questions of law I had to deal with. I had to consider a stated case from a magistrate which involved the boundaries of the duty of care and foreseeability as well as a problem of proof. The stated case procedure is a very clumsy procedure and many have criticised it. This one had plenty of problems - not least of which was that in the case as framed the plaintiff could have affirmative answers to his questions, but this still left a question on at least one other issue. The defendant also had a further issue which was not in the stated case and which he wanted ventilated.

There were technical problems in getting to these other issues, but I hope we (and I mean the counsel as well as myself) found some appropriate solutions. They required some mental agility. And I broke Lord Denning's rule. I did reserve.

"Imagine posterity gazing over our CJ in an imperfect state..."

Another taxing problem involved an order sought in relation to a search warrant and legal professional privilege. This made me ponder upon the sole purpose test and the question of whose purpose - if anyone's. Could it be some abstract purpose of the document or must it be the purpose of a person; one would think the creator of the document. But I was faced with a situation where A stood over B and forced B to copy out a document which A then unilaterally delivered to the solicitor for C. The solicitor had no connection with the document until it arrived in his mail box. Was it A's document or B's document? A's purpose or B's purpose? You will have to read the next exciting instalment of the story in the judgment or even in the Court of Appeal to know the answer.

The whole experience was filled with such philosophical niceties but most were more complex to explain than the above so I will not bore you further.

Let me note some temptations:

1. To know the arbitration amount when there is an appeal from an arbitrator.
2. To know which party is insured.

To be curious in these is, of course, heresy but it is also human. I was able to resist the first quite easily in one case but not the second in another for counsel called on a subpoena to the insurance company thereby making it clear which party was insured. I am pleased to say this had no effect on my conclusion because by that time I had come to tentative conclusions in one direction anyway, which I adhered to. In one case the former temptation arose when a diary was tendered which in fact had the amount of the arbitration in it. But I judiciously handed it back and suggested it be checked for this. The offending part was then covered over to remain concealed from curious judicial eyes.

The CJs wig. On the wall of St James Road are the pictures of previous CJs. The latest is that of our present CJ. I gazed each day on this picture upon entering the chambers. What was a minor blemish - a crooked wig, albeit only slightly crooked - became a major irritation. Imagine posterity gazing over our CJ in an imperfect state, a flawed vision. This would never do. One day, while speaking to the great one by telephone, I asked him to do me a favour and get a new picture with a straight wig. His response was, "Why are you sitting looking at pictures instead of reading transcript?." To this acerbic reply to my innocent request, I had no response. Wounded, I listened as he went on to explain that there was now another portrait but in my pain I heard little of this. Seriously, however, I must thank him and all my (temporary) colleagues for their support.

I learnt a great deal from the experience. I recall a very senior silk years ago saying to me that in your written submissions you should write the judge's judgment. This is not so - or at least not always so. One Court of Appeal Judge during my time on the bench said to me that one thing you realise is that counsel does not write our judgments. He also said he felt that every silk should be required to spend a period of time as a judge at the start of their appointment. It is without doubt a most valuable experience, even for the brief period during which I sat. Not least was the experience of sitting in my chambers at lunch on my last day, listening on the radio to the finale of Wagner's *Twilight of the Gods* and Brunhilde's *Imolation* scene as I pondered the Notice of Appeal against my first decision. And over me crept the thought: Twilight of a Judge (Acting). ❑

Where Do All the Law Graduates Go?

Very little is known about where people who qualify in law in Australian universities end up. We imagine that the vast majority become practising lawyers and, whilst this is no doubt largely true, we have almost no firm nationwide data.

Most law graduates nowadays have a combined degree - the law degree is combined with some other discipline. It would be wrong to imagine that law is necessarily their first priority for a career. We do know that a number do not go on to practical training, either in articles or in a practical training course. Even amongst those who are admitted, we know that a proportion do not go on to employment in the private legal profession.

To rectify this, the Centre for Legal Education in Sydney will be commencing over the next few years a nationwide study of the career destinations of law graduates. Those who entered the private legal profession will be relatively easy to trace, but a major focus of the project will be on those who either never seek admission or, having sought admission, do not work in the private legal profession.

The information obtained will be of value to government, the university law schools, the professional bodies and the practical training courses.

As a start to this project, the Centre for Legal Education has reviewed data obtained by the Australian Bureau of Statistics as part of its five-yearly censuses throughout Australia. Reports on the careers of legal qualified people were completed by the Department of Employment Education and Training after the 1981 and 1986 censuses. However a decision was made not to prepare a similar report based on the 1991 census.

The Centre for Legal Education took up the challenge to prepare this report, and has now published it. At the same time, it has examined the trends which are evident over the 10-year period from 1981 to 1991. This report is now available from the Centre for Legal Education at a cost of $5. The Centre's address is GPO Box 232 Sydney NSW 2001 (Fax (02) 221 6280).

In brief, the report records that less than two-thirds of the almost 37,000 people holding qualifications in law in Australia were actually working as lawyers at the time of the 1991 census. The largest proportion of legally qualified people who were working as lawyers peaked at 63% in the period two to five years after qualifying. Of those with legal qualifications, just under 30% were women.

Between 1981 and 1991 there was an increase of 63% in the number of people in Australia with a qualification in law. In the same period the number of people employed as lawyers grew by 71%. The population of Australia in the same period increased by only 12.5%.

However, during this period no more than 65% of those with legal qualifications have been employed as lawyers (as defined by the Australian Bureau of Statistics).

Further work by the Centre for Legal Education will look at the proportion of people working as lawyers, and also the particular sorts of work in which they are engaged. ❑

Bar Association Rules

Peter Taylor SC examines the changes brought about by the new Bar Association Rules.

The introduction of the "New South Wales Barristers Rules" was an important development for the Bar. Some of the changes that the new rules contain are significant. They are intended to have a real impact upon the Bar, its perception within the legal profession and by the public at large and, most importantly, upon the Bar's ability to demonstrate that it is committed to meeting the public interest. But whilst the changes in the Rules are important, they represent a development rather than a revolution.

In many respects what is now contained in the "Barristers Rules" reflect a consolidation and refinement of principles that are fundamental to the advocate's profession and represent the traditional values of the Bar. It is instructive, therefore, to reflect not only upon the changes to the Rules but also upon the extent to which they have remained substantially the same.

Fundamental Differences

There are 5 fundamental ways in which the Barristers Rules are different from the previous rules of the New South Wales Bar Association:-

1. The Barristers Rules have statutory authority by virtue of sections 38G and 57D(i) of the *Legal Profession Act* and practice as a barrister cannot be restricted by any other guidelines or rulings of the Bar Association. However, breach of the Rules carries no specific statutory sanction other than the risk of a finding of professional misconduct or unsatisfactory professional conduct s57D(iv).
2. Because of their statutory force, the Rules apply to all barristers and not just members of the Association. However, a barrister cannot practise without a certificate {s25(ii) and s48B} and a holder of a practising certificate is automatically entitled to be a member of the Bar Association {s57M(i)}.
3. The Rules are subject to review by an Advisory Council s57(h). They may be declared inoperative by the Attorney General if the Advisory Council reports that any provision of the rules is not in the public interest s57I(i).
4. They discard, partly because of statutory changes (see e.g.s.38J and s38K in relation to advertising and specialisation and s38M in relation to co-advocacy), merely ethical limitations.
5. The Rules involve a significant change of emphasis. They attempt to do this by articulating, specifically in the Preamble, the essence of the barristers function and obligations.
6. As part of the change of emphasis, the commitment to public interest is stated in a way that has never been articulated before in the body of the Bar's rules - see the Preamble, Rule 111 and (more arguably, having regard to the previous Rules 33 and 33A) Rule 87(k)).

Irrelevance of the Old Rules

1. The Act declares that practice as a barrister is not subject to any other rules, practice guidelines or rulings of the Bar Association or the Bar Council - s38G(ii). Whether or not in obedience to that declaration - but certainly consistent with it - the new Rules specifically declare that they are not to be read by reference to any former rules made by the Bar Association before 1994 and whether or not the substance of any former rule is reflected in the new Barristers Rules.
2. To say, in the light of this, that the new Barristers Rules represent no innovation or departure from the past would invite different reactions from different audiences. And it would ignore the significant aspects in which the rules do differ. But the reality is that there are many aspects of the new Rules which simply restate the Bar's fundamental values and ideals. Indeed, it is the inescapable fact that very much of the content of the new Rules can be shown to have originated in the earlier Bar Association Rules. That continuity should be neither surprising, discomforting or a matter of criticism.

Fundamental Similarities - Continuity of Philosophy

1. Although the Rules are now quite different in both their authority and their format, they are, and should be understood as, part of the Bar's tradition of integrity, service and dedication to the public interest in the administration of justice.
2. The fundamental concepts which are readily identifiable in the Rules as part of that history are the concepts of
   Integrity - Preamble 2
   Independence - Preamble 1 and 5
   Service - Preamble 3, 6 and 7.

Illustration of the Continuity of Particular Values

It is possible, and useful, to identify the specific provisions of the new Rules that embody particular values common to both the old and the new Rules. Without stopping to restate the provisions of individual Rules, that identification is not at all difficult to carry out. I suggest that it yields the following particular values:-

1. Service to the client and competence - Rules 16, 17, 110 and 111
2. Confidentiality - Rules 103-110 (but see the special exception in Rule 34)
3. Independence - Rules 18 and 19
4. Candour, honesty and commitment to the integrity of the curial process - Rules 21-31, Rules 35-42
5. Fostering the integrity of and confidence in curial determination - Rules 43-50

6. Commitment to the fairness of curial procedures - Rules 51-58
7. Special ethical obligations applying to particular situations
   a. Guilty clients - Rules 32 and 33
   b. Prosecutors obligations - Rules 62 to 72

Cab Rank Principles - Acceptance and Return of Briefs

The provisions relating to the cab rank principle merit special consideration. As a general proposition it can be said that this area of the Rules has been the subject of some of the important changes in the Rules. Again, however, it is useful to recognise the respects in which the Rules adhere to the Bar's basic traditions. The matters that have not changed involve these propositions:-

1. The barristers role should be accepted as limited to the primary function of advocacy and its ancillary activities - Rules 74, 75, 78, 80 and 87(k).
2. Barristers must embrace the cab rank principle - Rules 85 and 86.
3. Barristers must not accept briefs which threaten either as a matter of substance or appearance the impartiality or curial proceedings - Rules 87 and 88, 101 and 102.
4. Barristers must not allow either mismanagement or ambition to endanger the client's ability to secure appropriate representation - Rules 93-100.

Conclusion

The changes contained in the Barristers Rules are important. But it is equally important to appreciate the continuity in the Bar's fundamental values that the new Rules represent. The precise and elegant drafting of the Rules provides an opportunity to revisit those values and affirm the Bar's continued adherence to them. ❑

Sounds of Silence

Priestley J: "The formal orders that I propose therefore are that the appeal be upheld, the judgment below be set aside except as to costs, that a new trial be ordered limited to damages and that the respondent pay the appellant's costs of the appeal."

Meagher JA: "I agree but resist the opportunity of not saying anything further."

Handley JA: "I also agree and also resist the temptation."

(*Kotevski v Government Insurance Office of New South Wales*, Court of Appeal, ex tempore judgment - 14 October 1994). ❑

Getting the Timing Right

(New South Wales Court of Appeal; Coram: Handley, Sheller and Powell JJA at 12.45pm)

Handley JA: I see what the time is. For the benefit of your opponent, Mr Graham, how much longer do you think you will be, bearing in mind you have been allowed to speak for about one third of the time?

Graham: Can I go for one minute and finish?

Handley JA: The Court can't resist that offer.

(*Smith v Parker & Anor*, Friday 11 February 1993) ❑

A "Living National Treasure" - Sir Maurice Byers CBE, QC

(Speeches given at the Bench and Bar Dinner on 17 June 1994 at which Sir Maurice was the guest of honour.)

Theodore Simos QC

Let me assure you that there is nothing more calculated to spoil a good dinner than to have agreed to propose a toast to the guest of honour following that dinner. And may I say at once that if the guest of honour had been anyone other than my good friend Sir Maurice Byers I would have had no hesitation in resisting the blandishments of our President, Murray Tobias, when he asked me to propose the toast.

Our guest of honour was educated at St Aloysius' College, took his law degree at the University of Sydney and was admitted to the New South Wales Bar more than 50 years ago, namely on 26 May 1944. That is a very long time ago and enormous changes have occurred over that time. For example, in 1944 Australia's population was approximately 7 million, whilst it is now over 17 million. The population of New South Wales was then approximately 2 million. It is now over 6 million. The Supreme Court was then constituted by only 12 judges, one of whom was then an acting judge. The Supreme Court has now over 40 judges and there have been corresponding increases in the numbers of judges of other courts as well as the creation of a number of new courts.

Throughout this period of great change our guest of honour has had a uniquely varied, eventful and distinguished career. Indeed, his admission to practice on 26 May 1944 was such an auspicious occasion that, as we have recently been reminded, within 11 days of that date, namely on 6 June 1944, the allied expeditionary force invaded France.

Prior to his admission to the Bar Maurice was, for two years, associate to Mr Justice Kenneth Whistler Street, later Chief Justice of the Supreme Court. After his admission, our guest of honour joined chambers on the ground floor of the old University Chambers Building at 167 Phillip Street where he joined, among others, David Benjafield (later Professor Benjafield of the Sydney University Law School), Stanley Toose and Paul Toose, Jack Richards and David Selby. He practised there until 1957 when he moved with others to the 10th floor of the then newly-built Wentworth Chambers. On that floor he joined John Kerr QC, Marcel Pile QC, Gough Whitlam, Trevor Morling, Hal Wootton, Bill Cantor, Paul Toose, Carl Shannon, David Shillington, B J F Wright, Brian White and Alan Bagot.

His practice as a junior and later as a silk was primarily in the fields of equity, taxation, company law and constitutional law and he appeared many times before the Privy Council. He also appeared in common law cases and was a severe cross-examiner when the occasion demanded, brooking no nonsense from equivocating or, dare I say it, recalcitrant, witnesses. He even appeared occasionally before civil and criminal juries.

Our guest of honour took silk in 1960 and continued his extensive practice at the private Bar until he was appointed Solicitor-General for the Commonwealth in 1973, an office which he held for 10 years.

Prior to that appointment he served for a number of years on the Bar Council, in 1966 and 1967 as its President, during which years I had the pleasure to be the Association's Honorary Secretary.

His great capacity to remain calm and unruffled and to pour oil on troubled waters, even in that office, appears from the first sentence in his Presidential Statement contained in the 1966 Annual Report of the New South Wales Bar Association. It reads:

> "The life of this Council has been much less tempestuous than that of the last, a result not entirely unintended."

In his 1967 Presidential Statement he wrote, among other things more important, of the Bar Council's concern in relation to the Bar's perennial problem of slow payment of fees. Some things never change.

I have done my best to learn of any amusing events in the career of our guest of honour whilst at the private Bar but he has led such an exemplary life that the only vice of his which I have been able to discover (a vice of which I had in any event first-hand knowledge from those many pleasurable occasions when I appeared as his junior), was his love of big expensive cigars which he used to smoke continuously during conferences while sipping endless cups of strong black coffee sweetened with artificial sweeteners. He was wont when he came towards the end of the cigar to flick it to his right against an angled open window which it would hit and then fall into the light well of Wentworth and Selborne Chambers. It used to be said that Maurice would remain at the Bar only until the light well was completely full of his burnt out cigars up to the level of his 10th floor window. That would have happened in a very short space of time but for the fact that those who wanted him to remain at the Bar saw to it that the cigar butts were regularly removed from the light well.

Sometimes, the great man's aim was not as good as it might have been and the cigar butt would fall into and commence smouldering in his wastepaper basket. It was one of the junior's many tasks during conferences with Maurice to keep an eagle eye out for such an event and to retrieve the smoking cigar butt from the wastepaper basket and consign it to its rightful place at the bottom of the light well.

On one occasion, however, this happened in the absence of junior counsel and, indeed, in the absence of anyone else in Maurice's chambers, and of course the inevitable happened. That is to say, the wastepaper in the wastepaper basket caught fire, much to the consternation of Maurice, who went rushing down the corridor to his clerk, Ken Hall, shouting out "Ken, I'm on fire, I'm on fire". With his usual efficiency Maurice's longstanding and ever loyal clerk, Ken Hall, rushed in and extinguished the fire and the crisis was averted.

On another occasion in the course of making himself yet another cup of his endless black coffee, Maurice failed to follow the instructions as to how to use the hot water urn as a

result of which it began spraying boiling water in all directions. Maurice was cowering in the corner shouting again for Ken Hall's help. Ever ready, Ken Hall came again to the rescue, this time with nothing less than an umbrella under the cover of which he escorted Maurice back to the safety of his chambers.

Maurice's 10 years as Solicitor-General for the Commonwealth were eventful and successful. It was during his term of office that the Loans Affair occurred which, as we all know, resulted ultimately in the dismissal of the Government by the Governor-General. I understand that it was not Maurice who gave the opinion in that connection that a loan for 20 years was a loan for temporary purposes.

Arising out of the Loans Affair, Sir Maurice, among others, was required to give evidence before the Senate but, even though not subject to Ministerial direction to refuse to answer, he nevertheless refused to answer on his own initiative, because he considered it would be dishonourable to reveal the secret counsels of the Crown. It took a great deal of courage to follow this course. But such courage is characteristic of our guest of honour. All who saw that happen agree that Maurice was more than a match for his inquisitors.

During his term as Solicitor-General the Tasmanian Dams Case was heard and successfully argued for the Commonwealth by Sir Maurice.

He appeared in the *Nuclear Tests Case* against France in the International Court of Justice in the Hague in 1973 as counsel and in 1974 as Solicitor-General for the Commonwealth.

"...he considered it would be dishonourable to reveal the secret counsels of the Crown."

He was the leader of the Australian Delegation to the United Nations Commission on International Trade Law in each of the years from 1974 to 1982 and was Chairman of the Australian Constitutional Commission from 1985 to 1988.

Sir Maurice was, and is, one of Australia's greatest constitutional lawyers.

The statistics bear this out. During his 10-year term as Solicitor-General he appeared in over 90 major cases including every case of constitutional importance. There were 44 constitutional cases in which Byers led for the Commonwealth in respect of which he had 37 wins, six losses and one draw. Someone has calculated this to be a success rate of 88%.

As Mr Justice McHugh said, on the occasion of a dinner to mark Sir Maurice's retirement from the office of Solicitor-General, "There are some who would say that the result of all these cases gives the appearance that Australia had an entirely new Constitution as compared with what it was when Byers first took office as Solicitor-General". Mr Justice McHugh said of Maurice's success: "In case after case he has literally hit the State Solicitors-General out of the ground. They have all retired hurt. Some of them have even taken refuge in the High Court. Others have just simply retired."

On the same occasion the then Attorney-General, Senator Gareth Evans, described him as "A gentleman, scholar, conversationalist, wit, master advocate and devoted family man", and referred to his wisdom, experience, integrity, objectivity, his mastery of constitutional principle and his deep understanding of the basic principles of the Australian political system. He said that "Sir Maurice should be declared a living national treasure (as is done in Japan), especially as he combined in the one person all the round distinction of an elder judicial statesman, the wit and charm of a saloon rogue, the face of a cherub and the body of a sumo wrestler".

Sir Maurice had a phenomenal and detailed memory of decided cases, especially constitutional cases. His approach was to analyse all his cases, even the most simple, back to first principles, especially constitutional cases, and to re-read the Constitution to see what it revealed rather than to start with preconceived notions of what the Constitution ought to say.

He was a prodigious worker but his advices were usually quite brief. Sometimes as brief as one page which might, however, have been the fruit of many hours of work and the study of many cases with which he surrounded himself in his chambers. He once told his clerk in relation to such a short advice that if the solicitors weren't happy with its brevity they could come up and have a look at all the authorities for themselves before he put them away.

The depth of the intellect and thought of Sir Maurice is revealed in a sentence contained in a paper he delivered to a continuing legal education seminar of the New South Wales Bar Association last year in which he referred to the work of the High Court "In educing from the silences of the Constitution, secrets, hitherto unsuspected". Just contemplate that for a moment. I suspect that it was Sir Maurice more than anyone else who encouraged the High Court to do that.

Sir Maurice also has a wonderful sense of humour which is revealed in two quotations taken from his speeches which I will share with you. On the occasion of the dinner to mark his retirement as Solicitor-General, Maurice made a speech which included the following "gems":

> "The greatest charm of advocacy, after all, is listening to oneself. Its greatest agony is listening to one's opponent."

On another occasion he made a speech at a function of the Victorian Bar in which he said:-

> "More recently I have listened with mounting admiration while Daryl Dawson (then Solicitor-General for the State of Victoria) has fairly constantly argued that the Commonwealth of Australia is part of the State of Victoria, rather like Geelong or Wodonga, only less important, and that its laws, when not meaningless (which was not very often) are invalid because of inconsistency with the law of the State."

On another and earlier occasion he revealed the artistic and philosophical side of his character when he said of Owen Dixon and Douglas Menzies as follows:

> "To one accustomed to the 'storm and stress' school of judgeship, appearing before Owen Dixon or Douglas Menzies was like first hearing Mozart. It is, of course, absurd to imagine that one could again encounter Dixon's radiant charm and pure intellect or Menzies' sparkling bonhomie. They were great men not only for what they wrote, but for what they were."

In the same way, our guest of honour is great not only for his legal accomplishments, but for what he is. He is not only a brilliant lawyer and a great advocate, but also a devoted husband to his wife Patricia, whom he has always lovingly called "Princess", and who has always provided him with love, support and encouragement. He is also a devoted father to his daughter Barbara, who is a solicitor, and to his sons Mark, another solicitor, and Peter, a playwright and producer. As well, he is a loyal friend of great gentleness, of great charm and even greater humility. He is an adornment to the legal profession and to the human race. ❑

Jacqueline Gleeson

It is extraordinarily hard to find a junior member of the New South Wales Bar who can speak from personal experience about the junior years of Sir Maurice Byers. From my enquiries, there are very few senior members of the Bar who recall it well. Even the number of judges who say they recall Sir Maurice as a junior is modest. You might think that this situation would give one a great degree of latitude in recounting the life and times of Sir Maurice as a junior. But it is the prerogative, and even the raison d'être, of the junior barrister to dig deeper in search of the truth or at least a good story. I thought that Ken Hall might know something - but no luck there. Even Ken did not commence clerking for Sir Maurice until 1957 and, of course, by that stage he had practically taken silk. Ken did, however, have a photograph to show me - a lovely photograph of the Supreme Court Associates of 1942 - they numbered eight and had their hands clenched over their knees like a small and not very fearsome football team. In the photo, and I'm afraid he had to be pointed out proudly to me by Ken, was the associate to Kenneth Whistler Street - M H Byers, age 25 years.

It goes without saying that when Sir Maurice was admitted, in 1944, times were very different. For the one thing, meat rationing was in force in Australia - a sad state of affairs for a hungry young junior. I imagine Sir Maurice's gaunt young face, choking down stringy rabbit casseroles as he waited for some daring solicitor to stumble across his chambers. It seems to me that his experience under the wartime régime may explain Sir Maurice's veritable obsession with the *Oyster Farms & Fisheries Act* in his early years of practice. Most of the cases in which Sir Maurice appeared, in his first years at the Bar, which were reported in the *Weekly Notes*, dealt with various breaches of that Act. One can only assume that there were others which were not reported. Surely Sir Maurice was not like the negligent criminal convicted for every crime he committed.

As Simos observed, Sir Maurice's practice as a junior was very different from his practice as QC. And not only thanks to the *Oyster Farms & Fisheries Act*. M H Byers had a broad practice with plenty of common law and tenancy work, and regular appearances in the Police Courts. His reputation was always exemplary, and it was this fact which caused him, from time to time, to be briefed by wily solicitors who well appreciated that the addition of Byers to the team would lend an air of respectability to the cause of their less than reputable client. Moreover, Sir Maurice always had an eye for an "ingenious argument". I was told of Sir Maurice's early reputation for "ingenious argument" by one of those rare fish who did remember Sir Maurice as a junior. But I was comforted when I read in the *Weekly Notes*, in a decision of Sir Kenneth Street, the words:

> "I think that, despite the ingenious arguments of Mr Byers" and later "Despite the forceful arguments put by Mr Byers and the ingenuity with which he developed his point, I still think ...".

When Sir Maurice retired from 10 years as Solicitor-General in 1983, many speeches were made in his honour. The speeches referred to Sir Maurice's great successes before the High Court appearing on behalf of the Commonwealth. It was said repeatedly that he had won 88% of his cases over the 10-year period. I have it on good authority, or at least on the authority of the Chief Justice of Australia, that Sir Maurice's success rate was not so high in his junior years.

"... a silk who listens to the views of his junior no matter how appalling or misguided."

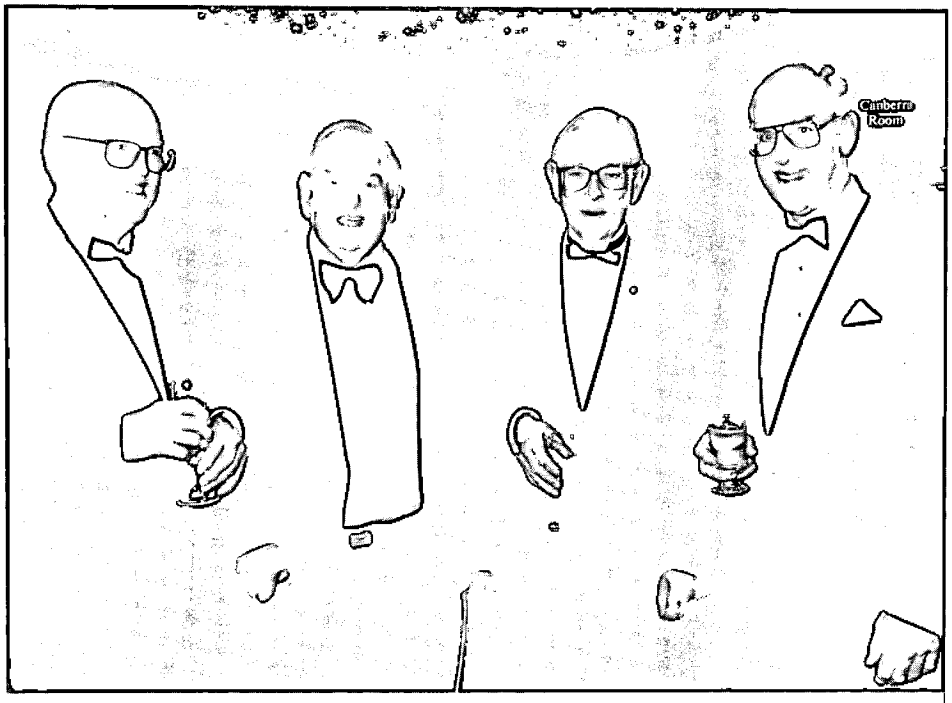
Sir Maurice is an inspiration to all junior counsel, indeed all counsel, in terms of personal and professional style. He is courteous and humble and exemplifies all that is honest, noble *and* excellent in the tradition of the New South Wales Bar.

Better remembered than Sir Maurice's career as a junior, and indeed, still being experienced and appreciated, is Sir Maurice's reputation for his dealings with the junior Bar. Dr Flick described him as "absolutely marvellous" to work with in a tone of enthusiasm the like of which I had never before heard him express. Unkind people might say that Sir Maurice distinguished himself as a silk who listens to the views of his junior no matter how appalling or misguided. His endearing quality of politely ignoring the worst guff has won him great affection and gratitude from the junior Bar and, I suspect, from many who were once juniors.

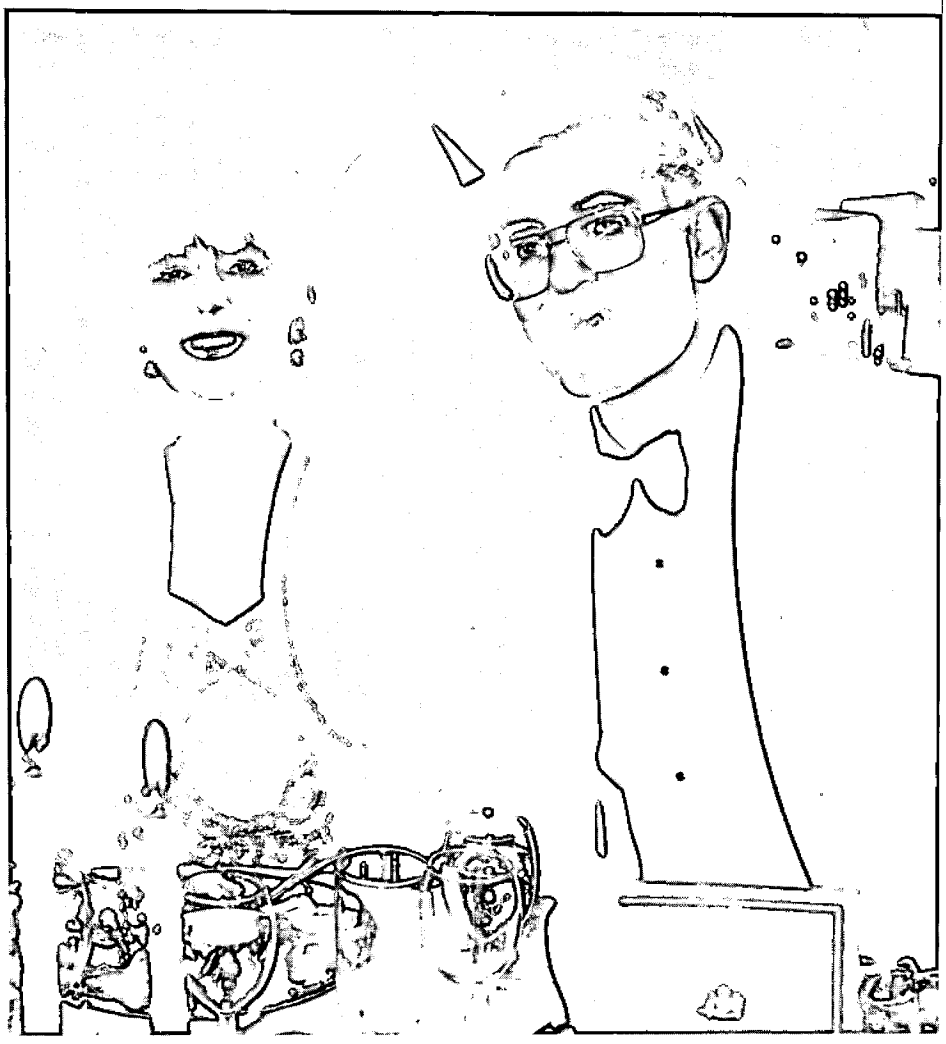
Notwithstanding the fact that so much attention has been given recently to one particular form of discrimination in the courts and the legal profession, there is now a groundswell of community feeling against another form of discrimination - that is ageism. The temporally challenged find different ways of responding and maintaining continued vigour. Sir Maurice is a shining example of the way in which the Bar provides a rewarding habitat for its members, well after they've given up running in the City to Surf. Even though Sir Maurice has well and truly joined that demographic described as the over-55s, he has a full and blooming practice.

In a recently published novel there is a touching description of the fate of an elderly French maiden aunt who, after 50 years of service to the local parish school, is eased out of her position. It is reminiscent of the embarrassing antics of R P Meagher as he tried to secure vacant possession of a room which Sir Jack Kenny QC did not wish to vacate. The author

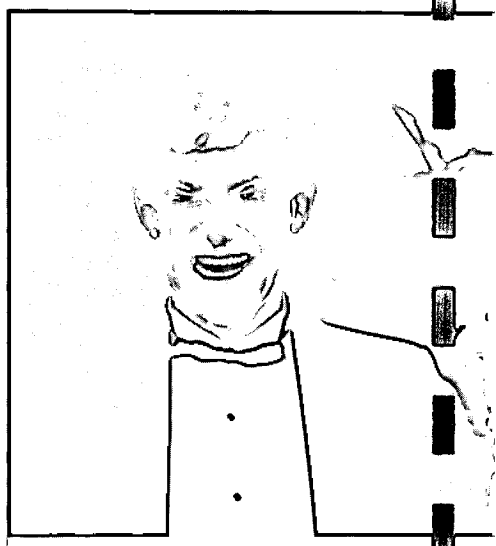
Bench and Bar Dinner - 17 June 1994



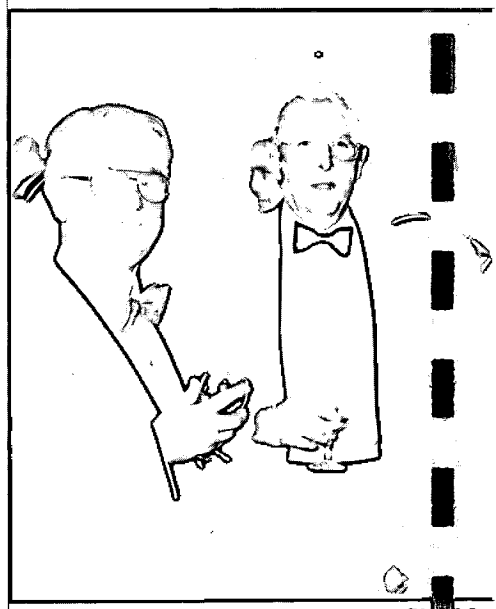
(l to r) Rt Hon Sir Harry Gibbs, G.C.M.G., A.C., K.B.E., Sir Maurice Byers C.B.E., Q.C., the Hon Sir Anthony Mason A.C., K.B.E., Theo Simos Q.C.



Alison Stenmark and Cliff Einstein Q.C.



(l to r) Jeremy Gorm[illegible] and



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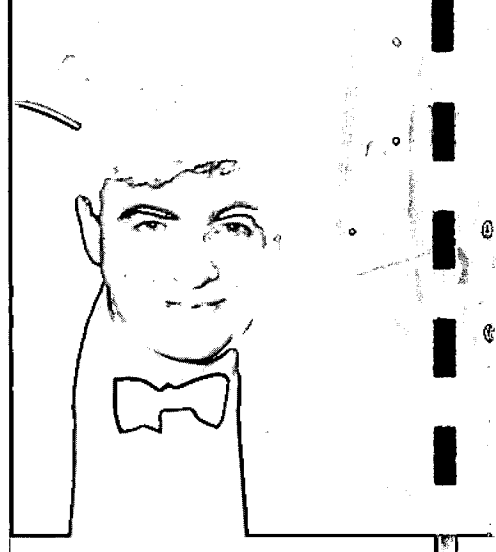
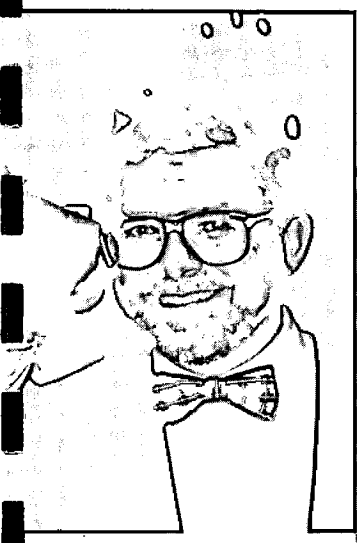


(l to r) Michael Slattery Q.[illegible] and



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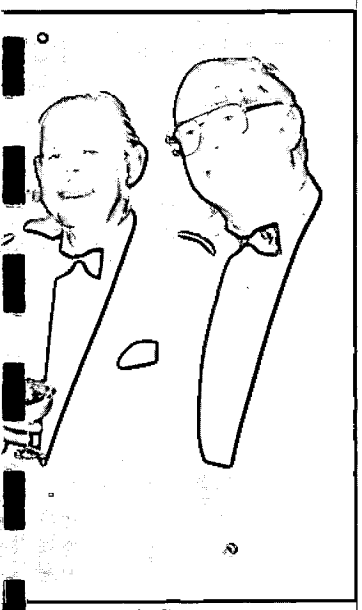

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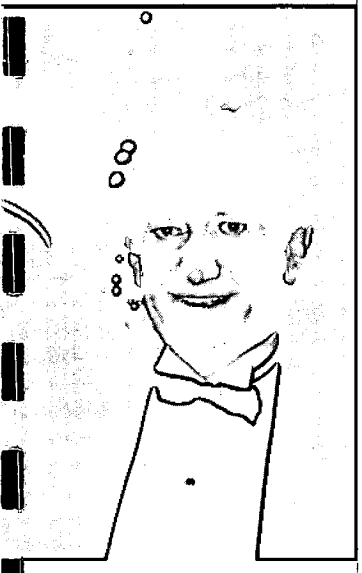

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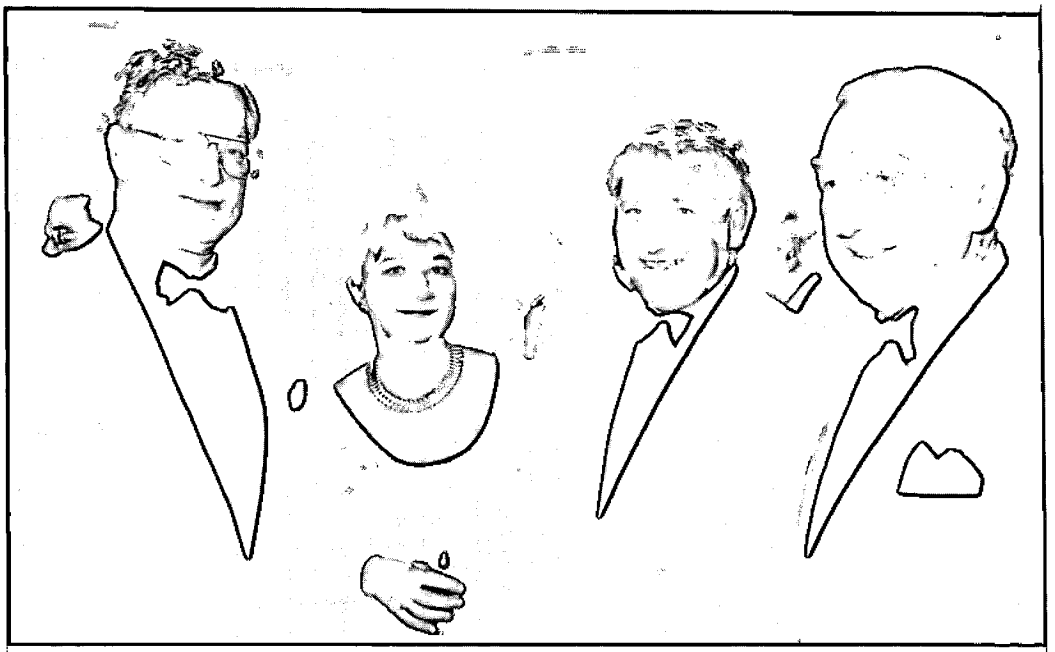
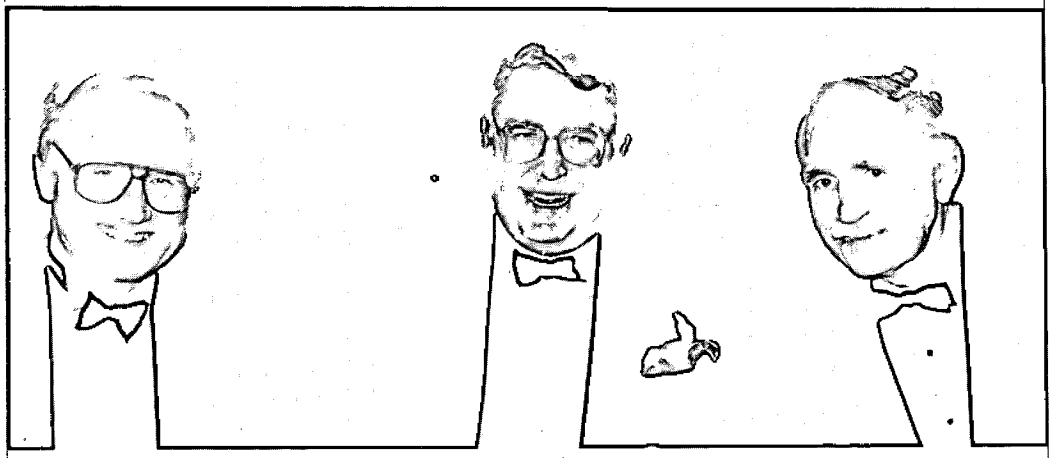
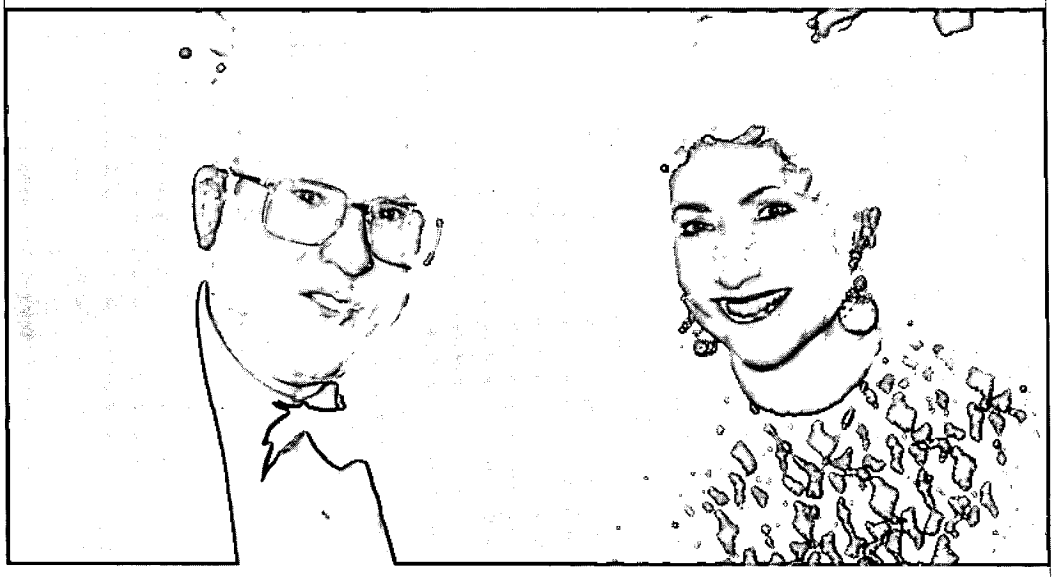


(l to r) Murray Tobias Q.C., Babette Smith, the Hon. John Hannaford, M.L.C., Chief Judge Staunton C.B.E., Q.C.



(l to r) David Fairlie, John Garnsey Q.C, Frank Riley



Commissioner the Hon. Barry O'Keefe, A.M., Q.C. and Annabelle Bennett S.C.

says of the school authorities:

"Their Jesuitical offer of a well-earned rest was accompanied by a little celebration, the purpose of which, no doubt, was to forestall any possible return by making her say goodbye in the presence of witnesses."

The purpose of this occasion is exactly the opposite. It is to forestall any possible departure on the part of the guest of honour by making him say how much he is enjoying himself in the presence of witnesses.

Therefore, I ask you to stand and to drink a toast to Sir Maurice Byers. ❑

Sir Maurice Byers CBE, QC

It's disconcerting to realise that you've been a barrister longer than many of your colleagues have been alive. Longer than Jacqui Gleeson, for example, who has said so many kind things about me. And longer, no doubt, than many others. Not longer than Theo, of course, who has also been kind to me.

Jacqueline Gleeson

But tonight we're together as barristers and as former barristers. We are all ministers of justice, sharing the one responsibility; each bound by the one duty owed to justice and having like immunities because of that. So that in what we do we are equal colleagues in the one undertaking whatever our function and whatever our age and whatever our experience.

I would like tonight to say something about the profession to which we all belong. And how it has changed during the years I've been a member of it.

In 1944 the Supreme Court of New South Wales consisted of the Chief Justice and 10 puisne judges and for part of that year of an acting judge. It then exercised jurisdiction in Admiralty, Bankruptcy, Divorce, Equity and Probate. It is comprised now of the Chief Justice, the President of the Court of Appeal, seven Judges of Appeal, a Chief Judge in Equity, another at Common Law and a third of the Commercial Division plus 30 other judges.

In 1944 the District Court was much smaller than its present Chief Judge and 57 District Court judges. There are 34 Federal Court and 52 Family Court judges. Of course, these two courts have an Australia-wide jurisdiction, but nonetheless, a considerable number of federal judges are concerned with litigation originating in this State and between New South Wales residents.

I have mentioned these numbers not to suggest that there are now too many judges or courts, but to illustrate that the legal system has become much more extensive, complicated and sophisticated than would have been expected or even considered possible 50 years ago. And I have mentioned neither the Industrial Tribunals nor the Magistracy. In 1944 the country was still at war and its growth in population and in manufacturing, industrial and rural skills was foreseen by few.

This change reflects not only the fact that the law affects more activities and transactions than previously, but that it does so by different institutions. Where the court is a specialised one, as the Family Court is, its effect upon individuals tends to be more protracted and perhaps more intrusive than is the case where a court of general jurisdiction embraces the same subject matter. When the Supreme Court, for example, had divorce jurisdiction, the undefended divorce cases tended to be pretty summary affairs whatever the ground for divorce happened to be. In those days adultery committed in the back seat of motor cars - "al fresco" to use Sir Frederick Jordan's description - was a fairly common ground for dissolution. A Supreme Court judge once confessed to me that he couldn't understand how it was done. But since my ignorance was greater than his, he remained, so far as I am aware, forever in the dark.

Given our Constitution, federal courts were inevitable. As events turned out, they were also necessary. Except for the introduction of section 40A early in the piece, the investiture provisions of the *Judiciary Act* remained in place without substantial change from 1903 until they were transformed by Attorney-General Ellicott's *Judiciary Amendment Act* of 1976. The Amendment Act repealed section 40A and thus abolished the automatic removal to the High Court of Supreme Court causes in which inter se questions arose.

The difficulty with section 40A was that few, if any, Supreme Court judges were clear as to what an inter se question was. British Law Lords, without exception, had no ideas at all upon the subject. Nor did most at the Bar. This meant that in cases of invested jurisdiction, one was never quite clear whether the judge you were addressing had ceased to have any jurisdiction to listen to you. Nor was he. Many judges were, therefore, reluctant to begin cases in which contested federal questions might arise. A result was that for 20 years few Supreme Court judges and few members of the Bar had significant constitutional experience.

When in 1975 appeals to the Privy Council from decisions of the High Court were abolished (under Attorney-General Murphy), all this changed. State courts now could be trusted with inter se questions and so section 40A went in 1976 as I have mentioned.

Thus, invested federal jurisdiction was transformed and at the same time two new federal courts began work and the practice of the law became, for the first time since Federation, a truly Australian profession. The Bar that practised before the High Court had tended to remain largely the Bar of each State or rather a small proportion to it. The presence of first instance federal jurisdiction litigation in each State before a highly regarded Court alerted the professions of each State to out-of-

State skills.

The *Trade Practices Act* helped to change the emphasis of litigation from tort to contract, from the roads and factory floors to the equally dangerous fields of commerce. The fact that two of the authors of *Meagher, Gummow and Lehane* need no longer keep their hands clean means that Equity cases are still heard even though the heyday of specific performance suits and of the interpretation of wills seems to be long past.

These changes to the law and to the legal system mean that what has really changed is the Australian community. The law and the community affect each other primarily in litigation. The citizen is there made aware of the law and has his and her effect upon its interpretation and its reach. Hard cases do affect the law and rightly so. In the interaction of the law and the citizen, the Bar and the courts are essential catalysts. Without the profession this change could not have happened.

The Attorneys-General responsible for the *Trade Practices Act*, the abolition of Privy Council appeals from the High Court, the Family Court, the Federal Court and the *Judiciary Amendment Act* both came from this Bar. Neither of their visions, nor the vision of their colleagues was a narrow one. On the contrary, we have all been responsible for, and assisted in, an unprecedented change - social and legal - a change for which the High Court Justices have in the main shown an insatiable appetite. The possession by the profession of that vision is the first thing I wanted to say.

"... the Supreme Court administered justice with an air of brutal jocularity."

The changes to the legal system are as well changes to the way the country is governed. To call the judges Her Majesty's Judges is but to speak the literal truth. It is true whether the system is unitary as in England or federal as in Australia. The curial system is the third arm of government in reality as well as in metaphor. When we appear before the courts we are engaged in the administration of justice and thus owe to the courts in this ministerial undertaking a duty which prevails over our duty to our client.

The practice of the law is thus radically and essentially different from the practice of other professions or callings. We participate and they do not in the administration of justice to the same extent as the judge, though our function differs. This difference would be known, one may think, to those entrusted with the government of the State. Yet it seems not to be, at least if some public pronouncements are to be accepted at face value. This crucial distinction between our calling and those of others is the second thing I wanted to say.

May I venture a personal view on the amendment of the Constitution to abrogate the prerogative power to appoint Queen's Counsel? The Attorney-General's right to recommend those appointments has been a long-standing means by which the Government has been able to regulate the practice of the law. It was a means which recognised the central part lawyers play in the administration of justice and the conjoint interest of the Government and of the profession in its due administration. I regret its abolition all the more because there seems to have been no good reason why Queen's Counsel should cease to exist.

It is probably true that delay and cost may be reduced by introducing simpler and more flexible rules of pleading, practice and evidence. At least that is my view, particularly if judges compelled reluctant parties to admit what was shown to have occurred even if the proof was questionable. But I cannot conceive that the *Legal Profession Act* is either likely or intended to achieve such benefits.

May I return now to the Supreme Court in 1944. It was said in those days that Chief Justice Jordan had occasion to sentence a man to death. Having done so, he rather absent-mindedly ordered that the costs of all parties should be paid out of the deceased's estate.

This anecdote, doubtless apocryphal, was taken by the profession to illustrate a remoteness from certain human feelings - a remoteness not extending to the erotic, for the Chief Justice was believed to be possessed of an unrivalled collection of literary pornography. The popular mind seems to attach this attribute, at least among the judiciary, only to Chief Justices. Sir Samuel Griffith was widely thought to be similarly disposed. Perhaps the vulgar believed Italian literature and pornography to be identical so that each Chief Justice's fondness for the former gave rise to the rumour of his addiction to the latter.

I should say that Sir Harry Gibbs, to whom the rumour did not apply, told me that in relation to Griffith the rumour was baseless.

When I came to the Bar the Supreme Court administered justice with an air of brutal jocularity. There were, of course, some judges who were brutal without being jocular and one or two who were jocular without being brutal. But, by and large, the statement is just. This attribute was shared by the Bar. Cases were, as a rule, hard fought and merciless. While discourtesy was rare, I have seen a short-tempered advocate reduced to incoherence by an adept and quick-witted counsel who was able, by his tactics, to non-suit his opponent. To some degree at least the conduct of cases at common law was determined by the presence of the jury. Jury cases are more theatrical and tense than trials before a judge sitting alone. The issues tend to be broader and forensic behaviour more black and white and, in a way, cruder. The moment is all important. Thus the contest between the advocates becomes increasingly a personal one in which putting opposing counsel at a disadvantage is seen as a way to the jury's affections or, at least, to their admiration, and thus, to ultimate victory.

In those days, too, the issues for trial were formulated in pre-*Judicature Act* pleadings. I am speaking, of course, of the common law side of the Supreme Court. The 3rd edition of *Bullen and Leake* was on every busy junior's desk.

Every declaration had to plead only those facts essential to the cause of action and no more. If more, it was embarrassing. If less, it was demurrable. Coming to the trial after battling through this jungle, having avoided the spring guns and mantraps lining the way, meant the barrister's temper was sharpened and his tolerance markedly reduced.

Often one was met by the Bench with feigned innocence,

asking "What do you think the pleader had in mind by" this phrase or that word. This was, of course, the ultimate insult. The judge had to plead no more, and thereby had become a past master of the art. No pleading, however perfect, was safe from any judge, however clumsy. Every Common Law judge was liable to ask such a question: if well disposed, with a puzzled frown; if malevolent, with an ophidian smile. So that summoning up the last reserves of one's self-control, with a false smile distorting your features, beleaguered and weary, you embarked upon the great ocean of judicial ignorance.

At this time the Victorians Latham, Starke and Dixon dominated the High Court. On the one occasion I was before him, Starke sat wigless and radiating menace. The others I encountered more often. Latham wore rimless glasses, was scholarly and dryly humorous; Dixon's angular face shone with vivacity, intelligence and a unique Mozartian charm. They were a powerful trio.

The Supreme Court was dominated by Chief Justice Jordan, around whose powerful figure his judicial colleagues orbited like so many attendant and mainly silent planets. The difference between the Courts was profound. The Supreme Court had long favoured a form of pragmatism where the likely social or legal disturbance that new ideas might give rise to became the test of their validity. That was not then and is not, I think, now the case with the High Court.

I can illustrate this difference with an anecdote.

Within a few years of my admission I argued before the Court of Criminal Appeal that a statement of intention was not a statement of fact for the law of false pretences. A decision of the Full Court of the Victorian Supreme Court had within the last 10 to 15 years restated this ancient doctrine. Sir Frederick Jordan, without consulting either of his colleagues, said the Court would not follow the Victorian decision. The High Court, after examining the earlier decisions, did apply it and, in doing so, maintained a long-standing and understandable distinction between the civil and the criminal law.

The Supreme Court chose convenience, so, I must say, did the State Parliament for after the High Court decision, the *Crimes Act* was amended to restore, as law, the State Court's legal misconception.

During the 1960s and the early 1970s there was no street in London where you might not encounter an Australian barrister or solicitor. We were all there to litigate claims for which the Judicial Committee was, we had half convinced ourselves, the only possible tribunal. Of course, it wasn't, except in the rare case where the High Court had, by previous decision irrevocably barred the prospect of success.

When in December 1973 I became Commonwealth Solicitor-General these pleasant excursions were denied to me. I must confess that, while their Lordships may have been politer than the then High Court Justices, or some of them, it was soon clear to me that they matched them neither in application nor intellect. And that has remained, and now remains, the case.

When belatedly appeals from the High Court were cut off in 1975, the day of the Privy Council as an ultimate appellate court in some Australian appeals was doomed. Even our legal system found it hard to cope with two ultimate appellate courts even though one had a more limited jurisdiction than the other. But still it was not until 1986 that this absurd and infantile system finally was given its quietus. This was made necessary by judicial decision even though the Constitution declares that decisions of the High Court shall be final and conclusive. As Humpty Dumpty said to Alice: "the question is who's to be master, that's all". And it wasn't reason, for reason denied the simultaneous existence of two ultimate courts of appeal of overlapping powers and jurisdiction, the judgment of each of which in the same matter is final and conclusive even though they may be contrary.

I hope you will forgive me if, after these digressions, I return to the pleadings. There were two immutable rules uniformly observed when pleadings were discussed. The first, the identity of the pleader was never revealed. The draftsman, perhaps one can call him author in the case of the more imaginative examples, was always referred to as the pleader. This was the case even when one was supporting one's own pleading - more necessary then than ever.

The second rule was that nothing favourable was allowed. Not the faintest hint of commendation for even the most supple or sophisticated of sentences. You may sometimes see a similar process at work when a Full Court is interpreting a statute. Or pretending to. Those wearied sighs of incomprehension! Those rhetorical queries as to the draftsman's intention - if, indeed, he was capable of forming one.

When you realise that this weaponry is just as likely to be let loose upon you as upon the Parliamentary draftsman, you realise that an essential prerequisite for a career at the Bar is a well-padded vanity.

What in other professions might be considered a blemish, even a disqualification, is in a barrister an essential attribute: lurking behind the diffident smile of the shyest junior is a conceit of Napoleonic proportions. Unless this was so, how could one survive in this most competitive, independent and gladiatorial of professions?

The Bar has been kind to most of us here. It has been superlatively kind to me. I have been lucky - something worth a thousand abilities.

I was fortunate, for example, to read with Charles McLelland - Malcolm's father. To Jerry's tuition and friendship I owe an enormous debt. I came to the Bar at the right time, at any rate, for me and was briefed in the type of case that suited my abilities.

I know the Bar faces a testing time. But we should be of good heart. An independent Bar has become an essential feature of the administration of justice in every court, State or federal. If we maintain our rights, accept our responsibilities and realise that accountability for what we do is the price of control of our destiny, all will be well.

You have done me great honour tonight. I would indeed be a monster of vanity were I not deeply moved by what you have done. To the President, to Theo Simos and Jacqueline Gleeson, to the Bar Council and to all here tonight, a not very humble barrister tenders his sincerest thanks. ❑

"Feeding the Chooks"

The first of the Public Defenders' Seminars for 1994 was held on 18 May 1994. The topic was "Feeding the Chooks". For those of us who were not sufficiently familiar with the phraseology of a recently retired northern politician, the seminar was given a subtitle:

"Should the media be given information by the Prosecution and the Defence in a criminal matter?"

The Crown case was presented by Lloyd QC, Senior Crown Prosecutor. The defence case was presented by Flood, Public Defender. A view of the relevant ethics requirements was given by McDougall QC, Ethics Convenor.

The seminar was chaired by Bowne, who brought to it not only her renowned sense of fairness and impartiality (demonstrated by maintaining the strictest of silence whilst first Lloyd and Flood, and then Lloyd and members of the audience, engaged in an at times heated discussion) but the significant benefit of a reptilian career prior to her admission to the Bar.

The views expressed by the participants were as follows:

1. Lloyd - the Crown View

When turning my mind to the topic from the viewpoint of a Crown Prosecutor, I've tried to bear in mind three basic principles of the criminal justice system. These are:

(a) unless good reason to the contrary be shown, the courts should be open to all;
(b) the press should have absolute freedom to report all that goes on in the courtroom, subject to the rules of defamation; but
(c) there is a significant public interest, which required recognition, in the protection of the names and reputations of the innocent victims of crime and of informers.

The basic premise and the Crown view is that the press should have access to all evidence. This includes transcripts, documentary exhibits, photographs, videorecorded interviews, "walk throughs" where the criminal re-enacts the crime for the benefit of police, and most photographs except for those that are particularly gruesome or are likely to cause distress to the victims of crime and their relatives, or offence to the public. There must be some good reason to justify denying the access. This applies to evidence tendered by the Crown and by the accused.

The reasons why the press should not have access to, or should not allowed to publish or disseminate, information relating to a trial, fall within some well-known and oft-quoted categories, including (and this is not an exhaustive list):

(i) proceedings held in camera in various sexual assault matters listed in section 77A of the *Crimes Act*;
(ii) incest prosecutions - section 78F of the *Crimes Act*;
(iii) the provisions of section 578 of the *Crimes Act* forbidding publication of evidence or part thereof in various cases (mainly sexual assault cases);
(iv) the inherent jurisdiction of every court to exclude the public (or to prohibit publication) if it is necessary so to do for the due administration of justice: *R v Lewes Prison Governor* [1917] 2 KB 254; *R v Hamilton* (1930) 30 SR (NSW) 277;
(v) protection of the names of informers;
(vi) the exclusion of young children from the court whilst particularly horrific or explicit evidence is being given;
(vii) non-publication of material so as not to prejudice a fair trial.

The reason for permitting access, and publication, is that everyone is entitled to see justice at work and how court proceedings are run. As a corollary, the press should be entitled to report proceedings. It is only in this way that confidence in the judicial system is maintained. It is an important precept, which must be remembered, that "justice must not only be done, but must be seen to be done".

The publication of court proceedings, including in relation to sentencing, will act as a deterrent to others from similarly offending.

It is important to explain to the public why a particular accused was dealt with in a particular way: for example, why a charge of murder was reduced to manslaughter upon the tender of psychiatric reports. Likewise, it is important to explain a reduced or lenient sentence. Publication will assist in this and will educate the public as to the workings of the legal system.

The publication of videorecorded records of interviews will show fair-minded and balanced police interrogation methods. It will educate the public as to the fairness of police and lead to increased confidence in convictions based on confessions.

Medical and psychiatric reports should be available in their entirety to explain the psychiatric motivations for the commission of crime.

In considering whether access should be allowed and, if so, to what extent, it is always necessary to bear in mind the possible need to exercise restraint in appropriate cases.

Often both the defence and the Crown are armed with inadmissible "background" or "hearsay" material. This may relate to the crime in question or to the background of the accused. If it is not to be used in court it should not be supplied to the press. However, it may be appropriate to put the press in contact with relatives to glean what they can.

The reasons for exceptions to publication are clear, both in the cases of victims of assault and in the cases of the names of informers. As to the former, the innocent victims of crime have had their lives shattered. Publications of names and details could only cause further unnecessary stress and trauma. As to the latter, it is clear that if names or identifying material were published, their lives may be put at risk. It might also be necessary to edit psychiatric reports before they are made available to the press: for example, where what is stated may expose by hearsay the names of others not on trial as having committed wrongdoing.

Access should be given at least when material is tendered. In my own view, the Crown should have a "media relations" officer who, subject to consultation with Crown prosecutors,

can provide information on a confidential basis earlier than this so as to allow timely and balanced (as well as accurate) reporting. This involves giving trust to the press to maintain confidentiality until the appropriate time so as not to be held in contempt of court or to compromise a fair trial or so as to cause the discharge of a jury.

The same principles should apply to the dissemination of material by the defence. Crimes occur for a reason. It is important that the reasons be explained and that material in mitigation which reduces the sentence be explained.

There are many common misconceptions by the public as to the law and sentencing principles. Dissemination of defence material will help to explain what takes place and why.

There are very good reasons for publishing and disseminating Crown and defence material. This can work in the interests of both the Crown and the accused. It ought to be an area where the Crown and the defence substantially agree.

2. Flood - the defence view

Flood noted:

"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."

Sir Anthony Mason (as reported in *The Financial Review* 17 March 1994. The author, Chris Merritt, stated in his report that the Chief Justice welcomed a closer relationship with the media).

I believe that there are cases when the defence can derive benefits for their client's cause by having a closer relationship with the media.

Last year my instructing solicitor and I decided that in a matter of a person who was charged with various serious offences after eliminating all possible defences, pleas of guilty should be indicated at the earliest opportunity. After devising a formula which was reduced to writing, the Court was advised on the first remand date that he would be pleading guilty and the extent of his guilt would be indicated to the Crown as soon as psychiatric assessments were completed. The media were provided with copies - there was wide and accurate reporting.

At the next appearance another document was prepared for the media and, after the Court was advised that my client would not require any witnesses called by the Crown and that his burden of guilt was beyond measure, that document was handed to the media and, again, accurate reporting occurred.

When the case came on before the judge, a social worker's report and psychiatric reports which were tendered were given to the press. Again, the result was wide and accurate coverage. There was extensive quotation from those documents.

The accused appointed his solicitor and a psychiatrist to act as spokesman to the media on his behalf.

Why? It was a sensational case and the accused could have easily been portrayed as a monster. Our aim was to get the best coverage possible of our client's version of events - also we hoped for a sentence less than life. In the long run we hoped, and still hope, that with the passing of time our client will one day secure his freedom. Some cases get into the collective consciousness of the community so that the eventual outcome may well be affected by or dictated by the folklore surrounding a particular matter. Remember Baker and Crump.

In this case I have been considering, one headline before sentence quoting a friend of the accused read:

"Just a poor bastard pushed over the edge."

Later in the article the friend was quoted as saying:

"Don't crucify him. He wasn't a total arsehole."

We couldn't improve on that.

The second case I want to consider involved a battered woman.

Looking at the big picture I believed that the time was ripe for the media to present a very sympathetic view of the accused. Again, reports from psychiatrists and psychologists which became court exhibits were made available to the press.

I took the view that, while a good behaviour bond was achievable, it was important to get a good press so that the Crown would not appeal. In my previous assessment the DPP was influenced by media pressure and a number of Crown appeals had been brought as a result.

I think that Allpas was one, so too were appeals against bonds in culpable driving cases resulting in death.

The battered wife case, however, threw up some pitfalls.

Although reports which become exhibits are on the public record, the media usually ignore them. If they are given to the media and reported, some sensitive and embarrassing material may be published.

Also, an accused who has knowledge that personal details of their lives may be broadcast to the world at large may be inhibited from full and frank disclosure to those experts who enquire into the matter and this could impede or frustrate accurate assessments.

The client needs to be told at an early stage that her or his case lends itself to a close relationship with the media so that they can express their views about doing so.

Sometimes the person who is so directly involved in the drama is incapable through emotion to make a rational decision.

It then becomes a matter of balance when weighing up the options.

My answer to the question asked in this seminar is that the media should, in appropriate cases, be given information by the defence. But the accused should, so far as possible, be in agreement and fully informed. Also, clear objectives need to be established before doing so.

In the battered wife case the accused, during the hearing and after, was filmed by *A Current Affair* which went to air on the night she got her bond. She did very well in that programme. She has since given an interview to *Women's Weekly* which also was a good positive piece.

The DPP did not appeal and she has held her bond.

3. McDougall - the ethical considerations

The first point that I should make is that I am expressing a personal view. My view should not be taken as "the Bar View". I trust that none of you will ever have to justify yourselves to the Professional Conduct Committee to which I belong (or to any other professional conduct committee) in relation to the topic of this seminar or otherwise. But if you do, and if the occasion arises out of the topic of this seminar, please do not think that you can excuse yourselves simply by pointing to what I have to say.

There is a strong and readily identifiable public interest in the fair and accurate reporting of criminal proceedings. That interest can be seen to be served by counsel - prosecution or defence - answering questions from the media, to ensure that the media are in possession of facts relating to a trial or issues raised in it. For example, there would be no criticism of counsel who in accordance with the Rules - as to which see later - makes available to the media upon request copies of non-confidential exhibits: cf *Home Office v Harman* [1983] AC 280.

The "old" Bar Rules (Part L - Advertising and Public Appearances) imposed restrictions on the extent to which a barrister could properly communicate with the media. To the extent that those Rules, on a strict interpretation, might have been seen as impeding communications in aid of the fair and unbiased reporting of trials, I think that they should have been read down. In any event, and subject to the intervention of the Attorney General, we are about to be regulated by the "new" Rules. Although those Rules are presently expressed to be in draft form, you should assume that they will soon govern your professional conduct.

Those of the new Rules (as I shall call them) which deal with the subject matter are:

"59. A barrister must not publish, or take steps towards the publication of, any material concerning current proceedings in which the barrister is appearing or has appeared, unless:

(a) the barrister is merely supplying, with the consent of the instructing solicitor or the client, as the case may be, copies of exhibits admitted without restriction on access or of written submissions given to the court;

(b) the barrister, with the consent of the instructing solicitor or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial and:

  (i) the answers are limited to information as to the identity of the parties or of any witnesses already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court, the client's position on issues in the case, and the client's intentions as to further steps in the case;

  (ii) the answers are accurate and uncoloured by comment or unnecessary description; and

  (iii) the answers do not appear to express the barrister's own opinions on any matters relevant to the case.

60. A barrister will not have breached Rule 59 simply by advising the client about whom there has been published a misleading or coloured report relating to the case that the client may take appropriate steps to present the client's own position for publication."

It will be seen that these Rules do not extend to soliciting publication in the press; the "permission" which may be inferred from Rule 59 arises only when and to the extent that a barrister is answering questions from the media. When this situation arises, the extent of the communications which the barrister may make to the media is clearly limited. The importance of the solicitor's or client's consent should not be overlooked, nor should its non-existence be ignored.

I believe that the position, in relation to communications with the media, varies as between prosecuting and defence counsel. To be sure, the Rules to which I have referred apply to both. But, as the Rules recognise, a prosecutor has a special character. The Rules which indicate this include:

"62. A prosecutor must assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to carry weight."

This list is by no means exhaustive. However, it indicates (as do the following Rules 66-71, which I shall not set out) the restrictions arising out of the peculiar function which a prosecutor has, appearing not as the representative of a party in adversarial litigation but as the representative of the impartial State; the interests of the State lie as much in securing due process according to the rule of law as they do in securing the conviction of the guilty.

If the prosecutor owes to the court duties of the kind towhich I have referred, it would be an extraordinary and intolerable situation if the prosecutor, through communications to the media, were able to subvert those duties or the high purpose which they are intended to serve.

In general terms, it seems to me that the requirements of public policy and of the Rules can be served where:

1. both prosecution and defence counsel, armed with the appropriate consents, respond to requests from the media, and do not solicit contact or volunteer material;
2. both prosecution and defence restrict themselves to facts rather than opinion;

3. both prosecution and defence, bearing in mind that juries read newspapers, listen to radio, and watch television, bear in mind the desirability of fair and even-handed reporting;
4. both prosecution and defence avoid giving "background material" or anything other than factual matter arising from and relevant to the issues at the trial; and
5. prosecutors conduct themselves vis-à-vis the media as though the obligations which bind them in relation to the court bound them equally in relation to the media.

I should make it quite clear that the references to the role of the prosecution are not intended to suggest, by silence, that defence counsel have, or should assume, any licence either in relation to the court or in relation to the media. I remind them of their obligations to the court, which are set out in Rules 21 to 35 (and in fact encapsulated in the heading to those Rules - "Frankness in court") and again in Rules 35 to 50 (once again encapsulated in the heading "Responsible use of privilege"). Defence counsel, just as much as prosecution counsel, should ensure that their conduct outside court in connection with a trial is of no lower standard than the conduct which the court justifiably expects and receives from them in relation to that same trial.

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The speakers were followed by a "question and answer" session. Many interesting points of view emerged. At the risk of giving credit to some, it is particularly appropriate to note the view expressed by Zahra and others that the Crown enjoyed a significant advantage in relation to the press, first, because the Crown addressed first, secondly, because the press tended to concentrate on and report the "juicy" bits of the Crown case, and third, because the press rarely stayed to hear the exculpatory material elicited or presented by the defence. It is fair to say that Lloyd acknowledged the justice of this approach. One suggested solution - and certainly one which is seen to be emerging in civil trials - was that both sides should open before the evidence was taken. That being so, there would be, if not a fair, at least a balanced presentation of the cases for both sides and at least the opportunity for the press to print both sides.

Molomby, no doubt drawing on his reptilian past, suggested that the media had no interest in the fair and balanced reporting of trials. The interest of the media lay in publishing what would appeal to their audience. Given this, he suggested that it might be desirable to forbid all reporting of trials until they had concluded (and, by extension, of committal proceedings until any resulting trial had concluded) but to allow reporting - fair, balanced, or otherwise - thereafter.

Another oft-expressed view was that the standard of reporting of trials has declined to an abysmal depth. It was pointed out that whereas in the past the press gave considerable attention to trials, and printed lengthy and accurate reports, the position these days - particularly with the electronic media - was for the short article or the quick "grab". Neither of these approaches is consistent with fair and balanced reporting. (The reticent and discreet nature of the chair was even more apparent whilst these charges and counter-charges were exchanged.)

There was, among some of the participants, a view that the Crown from time to time was seen to go too far, particularly in relation to opening statements, to exploit the advantage which occurred by reason of the not unnatural tendency of the press to report that which is exciting and to report it as soon as possible. Other views were expressed that the press was not particularly interested in the public interest, or in fair and balanced reporting, but was interested only in printing what would sell.

Another view emphasised that a close working relationship between counsel and the press - such as occurs openly in America and, it was said, behind doors in the United Kingdom - could be unhealthy. It could take the trial out of the courtroom and into the media. The view was expressed that if the press could not be compelled to print fair and accurate reports, they certainly should not be used by one side or the other to attempt to engender a more favourable result for the client.

The seminar raised, and discussed, some very important issues. Of its nature, no resolution was reached in relation to those issues. Nonetheless, it was a thought-provoking and interesting discussion of a topic which is of vital importance to all of us. ❑

Fine Tuning

Mr Bathurst QC: "... If Your Honour pleases. This is the sixth version of the statement of claim."

Mason CJ: "I often heard that you never got a good statement of claim unless it had been amended about seven or eight times. Sir Garfield Barwick used to say that."

Murphy and Allen v Young & Ors, application for special leave to appeal to the High Court, 16 September 1994) ❑

Pond Life to Froglike
Pro Bono Bon Mot

Andrew Robins continues to explore the travails of the junior Bar.

We left the elementary pond creature in a state of aspiration, unexpectedly alive after an out of pond Federal Court experience.

How has he travelled the evolutionary inch? What has he learned as he walked the peerless blue corridors of the famous flash floor in his never ending search for space?

He learnt about Pro Bono.

The 58th Annual Report

Just when irrelevance settled in like a comforting fog along came a document of inclusion - the Bar Association 58th Annual Report - a chance to take stock and even vote it.

We can now share ourselves better with our public. Put bluntly we can advertise. We can also publish a directory of our skills (at least those skills professed by those of us who are more than barely in it). This is a result of law reform and is now possible notwithstanding the decision of the House of Lords in *Shaw v DPP* [1962] AC 220 (the "Ladies Directory" case) which clearly applied to us in a darker age.

While our publication has its own natural comedy it is, nonetheless, lawful.

We can also draw public attention to all the work that is done for no charge at all of which we are all proud.

Pro Bono Publico

Did we see the list in the 58th Annual Report of the 23 episodes of work done for no fee?

All that work - for no fee. Work for no money. Imagine.

But wait, grateful public, there's more. We know you want more. And we know you get more.

There are many other Pro Bonos, that I know, that go far beyond Pro Bono Publico.

They are the unsung Bonos, the other order Bonos discovered in the passage from elementary pond life to froglike while floating in the peerless blue.

They are the half year's great discovery.

Pro Bono O N O

This is a common situation where a mistake is made by asking a solicitor what to charge.

You start with a figure and are bargained. If you fall for this you are not paid. So instead you do this.

Send a bill that the flicker would send. Remember we emergents are not flickers, we are flickees and our motto is "no flicks no fees, no dog no fleas". Then add

"I was just speaking to Bob the other day and we agreed it's an interesting point."

Poor form no doubt but it has these consequences

1. the solicitor will think you are so flash that you actually do move in Bruiser and Banana circles (one's Burgfuhrers carefully name coded so no-one could possibly identify them)

2. he/she/it has never heard of you as a reflection is his/hers/its lack of importance and because you have just arrived from Hong Kong where, you infer, you were known as the "Sheik of the Peak"

3. by "Bob" you mean Ellicott QC or Lord Alexander QC, "Many thanks, Maggie". In fact you mean Bob the man who handles the recycling who's been having problems meeting the maintenance for his 7 children in Dunedin since the wife tracked him through The Astra "Lost and Found"

4. you will be paid promptly and with thanks.

Pro Bono Oh No

This is where you do work, send a bill, and promptly receive a cheque and it all seems too easy. That's because it is too easy. This happened very recently to a fellow emerging creature. Cheque received, 13,000 bucks. Bounce, bounce, bounce. Oh no. Pro Bono.

Pro Bono Promisso

This is the situation where while the work done is, well, free, it is just "a tip of an iceberg", you are told. In fact it is a tip without an iceberg or the iceberg is also free.

Pro Bono Ho Ho

Similar to Pro Bono Oh No. Only this time the recipient of the bill falls about laughing when reminded that he took eminent Queen's Counsel to offshore documents showing he could pay his bill 1,773 times over. He is a clever person, otherwise describable, who knows the great secret of Pond Life.

Those who can't pay - don't.
Those who can pay - don't have to.

You have to laugh. Pro Bono Ho Ho.

Pro Bono God No

You are briefed on a panic basis and work like a lunatic. In fact you may work for a lunatic. Eminent Queen's Counsel is briefed as well. Furiously you draft an affidavit, writing on your knee. You fax to the solicitors as you go because you lack a typist of your own. Unfortunately, you also fax the first chapter of a pulp novel you are writing in case the "Bar Thing" doesn't work out. After a while your writing only barely resembles English, the pages fall on the floor and are scrambled. At 6 pm you receive back the coagulant of the day's exertions and begin to rewrite it.

It begins

"Samantha the Australasian Supermodel sat exhausted in the Mascot First Class departure lounge reading the prospectus for the launch of her pret a porter collection. Bored, she thumbed the section on 'Subordinated Participation in the Cozzie Line'. Hayman Island, as she knew it would be, was far too hot this time of year. She couldn't wait to get back to the Winter cool of Cap D'Antibes which her major financial backer had recently purchased as their European Headquarters. It was January and she looked laconically at the other first class passengers. 'Bloody barristers going to Tuscany' she mouthed in the shadow of her Ray Bans as she avoided their eager faces.

'Didn't I once act for you in a matter with..."

You seek, upon an oath of blood, the assurance that no one important will see it until it is put into order and translated into English.

You are then told that Eminent Queen's Counsel has just received his copy.

Oh God no.

You consider travelling one stop past Watson's Bay on the 325 Bus but resolve to deny and dissemble in the morning. With luck you will outlive the impression.

Then the client doesn't pay - see Pro Bono Ho Ho.

Pro Bono Loco

A seized upon offer by you to do work for a relative for free.

Pro Bono Yoko

Trapped on a social occasion against the wall by a person who in 1968 recorded a song which peaked at number 12 and now anchors a greying cabaret act your advice about the perils of hunter gathering hallucinogenic weeds, which you are happy to confirm on the meter, is met by the observation that all material things represent a false consciousness and that all the world's problems could be healed by hugging.

Pro Bono Ro- Ro

Commonly concurrent with Pro Bono Ho Ho. Takes its name from the Roll On Roll Over Cross Channel Ferry. One renders or is about to render a bill and is invited out on Sydney Harbour. Large power boat pumps fumes while consuming a day's output of a Bass Strait joint venture. You green at the stern while host describes the features of his mobile phone. He points out Poon Tang Point and tells you why he didn't buy it (not quite the right kind of North facing). The better Premier Crus are discussed, indeed poured, and the day ends with yourself poured onto the wharf least convenient for your travels with the question of your fees undiscussed.

Pro Bono Blotto

Similar to Pro Bono Ro-Ro with a liquid lunch and no boat.

Pro Bono Polo

Less common here but takes its name from the Windsor Smith's Lawn phenomenon where, on the pretext of watching people on horses, other people are met that "could advance your career".

They don't.

They analyse what they read about themselves in the newspapers that week and the problem of obtaining decent industry assistance when the bloody politicians expect commerce to compete.

You find yourself agreeing with the statement that at least Mussolini made the trains run on time and what the world needs is more monopoly and less of the wrong type of government interference especially from those itty bitty countries who don't know when they are on a good thing. You also learn that if the government stopped paying girlies to get pregnant there'd be far fewer bastards. You are left to wonder if the phenomenon has another origin.

Then it rains.

Pro Bono Tally-Ho

Different use of horses, extreme physical danger, same motive, same effect.

Pro Bono Bozo

A solicitor you know extremely well who has never briefed you asks a favour. You think its Pro Bono Promisso but in fact his party clown cancels and his children think you are really funny.

Pro Bono Disgusto

Similar to Pro Bono Oh No save that client and/or solicitor have a personal freshness problem. They still don't pay.

Pro Bono Pinnochio

This is a rare form of pro bono practised by those who seek political pre selection on the basis of all their pro bono publico. It's a rare affectation, at emergent level, but it can happen.

Pro Bono Oleo

An acute form of self conscious pro bono unfairly ascribed to a Continental origin. It is similar to Pro Bono Pinnochio in that the self advertisement and self congratulation of good doings is coating thickly in smarm. It is considered an unsuccessful strategy in these parts for cultural reasons although that attitude is changing.

Pro Bono Solo

Named after a lolly.

Free appearance as a junior for the benefits of exposure. Client is often an institution. Opponent may act in the interests of someone who belonged in one. Senior person does the work while you look thoughtful and concerned. Senior person gets the white bit with the peppermint in it, you get the middle. Only fair.

Pro Bono Cameo

Similar to Pro Bono Solo. You go along to something that will be reported in the newspapers and, of course, the law reports and will eventually run for months - without you. The Bar table bristles with tres chic junior counsel comfortable among the Gods, many of whom are present.

Eventually Someone Important QC will be quoted on the Television News complete with photograph (and caption) saying

Mr Someone Important QC

> "You will agree, will you not, Mr Captain of Industry, that transferring $20,000,000 of Trangalacto funds into your secretary's number 2 shopping account was very, very naughty?"

Mr Captain of Industry

> "It was standard practice in the industry at the time and with the benefit of 20/20 hindsight I admit I may have been unwise. But I deny categorically any wrongdoing on my part."

With luck, all those solicitors who have to sit around those funny little tables that wouldn't hold up a desk corner in Chifley Square, will confuse you with the company you keep and, to your benefit, maybe give you a run in the Big One.

They are not so easily fooled.

Pro Bono Talk Show

You ask yourself - if you joined the self-unemployed for the freedom it involves, why can't you "work at home" on a hot sunny day?

To whom after all are you answerable?

You find yourself considering the historical origins of the privilege against self exposure to a pecuniary penalty in the light of the decision in *Environmental Protection Authority v Caltex Refining Co Pty Limited* (1993) 118 ALR 392 when talkback radio catches your ear. They are talking about

1. immigration
2. fecundity induced by welfare (that again)
3. the application of Mabo (No 2) to Bondi Junction

You whip in a fax and it is read over the air. You do this Pro Bono. You reassure the listeners on a matter (number 3) "of very great concern to ordinary Australians".

Unfortunately there are many who want to hear that Bondi Junction is now recognised native title land and it's the fault of all those pinkos in Canberra. There are now several people with counter rotating eyeballs who wish to kill you.

With luck they will not become your clients.

With more luck they will. Some of them can pay.

Then there are forms which are not pro bono, strictly speaking, but which have pro bono aspects.

Pro Bono Reducto

Legal Aid work. One sends a bill thought to be the smallest bill capable of independent survival on a fee note without collapse through embarrassment.

However humble it is reduced by 20%.

Pro Bono Choko

Payment in vegetables (that you do not particularly like).

Then there are the miscellaneous no go bonos and so so bonos.

Among these -

Pro Bono Groucho

You grumpily agree to give advice for free but the advice you give is that "you get what you pay for". Very poor form indeed. Take an Aspro.

Pro Bono No Go

When called up for Pro Bono Publico one finds oneself unable to come to the phone.
This is also known as the Pro Bono Go Slow or the Pro Bono No Show.

No Pros Contra Bonos

This is an historical reference only and a reflection of the subject matter of *Shaw v DPP*. It is also a contraction of "conspiracy contra bonos mores" which, fortunately, no longer applies to our Barristers Directory.

Pro Sonny Bono

Client appears in flared trousers and is worth avoiding for that reason alone. Client remembers the words to "I got you, Babe" and proves it. Still doesn't pay, although you do.

Then there are the anti bonos or rare benevolent forms of bonos.

Pro Bono My Go

This is a common form of pro bono practised unselfconsciously by most emergents. Leaving aside Fortress Wentworth and the Open Portcullis Policy occasionally the amazingly important can be trapped with a question their training forces them to freely answer and answer for free. They answer because they know. People are like that. The answer can be repackaged and sold as recombinant advice for which, intoxicatingly, you take all the credit.

But then you don't get paid.

Nevertheless, the principle is sound.

Pro Bono Whacko

Not really a matter of madness, although it may lead to it. This occurs when someone sends you money for no reason you can identify. The money, not the work, is free. You may have done work, of course, but you forget. It was probably a very long time ago. Your records, that you can find, only go back one week. You just say "whacko" and bank it. You'll work out your accounts one day.

After all, as everyone will keep telling you -

"It's early days yet. Things can get better."

Then again, it's early days yet. As anyone can tell you - things can get worse. ❑

Registrar, Court of Appeal v Craven

(Coram: Kirby P, Meagher JA and Powell JA)

On 2 August 1994 on the first day of hearing the following exchange took place during the opening of counsel for the opponent, charged with contempt:

Mr Gruzman: The question is what "without lawful excuse" means. Your Honour the President in a recent case dealt with the meaning of "without reasonable excuse". So what is the difference? Your Honours, I looked up the dictionary.

Meagher JA: No need to go overboard! ❑

Keynote Speech by Justice Sally Brown delivered to the Victorian Women Barristers' Association*

This speech was not prepared for publication. It draws heavily on published and unpublished articles by a number of Canadian academic writers including Dr Sheila Martin, Professor Kathleen Mahoney, Professor Mary Jane Mossman and Professor Lynn Smith, to whom I am indebted.

It is not new to suggest it may be hard for judges to be impartial. Lord Scrutton is often quoted as having said "... the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish". This comment was made in the context of class bias.

Similarly, judges have written of innate biases towards particular classes of arguments. Lord MacMillan wrote that: "The ordinary human mind is a mass of prepossessions inherited and acquired, often nonetheless dangerous because unrecognised by their possessor ... every legal mind is apt to have an innate susceptibility to particular classes of arguments".

What may be new is to question judicial use of stereotypical assumptions and untested beliefs, which may result in us tending to judge people on the basis of their group membership rather than their individual characteristics. It is important to question whether the traditional safeguard against judicial error, the appellate process, can deal adequately with manifestations of this sort of bias.

You do not want a history lesson, but it is worthwhile to look at the long, systemic and sometimes systematic exclusion of women from the law and legal profession to better appreciate dynamics and consequences of it in the present. Perhaps lawyers are particularly susceptible to established norms, as the notion that prior acts are precedents is so entrenched in our thinking. For whatever reason, lawyers seem particularly resistant to change, and the response that "this is just the way things are done in the law" is often the response if change is mooted. Customs very easily develop into traditions which are stronger than law, and tend to remain unchallenged long after the reason for them has disappeared.

If you are feeling glum, remember that for many years women were not allowed to be lawyers and couldn't vote. Restrictions on our ability to practise in Victoria were removed in 1903 when an A*ct to Remove Some Anomalies in the Law Relating to Women* was passed. At that time women could not vote; the male Members of Parliament who passed that legislation were elected by men only.

In 1908 the *Adult Suffrage Act* was proclaimed, giving Victorian women the right to vote in State elections, but only the right to vote for men. It was not until 1923 that women were eligible to seek election to the Victorian Parliament.

When Miss G (Flos) Greig, the first woman in the Commonwealth of Australia to be admitted to practice, commenced her articles in 1903 she could not vote in State elections, or stand for the Victorian Parliament. The first woman elected to a Parliament in Australia was Edith Cowan in Western Australia in 1921; the first women elected to Federal Parliament were Dorothy Tangney to the Senate and Enid Lyons to the House of Representatives in 1943.

A Canadian Royal Commission on Equality and Employment in the 1980s defined discrimination as an arbitrary barrier which stands between a person's ability and his or her opportunity to demonstrate it. If there are barriers to women's fair and equal participation in the legal profession this constitutes discrimination.

When women first sought admission there were lots of splendid judgments in the United States, Canada and the United Kingdom which asserted that it was against order, morals and decency for women to become lawyers. Judges found that they should be excluded on the basis that their proper place was the home; more suitable roles for women were available; that women lacked the capacity for logical reasoning; that they would wreak havoc with juries and disrupt the proper order of society. And what about clothes? And toilets?

I say that although the formal barriers to women's entry into the profession have long been removed, many of these stereotypical views still operate as a starting point for how some people think of it. There is still a tendency for men to define women in the law as outsiders, as different and as if acts of generosity are necessary if they are to be included. The language encapsulates this; women were *given* the vote and *allowed* entry into the profession. By whom?

Now barriers to women's careers in the law are usually ascribed to legal practices' inability to accommodate female parents with family responsibilities. If you don't have such responsibilities it is assumed you soon will, to such an extent that one almost needs proof of menopause before the barriers lift.

This is particularly relevant to the Bar. Last Saturday's *Sydney Morning Herald* had an article on John Coombs, the retiring President of both the New South Wales and Australian Bar Associations. The article states:

> "Coombs maintains he has been a keen supporter of women at the Bar - although given their numbers (just 115 out of 1756 barristers in Sydney) this is one area where he has not been successful. Coombs suggests that although 50 percent of law students are women, they are not willing to make the personal sacrifice necessary to survive. 'The job is so demanding that you have to be very dedicated to it. My ex-wife used to say that the Bar is not just your job, it's your mistress too, and it is like that.' "

It goes on to say that his own family have endured his obsession and that his daughter, now 23, remembers that if she was especially missing him when she was a little girl he used to take her to his chambers for the day and even into court with him.

If Mr Coombs is quoted accurately and did speak of personal sacrifice, to whose sacrifice is he referring? His own? Or that of his wife and children? If it is his own, and the sacrifice was an inability to spend time with his children, you might ask what is the equivalent sacrifice for a female barrister? Is it not to have children?

Equality before and under the law and equal protection and benefit of the law are central to the debate. If we keep this

in mind we can ask what Dr Sheila Martin, Dean of Law at the University of Calgary, calls "How Could" questions.

How could a senior partner pander to the perceived prejudices of clients by withholding or withdrawing a file from a woman rather than defend the competence of a female colleague?

How can law firms hire out their own lawyers to draft employment equity policies when they have none themselves?

How could a conference panel on the changing demands faced by lawyers have only male speakers?

In a way, it was easier to argue the case when the exclusion of women from the legal profession was categorical, total and formal. Today, aspects of exclusion are systemic, circumstantial and less formal and when blatant forms of discrimination become unacceptable, they often go underground.

The arguments against female lawyers have proven surprisingly durable or have been retooled for modern times. Biologically-based justifications still predominate and our biological capacity to procreate is too often reinterpreted and imposed as a limitation.

We are often told that we shouldn't complain because things are somehow better now. This is true in a limited sense but better is a relative concept. Better relative to what and to whom? Is the scale good, better, best, or is it something more like terrible, bad, less bad, almost good? The tardy removal of a limited number of the more obvious barriers is a very limited form of progress and, as Sheila Martin asserts, lawyers would certainly counsel a client against accepting such a disadvantageous settlement if they truly believed that client had an entitlement, and this was all that was offered.

Many male lawyers who think that there are already enough women in the profession and that they have sufficient opportunity, may have internalised the 19th-century cultural expectation that women are not supposed to be lawyers. If this is your starting point it is easier to claim that we should be thankful for the gains that have already been made and dismiss goals of numeric equality, structural change and full participation as an alarming set of circumstances which simply go too far.

Justice Rosalie Abella of the Ontario Court of Appeal says that equality is evolutionary and that what constitutes adverse discrimination changes with time, with information, with experience and with insight. People say "things are better now". They are. But the statement can be simultaneously self-congratulatory and renunciatory; taking the credit for changes but disclaiming the need for future struggle. Such statements are based on a preference for allowing equality to simply evolve with the passage of time, without further action or turmoil. Sometimes they are proffered as the reason why the profession can take a rest from reform and many of us ourselves may proffer them as a reason why we do not have to confront the reality of inequality, or take risks for other women by speaking out when we know there are real costs for doing so. If the operative belief structure is that generally there is sex equality in the profession, but a few problem areas remain, examples of existing exclusion will be defined and potentially dismissed as isolated exceptions to the general rule of inclusion.

SOME IDEAS TO FOSTER CHANGE

Don't resort to past practice

The only way a discriminatory past can contribute to an egalitarian future is if we learn from and refuse to repeat the lessons of history. We should therefore expect that the changes required to achieve genuine equality in the legal profession will be like nothing we have seen before, troubling as this is to a profession schooled in precedent. We must also be prepared for some suggested solutions not to work or to raise unanticipated problems. There is no simple solution, and those who foresee a one-shot remedy will not only be disappointed but may also unjustly label persistent equality-seekers as chronic complainers.

Operate as if we truly believe that women have entitlements in the legal profession

There is a tendency to characterise the unfairness in the profession as a women's issue rather than as a structural flaw. In attempting to make a case that exclusion continues we do so under the very conditions of sex inequality we seek to change, and this itself means that we are sometimes seen as less credible participants. Discrimination in the legal profession must be defined and treated as a problem of the profession rather than a problem of the women who suffer its consequences.

Attention should be focused on what is said, not how it's said

Too easily questions of voice and tone predominate. No good advocate wants to alienate his or her tribunal, but women who press for change are often labelled strident, shrill, angry or upsetting, adjectives which are never applied to women making the case for the status quo.

It is ironic that whilst the stereotype is that women are emotional, we are often denied the opportunity to express anger, especially on our own behalf.

Change requires individual action, personal responsibility and hard work

All that the passage of time will do is make us old. It is arguable that the participation of women has itself changed the structure of the profession's hierarchies, so that instead of rising to the top with time, the top is redefined to keep us out.

One of the hardest things for men and women to accept is that passive acceptance of a flawed status can contribute to the creation of disadvantage. The faces of gender bias are intensely personal ones. I suggest we must think systemically, but act individually. The law is essentially a self-regulating profession, and there are many people with the power to effect significant change, both by decision-making authority or moral persuasion. Every lawyer should have a personal commitment to equality.

Cardinal Newman, in a famous letter to the Duke of Norfolk, wrote: "I drink to the Pope - but to conscience first".

May I follow his lead and say:

"I drink to the Law - but to equality first". ❑

* *(Reprinted with the kind permission of Victorian Bar News)*

For more than 100 years a directory containing ratings for most of the attorneys practising in the United States of America and Canada has been published in the United States of America. According to a recent edition (1991) the directory, the Martindale-Hubbell, develops its ratings for individual lawyers by soliciting confidential opinions from members of the Bar, and from the judiciary. The Martindale-Hubbell now stretches to thirteen or more hefty volumes, and has come on some since 1874 when James B Martindale noted his aim as being to "furnish to lawyers, bankers ... and all others who may have need of business correspondents away from home, the address of one reliable law firm, ... in every city and town in the United States".

The NSW Barristers' Directory may not develop so many volumes but it is reasonable to expect that in time it will incorporate entries for the whole of the Australian Bar and is released annually. It is a compulsive and impressive read. Its editors, John Garnsey and Babette Smith, have assembled a fascinating collection of self images. Warmly endorsed by our Chief Justice and others, the Directory was launched on 7 September. In a note to the editors of *Stop Press* at that time, Garnsey expressed the hope that the Directory was one of which we would be proud. That was not a vain hope, I think. Though not required by the *Legal Profession Reform Act*, that Act was probably a *causa sine qua non* for the production of the Directory. Previous collections of names of NSW barristers were not exactly riveting reading. The annual Law Almanac, of course, had its uses. It was a handy reference work for barristers wanting to pull rank in the lift, or incredulous judges checking to see whether those appearing in front of them were in fact admitted. Occasionally Attorneys General were known to consult them to ensure their preferred judicial appointees were in fact the ones appointed. (Even so, urban myth suggests some parallax errors have occurred, resulting in one or more, alas now dead, judges, being appointed, to the surprise of the relevant judges and Attorneys.)

The Directory fulfils the traditional roles and much more. Solicitors and members of the public will find it extremely useful. Though counsel have nominated their own fields of interest and of practice without necessarily being skilled or experienced in any of them, it is an impressive beginning. It can reasonably be assumed most counsel would not have nominated fields in which they have no relevant skills, and that none will have nominated fields of interest which bore them. The authors note the difficulty of creating categories. In creating and linking categories the authors have my sympathy. The next edition could make greater use of the invitation extended for the first directory to nominate special fields. For some of those special fields could themselves become categories, given the same treatment as those used in the initial survey. Medical negligence, for example, would probably deserve its own category rather than being lumped into professional negligence - for it is increasingly a specialised area and one of substantial growth. There are others, too, such as immigration, at the moment lumped into "administrative and constitutional", worthy of such consideration. Accepting the authors' difficulties in confining the number of categories, one is struck by some of the unusual results in the survey. I had no idea the bar had so many constitutional lawyers. And what about all those dust disease specialists? (In fact, interestingly enough, many of our constitutional lawyers are also big in dust diseases.)

Apart from some amusing results from the slightly idiosyncratic linking of categories, the Directory must be seen as a triumph.

Of course, there have been some glitches. Hunter J and Lindgren J appear still as of counsel, although they were appointed some time before the release of the Directory. One medical negligence specialist (Bronner) does not appear at all in the list of barristers. One barrister (I Byrne), clearly a prodigy, was apparently born only eight years before his admission to the bar.

I do not know that the areas of practice table is all that easy to follow. Next time the authors might well consider (space permitting) listing each "special field" category much as it has done with the area of practice table and listing under each area lists of counsel and their dates of admission in order of seniority.

The Directory is well laid out. So far as I can see, it does not contain any pictures of gavels. It has excellent biographical notes on some more prominent past NSW barristers, and a good potted history of the bar. Perhaps future editions could say something of the contribution of some early female members of the bar.

Consideration should be given by the authors of future directories to include a full set of the NSW Barristers Rules and relevant extracts from the *Legal Profession Act*. Given that most Australian bars have now adopted the NSW Rules almost in entirety, the expansion of the Directory to include members of the whole Australian bars is by no means out of the question.

The most damning thing I can say about the Directory is that it is only due to come out every second year. It is such a valuable tool to members of the public and to the solicitors and barristers professions, that, given the multiplicity of changes at the bar each year, it is well worth considering being made an annual event. Perhaps, in time, we shall see an annual and multi-volumed "Garnsey-Smith". ❑ Stephen Walmsley

Babette Smith and John Garnsey QC, editors of the Barristers' Directory

Book Reviews

Lewis Australian Bankruptcy Law

Tenth Edition - **Dennis Rose QC**
Law Book Company 1994 RRP $49.00

The tenth and most recent edition of *Lewis Australian Bankruptcy Law*, in which the law is stated as at 31 December 1993, is the sixth by Dennis Rose QC, the Chief General Counsel of the Commonwealth Attorney-General's Department.

This work is not, nor does it purport to be, a substitute for other excellent materials available in the area of bankruptcy law, most notably the comprehensive annotations to the *Bankruptcy Act* 1966 (Cth) and the *Bankruptcy Rules* in *McDonald Henry and Meek Australian Bankruptcy Law and Practice* by C Darvall QC and N T F Fernon (Fifth Edition, Law Book Company, 1977, looseleaf service). It is, however, a valuable and necessary complement to such works - necessary in that the reader, particularly one not generally familiar with this area, is liable to become lost in the mass of detailed information contained in a work such as *McDonald Henry and Meek*, unless presented with a comprehensible overview of the legislation and the policies which are reflected in its terms.

In this book Rose QC articulates and explains the principles which underlie the modern law of bankruptcy, namely the orderly and expeditious realisation and distribution of the bankrupt's estate amongst and for the benefit of the creditors, and the discharge of the bankrupt from the majority of pre-bankruptcy liabilities, thereby encouraging resort to the legislation and permitting the bankrupt to make a fresh start. An understanding of these principles is essential in order to appreciate the meaning of specific provisions of the legislation and the relationship between provisions.

This work also provides a very useful and concise guide to the practical operation of the legislation, dealing in a logical fashion with creditors' proceedings; debtors' petitions; the discovery, realisation and distribution of the property available to creditors; discharge from and annulment of bankruptcy; arrangements with creditors outside of bankruptcy; and related topics. It serves well as a first point of reference, and enables the reader to place more detailed discussions of particular provisions and concepts in the decided cases and elsewhere into a wider perspective.

The text naturally incorporates amendments made to the legislation since the publication of the ninth edition in 1990. Significant changes which came into operation in 1992 include the compulsory contribution of income by bankrupts to bankrupt estates; a new system of discharge from bankruptcy by operation of law; annulment of bankruptcy by operation of law in circumstances where the bankrupt has paid all debts in full or where creditors accept a proposal in full satisfaction; a more detailed system of early discharge; amendments to practice and procedures at meetings of creditors; a mechanism for the issue of "offshore information notices" where evidence relating to a bankrupt's financial affairs is located in a foreign country; and restrictions on overseas travel by bankrupts (these latter two reforms are referred to by some, although not the author, as the "Skase amendments").

In summary, this book is an extremely useful starting point in bankruptcy law, and one certainly worth having close at hand. It explains both the policies and the practical application of the legislation. It is written clearly and concisely, and complements other available materials. ❑ David R Parry

Coronial Law and Practice in New South Wales, Third Edition - Kevin Waller

Butterworths June 1994, RRP $19.00

Hardback "handbooks" of a jurisdiction have largely disappeared in a sea of looseleaf publications - victims of constant legislative change. This book is the descendant of a survivor and will probably thrive for the same reason as its second edition predecessor. An inquest of any substance without several copies of Waller on the bar table is rare - although most have had wads of photocopied pages of decisions and legislation that have accumulated over the last 12 years, tucked in the back. The amendments of 1988 and 1993, the impact of *Annetts v Dean* (1990) 65 ALJR 167 and the developing tendency to fight out factual issues in detail and at length in coronial proceedings, have all made a third edition very useful.

From my observation, the book is usually used as a refresher on how the Court works and thereafter as an annotated Act. But even the growing band of counsel that move like a pack from one medical or aviation inquest to the next, and who need no refresher, keep the book handy.

Much of the change is systemic (creation of the office of State Coroner) but the substantive changes do matter. The alteration to section 19 which deals with the course of an inquest when a criminal issue arises, has had day-to-day consequences in advising and appearing in inquests. Deaths in custody are now expressly dealt with in the Act. An appearing party cannot be refused a request that a witness be called, without reasons (Section 31A). The non-legislative changes have also been substantial and are reflected in the new edition. *Annetts v Dean* has changed the relationship between the bench and the bar table. The silent coroner is a thing of the past. Warning must be given, if only in address, of a possible adverse finding. The practical consequence of this change has been dialogue and the end of the "blind" address.

The New South Wales coronial system (including its forensic work) has worldwide repute. Some of that is due to the administrative changes that have occurred. Another component is no doubt the impact of Chelmsford, Deaths in Custody and a large number of recent high profile inquests. The old, brief form of inquest that was often little more than a formality, is a thing of the past. All of this is well reflected in the new edition.

However, the book is also full of little surprises. One is in the medical negligence section. In the third edition the author repeats his theory that guilt is part of grieving but his fairly famous second edition anecdote of the widow to whom he allowed an inquest to enable her to air groundless grievances has been converted to the following "... in a minority of relations, usually female, the guilt is exaggerated to the point of irrationality". If one adds the reference to "medical men" (being prone to use technical terms), it is clear that Mr Waller is no SNAG. It's hard to work out what is more surprising - the fact of such language or it surviving the editor's pen.

Despite its little surprises, the third edition is as much "the handbook" as was the second edition. It is portable (212 pages), readable and reasonably comprehensive. It is unquestionably written from the Coroner's, not the practitioner's viewpoint, but by someone with a wealth of coronial experience. If you ever use a Waller you will have little option but to upgrade. ❑ Jeremy Gormly

Obituaries

Edward Henry St John QC - Valiant for Truth

Long-time Commissioner of the International Commission of Jurists, Geneva; One-time Member of the Australian Parliament; Acting Judge of the Supreme Court of New South Wales; Barrister-at-Law; Opponent of Apartheid; Defender of the Environment; Fighter for Good Causes.

Edward St John was a restless spirit. He attracted calumny and praise in equal measure. His admirers saw him as a modern Pilgrim. At various times he was dubbed a "McCarthyist", a "communist", a "tool of communists", a "neo-Nazi", a "pornographer" and a "puritanical wowser". Even he could not make all of these epithets true. Yet he was a man of intriguing contradictions:

. His family background, as the son of an Anglican priest, stamped an evangelical conservatism on some of his views. Yet he was an unabashed internationalist, a fighter for United Nations treaties and international legal principles. His last great quest was to have the International Court of Justice provide an advisory opinion on the criminality of nuclear weapons;

. He was a late entrant into politics and by then a senior and successful lawyer. But once he got inside the House of Representatives he did not, like the rest, pursue his own ambitions. He resolutely pursued truth as he saw it, smashing his chances of political power;

. His finely tuned experience in the Equity courts could have brought him a lifetime's calm as a Judge of the Supreme Court where he sat briefly in an acting capacity. Yet at the Bar he often took on the causes of the unpopular and disadvantaged. His last two major cases included his successful defences of Thomas and Alexander Barton and a major action arising out of the Chelmsford *débacle*;

. He was seen as prudish and puritanical for his criticism of John Gorton's personal relationships and alleged larrikinism. Yet he fought fearlessly for free expression in the *Oz* and *Thurunka* obscenity cases (thereby earning the badge "pornographer"). And in his legal chambers he delighted in a luminous painting by Salvatore Zofrea which many of his visitors found disturbingly erotic;

. In 1981 he said that he thought "without giving the matter close consideration that Australia would and must in due course become a republic". But in response to a call from Mr Whitlam at that time he cautioned that such a change "might ... have greater repercussions than we should ever have anticipated, not only for our Federal system but also perhaps ... for our democracy itself";

. He could have enjoyed a life of genteel affluence of a leading Silk, safe in his castle in Phillip Street. But instead, he led successively wandering tribes of younger barristers to new and more affordable chambers named Wardell and Edmund Barton. Like a prophet of old he offered the young advocates a new promised land with new outlook and professional openness;

. He was a member of the Association of Cultural Freedom, a strongly anti-communist and, some thought, highly conservative body. He had a deep friendship with B A Santamaria and the National Civic Council. Yet it was he who set up the South Africa Defence and Aid Fund to help victims of apartheid. He did so after observing the shining spirit of Nelson Mandela and his colleagues facing the treason trials in South Africa in 1959;

. He helped establish the fundamental global principles of the rule of law at the successive meetings of the International Commission of Jurists in Bangkok, Rio and New Delhi. Yet he so loved the Australian environment that he urged the strongest possible measures, including peaceful resistance, to protect its beauty. He led the campaign against the flooding of Lake Pedder. Having abandoned politics for himself he supported Peter Garrett's environmental candidature for the Australian Senate, which almost succeeded. He was no hide-bound reactionary upholding the courts and the law at any cost. This was not the rule of law that he believed in. In a letter to the *Sydney Morning Herald* in September 1990 he cautioned against attempts to stifle criticism of particular court decisions:

> *"... The search for truth and justice is sometimes long, arduous and costly. Politicians and journalists speaking and writing in good faith to further that search deserve our thanks, not our condemnation. We must never forget the Chamberlain case, the Voyager Royal Commission, the Dreyfus case or the recent Irish cases in the United Kingdom - to mention only a few times when citizens, lawyers, politicians and the media refused to accept 'decisions of courts of competent jurisdiction' and were, in the event, fully vindicated."*

What are the clues that explain these apparently contradictory elements in the make-up of a man, constantly on the move, striving to shake up and even shock into action the law, the bench, politics, Australian society and the global community?

The clues can be found in his early life as the son of Canon St John. From his father's mind and tongue - and from his mother too - he heard the Psalmist and the *Book of Common Prayer*. He found conviction and certainty where others were plagued with doubt. He accepted the abiding moral obligation to action. It filled his prose with biblical allusions. It filled his mind with biblical fervour to pursue truth selflessly and to ensure, in Wesley's words, that "These things shall be".

In his blood, as he told the House of Representatives in 1967, were the genes of Oliver St John who defended John Hampden when he refused to pay ship money to King Charles I. Oliver married into the Cromwell family. So Cromwellian spirit is also there. Ted St John resisted the comfortable establishment for the never-ending attraction of righteous causes. He named his first son Oliver and lavished great care upon his life, learning from it and teaching to the advantage of a wider community. He dedicated his book *Time to Speak* to his wife Valerie, to his daughters Madeline and Colette and his sons Oliver, Edward and Patrick. Typically enough, the title was taken from a famous passage in *Ecclesiastes*.

Ted St John was not a comfortably, easy man. Like all of us, he made mistakes. In such a turbulent life it would be astonishing if there were not actions which each one of us would disagree with. Such were the contradictions of this man. But Australia - especially in the law - is too often bland, unquestioning and complacent. Its leaders all too often thirst for passing majorities and transient popularity. Ted St John did none of these things. He was valiant for truth, as he saw it. He finished his book with the words of the Psalmist who "asked the question, and supplied the answer":

"Lord, who shall dwell in Thy tabernacle,
or who shall rest upon Thy holy hill?
Even he that leadeth an uncorrupt life,
and doeth the thing which is right, and
speaketh the truth from his heart."

I am sure that he is looking at me even now, his fine intellect questioning and criticising what I am saying and the picture I so inadequately present. May his restless, reforming spirit rest, at last, in peace. ❑ Justice Michael Kirby speaking at the Memorial Service for Edward St John QC

The Hon C L D Meares AC, CMG, QC

The death occurred on 5 August 1994 in Sydney of one of the most striking figures of the Australian legal scene. Leycester Meares, a former Judge of the Supreme Court of New South Wales, was a man unstinting in his contributions to Australian public life and unfailing in his many acts of personal kindness to his family, friends and people in need.

Born in 1909 to a well known legal, accounting and grazing family, and admitted to the New South Wales Bar in 1932, Leycester Meares saw War service in the AIF during the Second World War. In the post-War period he built a large practice as a barrister, mainly in common law and commercial cases. He was a redoubtable cross-examiner with a high sense of drama and theatre in his courtroom style. He had no great interest in academic law, but was a superb advocate. He rewarded instructing articled clerks, solicitors and even good junior counsel with boiled lollies, produced from a large bottle kept in his desk under lock and key against marauding unworthies. A measure of the regard in which he was held in the practising profession was his election as President of the New South Wales Bar Association in 1961 and the first President of the Australian Bar Association in 1963. He was also an office-bearer in the Medico-Legal Society, the University Club, and many such bodies.

He never married. But he had a large circle of family, friends and devotees, none of them more loyal than his long-time Judge's Associate, Ruth Kerr.

As a Judge of the New South Wales Supreme Court, Leycester Meares served first in an acting capacity and then by a full-time appointment between 1969 and 1979. He sat mainly in common law. He later took charge of the Commercial List of the Supreme Court where his practical commonsense and long experience in trials of commercial disputes were much in evidence, as was his stern integrity leavened by his sense of humour.

Meares' abiding passion for law reform led him to become Chairman of the New South Wales Law Reform Commission - a post which he held from 1972 to 1976. During this time he promoted greater co-operation between law reform bodies throughout Australia.

In 1973 Justice Meares was appointed by the Whitlam Government to the National Compensation Rehabilitation Inquiry under Sir Owen Woodhouse of New Zealand. The report of that inquiry proposed a major change to Australia's national compensation law, the attainment of which was frustrated by the dismissal of the Government in November 1975 by Meares' long-time friend, the Governor-General Sir John Kerr. In the ensuing isolation of Kerr, Meares stuck to their friendship. He was not a fair-weather acquaintance.

Following his retirement from the Bench, Meares served in many other national and State bodies, including as counsel before the Joint Committee on Public Accounts, as President of the Courts Martial Appeals Tribunal, as Chairman of the National Advisory Council for the Handicapped and as Chairman of the Australian Vietnam War Veterans Trust. His earnings from these positions he donated to charity. He was an indefatigable worker for good causes: puckish in his humour, kindly to new members of the legal profession and a model of grace under fire - sterling attributes in a barrister and law reformer. It was in these capacities that he will be best remembered in the legal profession of Australia to which he contributed so much over a long life of service. He was 85 years old when he died.

In his private life Leycester Meares was a great raconteur. He had a nickname (often rude) for everyone. He ran a country property near Mudgee and played sports of all kinds with furious and seemingly daredevil indifference to risks. He was often sent off the hockey field - even in years when most retired judges had settled down to genteel armchair pursuits. He never quite managed to show the same dispassion on the hockey field as he invariably mustered in court. He was a great patron of the arts, assiduously buying new paintings. He could be seen every weekend going the rounds of the art galleries of Sydney. He regularly attended the major auction houses, either buying or selling paintings.

He was also an habitué of Lord Howe Island to which he made an annual pilgrimage. His visits began in the late 1930s, after which he spent every January on the island (excluding the War years); fishing, carousing and talking to the inhabitants. He knew, liked and became friends with all of them. When he attained the age of 80 the entire island gave him an enormous party - an event which his friends in Sydney later duplicated although reportedly without quite the same panache.

Leycester Meares was appointed Queen's Counsel in 1954. He was awarded the CMG in 1978. In 1985 he was honoured by being appointed a Companion of the Order of Australia, the nation's highest civil decoration. ❑

Michael Kirby and R P Meagher

Law Courts Library Access Rates for 1995

Individual Rate:

Per Day	$25
Per calendar month	$60
Per calendar year	$250

Firm/Organisation Rate:

1-10 principals	$250 plus $60 per principal
11-25 principals	$250 per principal
26 or more principals	$250 each for first 25 principals + $120 each for subsequent principal

Floor Rate:
$250 for floor rights
$120 per individual barrister providing that the floor application includes applications from at least 9 individual barristers

Library Rate: $250 per card

The rules relating to access to the Law Courts Library can be found in the *Law Courts Library Guide* and the *Inter-Library Loans Guide*. These rules define the persons eligible to use the Library.

Persons who are not occupants of the Law Courts Building are required to pay an access charge if they wish to enter the Library and use the facilities. Brochures outlining the services available for legal practitioners are available at the Level 3 Inquiry Counters in the Law Courts Building.

Authorities for Court are provided free of charge on the day the matter is heard. Day Loan Application Forms are available in the Library foyer and Library staff locate the items required and bring them to the foyer.

In 1994 the Library established a network to integrate access to the wide range of electronic data now available to Library users. Use of electronic databases increased to such an extent that additional personal computers were acquired for the use of readers and time-limits were imposed on the use of discs.

The increase in access fees will provide funds for network licences which permit several readers to use the same electronic data simultaneously.

Users will benefit from the faster access and will be able to take advantage of the network menus developed by Library staff to provide access to the databases by subject, jurisdiction and form. The bulk of the access fees payments will continue to be used to maintain and restore the collection and to repair damage caused by photocopying. ❑

Superannuation

Superannuation 1995 - Annual National Conference for Lawyers will be held 23-25 February 1994 at the Ritz-Carlton Hotel, Double Bay, Sydney, NSW. Enquiries should be directed to Diane Rooney - telephone (03) 602 3111 fax (03) 670 3242. ❑

Law Students with Asian Language Skills on Register

A register has been compiled of law students with language skills in Khmer (Cambodian), Lao and Vietnamese. This is an initiative of the Australia-Indo-China Legal Cooperation Committee, an advisory committee to the Commonwealth Attorney-General, Canberra.

The register has been co-ordinated by the Centre for Legal Education, based in Sydney. It contains the usual details of the students' academic records so far, and their written and spoken language skills. Where appropriate, the student's access to a computer which will print in the appropriate language's script is included.

These law students will be the future lawyers in the countries of the Indo-China sub-region.

Any lawyer who would like access to this register should contact Mr Robert Watson, Research Officer, AILEC Secretariat, Attorney-General's Department, National Circuit, Barton, ACT 2600. Telephone (06) 250 6787; Fax (06) 250 5929.

The students in the register are available now for translation work and in other ways that lawyers might find useful in legal work involving Cambodia, Lao PDR and Vietnam. ❑

Australian Rights Congress

The Australian Rights Congress will be held 16-18 February 1995 at Darling Harbour, Sydney. Full registration for the three day Congress is now being offered at a special subsidised price of $225. A diverse range of organisations, and a significant number of individuals, have expressed a desire to attend this unique forum.

Because of the broad appeal of this conference, the organising committee has reduced the registration fee so that as many organisations and individuals as possible may attend and contribute to this important event. The speakers panel attests the importance that community leaders are placing on the Australian Rights Congress. Speakers will include: Brian Burdekin, Federal Human Rights Commissioner; Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner; Rodney Croome, Tasmanian Gay and Lesbian Rights Group; Robert Fitzgerald, President, Australian Council of Social Services; Stuart Fowler, President, Law Council of Australia; Amanda Vanstone, Shadow Attorney-General and Shadow Minister for Justice, and many others.

You are invited to attend the Australian Rights Congress and make your contribution. Please contact John Mulready on (02) 956 8333 or fax on (02) 956 5154 to register or for further information. ❑

39th Annual Congress - UIA London '95

The 39th Congress of the International Association of Lawyers (UIA) is to be held in London from Sunday 3 September until Thursday 7 September 1995.

There will be three main themes of the conference: New Frontiers in Financial Services; Law and Biotechnology, with particular emphasis on Human Rights aspects; and the Structure and Organisation of the Legal Profession. The three main theme sessions will be complemented by smaller sessions conducted by the Committees of the UIA. The conference is supported by the Bar of England and Wales and the Law Society of Englands and Wales.

For further information contact Ms S Scheuer, 7th floor, Wentworth Chambers, 180 Phillip Street, Sydney. Telephone (02) 232 7753. Facsimile (02) 233 1849.

1995 RED MASS - GOLDEN JUBILEE YEAR

Mr John McCarthy QC
President, St Thomas More Society
and the Council of the Society
cordially invite all members of the Bar to the
CELEBRATION OF THE 1995 RED MASS
conducted for the Opening of the 1995 Law Term
to be held in
ST MARY'S CATHEDRAL, SYDNEY at 9.00am
MONDAY 30TH JANUARY 1995

The Golden Jubilee Red Mass will be celebrated by
His Eminence Edward Cardinal Clancy AC
and in attendance will be
His Excellency the Honourable Bill Hayden AC
Governor-General
of the Commonwealth of Australia,
and Mrs Hayden.
In attendance also will be Justices
of the High Court of Australia.
Judicial Procession from Main Doors at 9.00am.
Arrangements have been made for Judges and Counsel
to robe in the Crypt.
Dress for Senior Counsel: Full Bottomed Wigs
Morning Tea will be served
in the Reception Room after Mass.

Any enquiries contact
J A McCarthy QC Secretary - Telephone 231 1006

Encyclopedia of Commercial Laws of the People's Republic of China

This year marked the 45th anniversary of the People's Republic of China. Market-oriented economic development did not commence until 1978. Since then investment opportunities in China began to increase drastically. Now China is one of the most popular countries for foreign investment.

Corresponding with economic development, a vast amount of legislation has been enacted. Various aspects of commercial law is regulated by both written statutes and unwritten practice. It is imperative for people intending to trade with China to understand the legal complexity. To date there has been no introductory or standard work on this area. It was time for the publication of a reference work. The *Encyclopedia of Commercial Laws of the People's Republic of China is* especially prepared for people living outside China and who cannot read Chinese.

The work is prepared by the teaching staff at the School of Law at Wuhan University. The Law School is one of the top three law schools in China. Authors are first class experts.

The work includes fourteen sections, namely Legal System, Civil Law, Economic Contract Law, Foreign Investment Law, Company Law, Tax Law, Intellectual Property Law, Anti-Unfair Competition Law, Foreign Trade Law, Financial Law, Insurance Law, Real Property Law, Environmental Protection Law, Commercial Arbitration and Litigation. This covers all major aspects of contemporary commercial laws of the People's Republic of China. This is the only comprehensive reference work on Chinese Commercial Laws.

There is a section on glossary in both English and Chinese, with page references. A full index is provided for easy reference. When a reader comes up with a particular problem, he/she can find the answer in the text easily.

The work is published in looseleaf format in four volumes. Materials will be up-dated twice per year so that readers can receive the most up-to-date information. The legal system in China is still in its infant stage. Laws will be changing rapidly.

The work is not available from bookshops. For more information contact GPO Box 12705 Hong Kong (address: Room 1404, Tai Sang Bank Building, 130-132 Des Voeux Road Central, Hong Kong) or telephone (852) 544 9330 or fax (852) 544 9377 or (852) 538 0914. ❑

What a SNAG !

Hely QC:	Q.	Do you prefer to be referred to as Miss O'Keefe, Mrs O'Keefe or Ms?
	A.	You can call me Julie. I don't mind that.
	Q.	In other circumstances I would be happy to, but -
	A.	Then I prefer Miss.

(ASC v Crane & Reymonds, Coram: Levine J, 30 August 1994*)* ❑

This Sporting Life

Bench and Bar Versus Services Golf Match, St Michaels Golf Club Friday 4th November 1994

There was brilliant sunshine. Then there was wind and rain. Finally there were sheets of lightning. Nobody got killed, Bob Toner had a drink, Peter Gray sang a lewd Irish folksong and, all in all, it was a pretty good day of golf.

That, in a few words, is the overview of the 1994 Bench and Bar versus Services Golf Match which this year was held at St Michaels on Friday afternoon, 4th November 1994.

Fourteen members of the Bar turned out to play the Services and I regret to report that the Services won the overall event by a handsome margin. They also won the 'A' Grade (scratch to 15) but the Bench and Bar were successful in the 'B' Grade (16 to whatever) which represents our first success in this 60 year old tournament for many, many years.

D. Farthingdale DSC

Because a thunderstorm overtook us at about 5.30, only two matches completed the course and the other matches were determined by negotiation, but since the Services had all the big guns, we still lost.

(left to right) M Gilmour, D Flaherty, P Gray

Madeline Gilmour looked stunning when she hit off wearing white knee length shorts and shirt, and pulling a colour co-ordinated golf bag, but the wind and the rain and the lightning soon fixed that up.

Peter Gray shot the lights out and returned, after adjustment for holes not completed because of the weather conditions, a score sufficient to mark him as the most successful participant in the Bench and Bar team, and therefore the winner of the perpetual Northern Ireland Medal, presented to the Bar in 1992 by a contingent from the Belfast Bar who played in the match that year at Bonnie Doon. So overcome by success was Peter that he forthwith claimed long and distinguished Irish ancestry and burst into song. For five minutes or more he regaled those present with a bawdy Irish ballad sung, one has to say, in a modest baritone, and, flushed with success, he then attempted to decamp with the trophy. He apparently thought that his golf was so good and his singing even better such that he should be entitled to make the trophy his own for all time.

(left to right) Peter Stitz and Bob Toner

An ugly scene followed, with Bob Toner and David Farthing physically restraining Gray whilst the trophy was recovered from his person. Allan Hughes won a golf shirt (apparently for being there - it could not have been the quality of his golf). Peter Gray also won nearest the pin (2 feet away, he claimed - I saw it - he must have very long feet) and several others won golf balls. All of this was somewhat out of keeping with the elegant surroundings of the Victoria Barracks Officers' Mess where we were all grandly dined and wined in Victorian splendour.

A great night was had and, late in the evening, as proceedings wound down, a number of us repaired to Kittie O'Shea's Hotel in Paddington in search of a cleanser. That was not to be; the establishment was closing as we entered.

It is reliably reported that, not to be outdone, Peter Stitz from Sir Owen Dixon Chambers and Bob Toner were last seen striding, or moving in a manner that can broadly be described as such, to a nearby hostelry in further search of strong drink.

Despite the weather, the occasion was again a great success. Next year the RAAF will host the occasion and preliminary thinking is that we will play the Services somewhere in the mountains, probably on a Sunday morning, after dinner at the RAAF Officers' Mess at Glenbrook, which is the Old Lapstone Hotel. History buffs will be drawn to the occasion like moths to a lamp given that it is, I am assured, the place where Gough and Margaret Whitlam spent their wedding night. Those known to be interested in participating ought, by now, to have received some preliminary information about that occasion. If you are interested, please let me know. If insufficient interest is shown, an early November Friday afternoon format in the city is likely to be arranged.

The annual match against the Solicitors will be played on Thursday, 19th January 1995 at Manly Golf Club. It is expected that before Christmas entry forms will be sent to individuals known to be interested, and <u>not</u> to clerks for display on notice boards. If you receive nothing about the event, please let me know. ❑

John Maconachie

Ethics Report

Conduct of Complaints Against Barristers

Most barristers, through fortunate want of experience, know little about the professional conduct procedures of the Bar Association or how to respond to a complaint. Jeremy Gormly seeks to give some guidance to those matters.

The changes brought about by the *Legal Profession Act* 1987 and subsequent amendments have led to a much greater likelihood that any barrister can be the subject of a professional conduct complaint. Furthermore, the procedures under the Act have meant that barristers are far more likely to find themselves facing full, formal hearings to defend complaints than occurred prior to the Act.

The dictates of the Act are such that all complaints must be investigated and dealt with. This article concerns:-

(a) the procedure used to deal with complaints;
(b) the best methods for responding to a complaint if one is received.

Procedure

Under the *Legal Profession Act*, the Legal Services Commissioner is the person to whom any person may direct a complaint about a barrister. On 1 July 1994 Mr Steve Mark was appointed as this State's first Legal Services Commissioner. The Act requires the Commissioner to assist complainants to formulate their complaints. The Commissioner may investigate the matter himself or refer the complaint to the Bar Council for investigation or mediation. The Commissioner may take over the Council's investigation if he considers it appropriate.

The Commissioner also has a wider public role in promoting community education and enhancing professional ethics and standards and to this end the Council will also play its part.

The Council can and does act of its own accord if some possible misconduct comes to its attention other than as a complaint.

Complaints are made, in rough order of frequency, by clients, solicitors (from either side), opposing clients, Judges, other barristers and others.

Complaints sent to the Council for investigation are distributed by the Professional Affairs Director (Helen Barrett) to one of the four Professional Conduct Committees (PCCs) of the Bar Council. Those Committees consist of one Queen's Counsel who is a member of the Council and seven to nine other barristers ranging in seniority, who may or may not be members of the Council. Each PCC also has two lay members who rank equally in the decision making process with other members of the Committee.

The Committees meet fortnightly. They investigate complaints, generally by obtaining written versions from the complainant, the barrister and any possible witnesses, being usually instructing or opposing solicitors or other Counsel, interpreters, etc.

When all of the material constituting the investigation has been gathered, gaps in the material may be dealt with by way of obtaining transcripts and court documents or requests for further particulars from the barrister or any other person.

After the investigation process, one member of the Committee will prepare a report and, after discussion and alteration to the report reflecting the view of the Committee, the report is referred to the Bar Council. The report, almost invariably, includes a recommendation to the Bar Council as to what should be done with the matter. Conduct matters are treated with priority by the Council.

Conduct complaints are usually the subject of considerable analysis both by the PCC and by the Council and if there is not a clear view, then there is extensive debate. Periodically, where a Committee is divided in its view, a minority report will be presented by the dissenting member or members of a Committee which usually has the effect of provoking further debate. Most matters, however, involve a reasonably clear course of action.

Having considered the matter, the Council has, under s155 of the Act, a number of options:

(a) To dismiss the complaint (sometimes the barrister may also be counselled).
(b) To find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Legal Services Tribunal of unsatisfactory professional conduct but that a reprimand is the only penalty required.
(c) To find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty of either unsatisfactory professional conduct or professional misconduct and refer the matter to the Legal Services Tribunal for hearing.

If the Council decides that a reprimand only is appropriate, then the Act requires that the person to be reprimanded give consent to the reprimand. Consent to a reprimand is, in effect, an acceptance of the Council's finding of a breach of conduct. The practice has been for the reprimand to occur orally in chambers delivered personally by the President.

Complainants now have a right to seek a review of a decision to reprimand, as well as a decision to dismiss a complaint.

Where a matter is too serious to be dealt with by way of reprimand, then the matter must be referred to the Legal Services Tribunal (which now hears matters of both unsatisfactory professional conduct and professional misconduct). The definitions of "unsatisfactory professional conduct" (a lesser breach) and "professional misconduct" (a serious breach) are set out in s127 of the Act. The definitions are as follows:

"Unsatisfactory professional conduct" includes:

> Conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

"Professional misconduct" includes:

(a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence;
(b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice

of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers or the roll of solicitors; or

(c) conduct that is declared to be professional misconduct by any provision of this Act.

Appeals & Review

A decision of the Tribunal may be the subject of an appeal to the Supreme Court, by any of the parties to the hearing. The Legal Services Commissioner hears applications by complainants for review of a decision by the Bar Council to dismiss a complaint or to reprimand the barrister.

Penalties

The Legal Services Tribunal may, by way of penalty:

(a) cancel the barrister's practising certificate;
(b) order that a practising certificate not be re-issued after expiration;
(c) order that the barrister's name be removed from the roll;
(d) fine the barrister $50,000 (in the case of professional misconduct) or $5,000 in the case of unsatisfactory professional conduct;
(e) publicly reprimand the barrister;
(f) order that the barrister undertake further legal education;
(g) make a compensation order (see section 171D).

Responding to a Conduct Complaint

The real purpose of this article arises from the experience of many persons sitting on Professional Conduct Committees and reading numerous first responses by barristers to a complaint.

It has been observed by one senior member of the Council that responses to complaints fall into two general categories. The first is to write a short, uninformative, dismissive letter of denial as though the matter ought not to be taken seriously. The second is completely different. It involves responses of 15 or more pages detailing a blow by blow history of the whole case (often unwittingly failing to deal with the complaint) and reflecting the distress of the barrister at being the subject of any complaint, whether justified or not.

Because of the nature of the Act and the duties cast on the Council to investigate complaints, neither form of response is appropriate. The dismissive response usually results in protracted investigation as a Committee struggles to obtain a full factual picture and a full response from the barrister that deals with the precise complaint. Flippant or ill-considered comments in a first response become part of the investigation file which may ultimately become evidence before the Tribunal.

The long and detailed, distressed response also prolongs investigation, but in a different way. All responses to complaints by the barrister are sent to the complainant as a version on which they may then comment. Private or confidential correspondence cannot, therefore, be received in the course of the investigation, or treated as confidential unless a real issue of legal professional privilege arises or there is some other good reason of law. Long and unduly detailed responses from the barrister often provoke even longer comment from the complainant. Everything slows down as the issues are unravelled.

Responses to complaints often have to be written when the brief has long since been sent back. Recollections of precisely what occurred will fade, particularly if the case was small or insignificant. The Act now sets a three year time limit for a complaint. The Commissioner may, however, accept a complaint after the time limit has expired if he believes it is just and fair to do so, or if it is in the public interest to investigate.

An initial reply written without reference to the brief will frequently contain unwitting inaccuracies which may emerge in any hearing before a Tribunal. A fourteen day time limit for a reply is usually fixed but, if additional time is needed to get hold of the brief, it will generally be granted.

Some sensible guides for responding to a complaint are as follows:

1. Isolate and address the complaints rather than give a full history of the whole case. If the complainant has provided no background to the case, some background may be necessary to an understanding of the issues raised.
2. Responses are best if they are succinct, but must deal with the factual circumstances of the complaint and provide a full answer.
3. Few persons, including barristers, are capable of being fully objective about a personal or professional complaint. It is best to approach another barrister, preferably someone senior, or your solicitor, with the complaint and your draft reply. Most people resist doing this, but no matter how embarrassing, it invariably produces a better response.
4. Although the process required by the Act is prosecutorial in nature, conduct proceedings are not criminal proceedings. Failure to provide a prompt, full and frank response is itself a breach of standards of professional conduct. A barrister who fails to reply to a complaint is guilty of professional misconduct (s152).

Mediation

From 1 July 1994 the Council will be able to refer consumer type disputes to mediation. Participation will be voluntary and anything said is confidential and cannot be used later.

Belated Litigation

Quite frequently, something that becomes the subject of a professional conduct complaint is also the subject of either civil or criminal proceedings. When that occurs, the investigation process by the Council will normally cease until completion of the related litigation unless both parties otherwise agree. The Council has adopted that policy to ensure that the investigations and results of conduct proceedings are not misused by other litigants as a method of obtaining evidence in unfair circumstances. A barrister, for example, has a professional obligation to make admissions and provide a full and frank response to any complaint. The barrister in a criminal matter has a right to silence, and in a civil matter has no obligation to make admissions.

Conclusion

Since the new Act commenced in 1987, barristers are much more likely to be subject of complaints. The broadening of the scope for breaches of professional conduct by reason of the two levels of definition make barristers much more likely to be involved in full hearings defending allegations of breaches of professional conduct. If you are the subject of a complaint, draft a full but succinct reply and discuss the complaint and your response with a senior colleague or your solicitor before replying to the complaint. ❑

Contact with Judicial Officers

Attempts to achieve efficiency in the use of courts and court facilities, through means including the multiple listing of cases in many jurisdictions, has led to an increase in contact between judicial officers and members of the Bar outside of the court room. It is pertinent to remind ourselves of the requirement of the Bar Rules. Both Rules 58 and 59 of the current Bar Rules, and rules 56 to 58 of the "Draft Rules" require a barrister to act with propriety in extracurial communications with judicial officers.

The present Rule 58(1) says as follows:-

> "A barrister shall use his best endeavours to avoid being alone with any Judge, Magistrate, Arbitrator or member of a tribunal from the commencement of the day of hearing until the conclusion of addresses, except with the prior consent of his opponent."

The rule is wide enough to encompass, and its evident purpose requires that it should encompass, social functions. Rule 59 confirms this. It provides:-

"1. If, in connection with any proceedings then pending or part heard, a barrister for one side wishes to see the judge hearing or likely to hear any such proceedings to discuss a matter arising in connection with the proceedings, he shall not do so unless:
   a. he is accompanied by the barristers for all other parties interested, or
   b. he has informed the barristers for all other parties interested of the nature of the matters he wishes to discuss with the judge and has given them an opportunity to be present.
2. In the circumstances arising under subrule (1)(b) above, the barrister shall not mention to the judge any matter relating to the proceedings not communicated to the other barrister or barristers.
3. In subrules (1) and (2) where an opposing party is represented by a solicitor who has not briefed counsel, "barrister" includes such solicitor."

The practice of entering Judges' Chambers both prior to and during proceedings has become widespread in many jurisdictions. This seems to happen in particular:-

(a) Where large numbers of cases are listed per day; and
(b) In jurisdictions such as the Compensation Court where many cases are listed per day before each Judge and often barristers, holding multiple briefs in various courts, indulge in a little list juggling.

The rule is quite clear. Approaches to a judicial officer should not be made without the prior consent of one's opponent.

A problem may arise for a barrister when what is a social discussion turns to a discussion of a pending case or a part-heard case. In some jurisdictions this is complicated by the fact that some judicial officers themselves invite legal representatives into their rooms or chambers for what can be called a social discussion. Often the judicial officer is well known to the barrister. Entering judicial chambers for this purpose without the knowledge of one's opponent would prima facie contravene Rule 58(1) and could lead to abandonment of the proceedings, adjournments and unnecessary costs. In the present climate those are factors which should be taken seriously. It is important that social contacts do not interfere with the court's functions.

In many cases conversations with Judges take place in chambers where the barrister is required to proceed from those chambers through to open court. To the general public the sight of a barrister leaving a Judge's chambers on his own before the commencement of a hearing or during a hearing may lead to suspicion which in turn leads to a lack of confidence in the judicial system. This is something that the law and, in particular, barristers should avoid.

The Draft Rules differ from Rules 58 and 59 in that they would make two exceptions in respect of communications with the court, namely those when ex parte applications are to be made and those where the hearing of the matter has been properly notified to one's opponent. Rules 56 to 58 would prohibit communication with the court in the absence of one's opponent in connection with current proceedings. Current proceedings are defined as meaning:-

> "Proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal being heard."

Query whether the Draft Rules extend to the situation that exists, in particular, in country lists. The proposed Rule 56 does not appear to take into account the wide provisions of Rule 58(2) in that it only deals with communications and not with other activities which might convey the impression to a reasonable observer that the barrister is communicating information about the proceedings to the Judge.

The simple answer lies in the preamble to the Draft Rules relating to the paramount duty of a barrister to the administration of justice. In short, if in doubt do not communicate. If communication must be made with a Judge then it should be made after discussion with one's opponent and then through the Associate. Do not communicate to the Judge matters which have not been discussed with your opponent and which should be properly discussed in open court. Equally do not communicate to the Judge matters which you would be unhappy to discuss in the presence of your opponent. The comments of then Chief Justice, Mr Justice Street, in *R v Warby* [1983] 9 A Crim R 349 at 352 are appropriate:-

> "These principles underlie the concern expressed by Ward J at counsel seeking, 'on the run', as it were, in private chambers, to communicate to the judge matters which ought properly to have been communicated to him in open court either with or without appropriate safeguards. If they are matters involving confidentiality, that is to say if the requirements of justice within those exceptions which are referred to in that latter quotation justify hearing in private chambers, then again appropriate safeguards can be introduced to ensure that the minimum essential inroad is made upon the observance of the general principle. A chance casual or social comment is to be regretted, equally as it is to be disregarded." ❑

This is an important document - please pull out and keep.

Ethics Report

edited by Robert McDougall QC

When does a client's complaint release privilege?

From time to time, a client may make a complaint either against solicitors, against counsel, or against both, relating to a matter in which counsel has been briefed. Often, the only way that the counsel or solicitors can respond to the complaint is to reveal, either in detail or in outline, the substance of advice given to the client and other matters relating to the facts out of which the complaint arises.

Prima facie, counsel and solicitors are bound by obligations of privilege in relation to advice given, and confidentiality. Can they, in the circumstances outlined, protect themselves - or each other - by revealing (their version of) what actually happened?

The simple answer appears to be "yes". A recent decision of the English Court of Appeal, *Lillicrap & Anor v Nalder & Son* [1993] 1 WLR 94, is clear authority for this proposition.

In some cases, it may be that the nature of a complaint does not require a revelation of all that occurred during the course of the retainer. In other cases - particularly where a general complaint is made of "failure to advise", it may be impossible to rebut the complaint without revealing all that occurred. Notwithstanding this, counsel should be careful to ensure that, so far as possible and consistent with their entitlement to defend themselves fully, they do not make public matters which have no bearing on the subject-matter of the complaint. ❑

Recent decisions

Recent decisions of the Legal Profession Disciplinary Tribunal and the Legal Profession Standards Board reveal matters of which counsel ought to be aware. In one matter, it appeared - and it was frankly conceded - that counsel had disclosed information which had come to him in the course of a retainer in certain proceedings. Thereafter, when other proceedings related to the same general subject-matter were current, counsel who had received the letter, without the client's permission, gave a copy of it to the other counsel who was, in those other proceedings, briefed against the client. The letter was tendered and used in those other proceedings.

The Tribunal found that the action of counsel in making available a copy of the letter constituted professional misconduct. That conclusion should come as no surprise to members and it is clearly consistent with rule 65.

In the particular circumstances of the case before the Tribunal, no penalty was imposed, although a finding of professional misconduct was recorded and the barrister was ordered to pay the Bar Association's costs. Counsel should not think that future cases will be dealt with on the same basis.

A recent case before the Board reveals another matter of interest. A complaint was made that counsel had given incorrect advice as to a client's liability to tax on certain receipts. The complaint was that this amounted to "unsatisfactory professional conduct". Counsel conceded that the advice was incorrect but maintained that it did not amount to unsatisfactory professional conduct. The Board did not agree. It took the view that "in the area of law where the barrister professes to practise he should know, or check if he is uncertain, those areas of law that he is likely to encounter every day and which are fundamental to tendering advice to clients". It held that the standard of competence embodied in the definition of "unsatisfactory professional conduct" in s. 123 of the Act, whilst it did not impose a standard of perfection, did "require a standard of competence that encompasses fundamental aspects of the law in which the practitioner professes to practise".

The Board found that the barrister was guilty of unsatisfactory professional conduct. In the particular circumstances of the case, it ordered that he be reprimanded, and that he waive and repay part of his fees, and that he pay the Bar Association's costs.

One lesson which may be learned from this decision is that counsel should take care to keep themselves informed of the law, and the developments in the law, relating to areas in which they practise. Another lesson is that when counsel venture outside their ordinary areas of practice, they should take great care to ensure that they are fully appraised of the law relating to the area into which they venture. ❑

Failure to Complete Chamber Work/ Failure to Return Brief

Recently, the Board found a barrister guilty of unsatisfactory professional conduct for failure to render an advice to his instructing solicitors and his failure to return the brief when requested to do so.

The brief had been delivered in April 1993 and a number of follow-up calls and letters had been sent to the barrister by late July 1993. Having received no response, the solicitors requested the return of the brief and again a number of follow-up letters were sent. Not having received the brief by early September the solicitors complained to the Association.

The Board found that the conduct of the barrister in, firstly, failing to deal with the brief and then failing to return the brief when requested to do so, fell short of the "standard of competence and diligence that a member of the public is entitled to expect" of a barrister.

The Board took into account the barrister's frankness in admitting that his conduct fell short of the necessary standard. The Board further noted that the barrister had been the subject of another complaint which was dealt with by way of counselling by the President but that he had now taken steps to refine his practice in such a way as not to move outside areas with which he is confident and he could deal with expeditiously.

The barrister was reprimanded, fined $500 and ordered to pay the Bar Association's costs of $4,500. ❑

Ethics Report

Communicating with clients

Previous editions of the *Ethics Report* have stressed the importance of good communications with clients. Unfortunately, it appears that the message may not have sunk in. There are still far too many complaints about barristers which can be traced back to a simple failure to communicate effectively with the client and to explain to the client what is going on. I repeat what I said in the first *Ethics Report*:

> "The clear indication is that clients want their barristers to spend a little time with them, to explain things to them fully, and above all to behave courteously. They are entitled to no less. ... No matter how busy you are, you should deal fairly and courteously with your client. In your own interests, and in the interests of the profession as a whole, you should do what is in your power to ensure that when you and the client go your separate ways, the client has a well-founded belief that she or he has been treated fairly and courteously."

The concerns of clients were reflected in the December 1994 report of the Civil Justice Research Centre, *Plaintiffs and the process of litigation* (a report based on a study of the 1992 Supreme Court Special Sittings). One of the key findings of the report was:

> "With regard to information, the comments provided indicated that plaintiffs had a need for information about various aspects of their case, but that this need was left wanting. Comments made about the lawyer-client relationship indicated concern about the way their legal representative/s conducted their case."

Another finding was:

> "The main concern expressed was that they [plaintiffs] were excluded from the negotiations which ultimately resolved their case."

Barristers should not assume that a complaint against them which may be seen ultimately to be based on a failure to communicate will be dismissed. There are undoubtedly circumstances in which the inadequacy of a barrister's dealings with a client may amount to unsatisfactory professional conduct. Although Bar Council has appointed a committee to investigate ways in which this problem can be addressed, ultimate responsibility lies with individual barristers. Please take time to consider the way in which you deal with your clients, and endeavour to treat them as you yourself would wish to be treated were you in your client's position.

Rule 56

There seems to be an impression that r.56 may be complied with if a barrister:

- sends a communication to a court; and
- at the same time, sends a copy of that communication to the barrister's opponent.

Rule 56 is quite specific. A barrister must not communicate with the court, in the absence of the barrister's opponent, unless the court has requested that communication or unless the opponent has, before that communication is made, consented to the communication.

The administration of justice works because, at the end of the day, litigants are prepared to accept a court's decision. It is fundamental to the administration of justice that justice should not only be done but should be seen to be done. That fundamental principle will be undermined if a party to litigation communicates with the court in the absence of, or without first giving notice to, the other party. Rule 56 is not a matter of form, or technicality. It goes directly to the efficient administration of justice. Barristers should not think that a breach is likely to be excused.

The proper way to address witnesses

In *Reg v Marini* (CCA 60727 of 1993, 27 June 1994 unreported) Simpson J, with whom Hunt CJ at CL and Abadee J agreed) made the following observations:

"At the time of giving her evidence, the complainant was almost twenty-one years of age. She was addressed by the Crown in the usual way as Ms Martinez. In cross-examination she was persistently subjected to the indignity of being addressed by defence counsel by her first name. No other witness was so treated.

It should be clearly understood by defence and prosecution counsel that all witnesses should be treated equally and adult witnesses, in a formal proceeding such as a trial, must be addressed as such. The use of first names by counsel can only have the effect of demeaning the standing of a witness, and reducing him or her to a different and inferior position in the eyes of the jury. Neither criminal nor civil courts should tolerate the subtle differentiation between witnesses which arises from the selective use of first names and which has the effect of undermining the value of some witnesses' testimony.

The complainant in this case was entitled to be treated

with the courtesy normally accorded to adult witnesses and which was accorded to other witnesses in this trial.

While it may seem unfair to criticise the trial judge who was not asked to intervene or the Crown Prosecutor who was not responsible for the form of address, it is regrettable that neither intervened; it should be recognised that judges and counsel should be astute to prevent such occurrences in future.

I should add that while I have in these remarks referred to adult witnesses, the principle concerned is not confined to adults. Counsel regularly deal, and usually sensitively and sensibly, with witnesses of all ages; very young children are commonly, it is thought, more comfortable when addressed by their first names. Finer judgments will be required in the case of adolescent witnesses, and it will be a matter for the good sense, judgment and sensitivity of the professional participants in a trial as to the form of address on those occasions. For myself, I consider that if doubt exists, it should be resolved in favour of greater rather than less formality."

A transcript of the judgment is available from the library.

Although the remarks of Simpson J were directed to the cross-examination of a witness, it is quite clear, both from what her Honour said and by reference to basic considerations of courtesy and propriety, that the underlying concerns are not limited to cross-examination. Counsel should take care to deal with witnesses in an appropriate way.

Responsibility for costs

In *Stafford v Taber* (CA 40436 of 1990, 31 October 1994 unreported) Kirby P (with whom Handley and Sheller JJA agreed) in the course of ordering, by consent, that an appeal be dismissed, made the following observations as to a solicitor's responsibility for costs:

"Inference of neglect: solicitor to pay part costs

The only inference that is presently available is that this appeal has been seriously neglected by the appellant's solicitors. It also appears that the interests of the appellant have been seriously neglected and possibly prejudiced. I should say that I do not believe that this has finally had any adverse effect on the rights of the appellant. My careful examination of the case has led me, albeit without full argument, to the conclusion that the appellant would probably not have succeeded in the appeal. Nonetheless, every client, and indeed every individual, is entitled to be dealt with courteously by the Court and by every officer of the Court. A client is entitled to have an appeal handled with attentive diligence. That does not appear to have occurred in this case.

By Pt 52, r.66 and Pt 52A, r.43 of the *Supreme Court Rules*, provision is made whereby, in the circumstances such as occurred in this case, the Court may in disposing of orders for costs order that a legal practitioner, in default, should pay the whole or part of the costs that have been incurred by want of due attention to the proceedings. It seems to me that those rules apply in the contested facts of this case.

In the presence of the solicitor an opportunity was afforded to indicate to the Court why the foregoing rules should not be invoked in this case. In the result, no submission was put to the Court to suggest that this was not a proper case to invoke those rules and to order the solicitor to pay part of the costs. I say 'part' because the appellant, apparently with complete honesty and candour, told the Court that he had given instructions to lodge the appeal although he knew the appeal had difficulties and success was by no means assured.

He, therefore, must take some responsibility for the initiation of the appeal. However, in the circumstances, as the Court understands them at this stage, it would be wrong that the appellant should bear the whole of the respondent's costs. So much of his costs as were incurred after 23 September 1994 (when the matter was called over before Handley JA) should, I believe, be borne by his solicitors. The possibility of an order which reflected this consideration was put in the presence of Mr Mezzanotte. Counsel for the appellant told the Court that the solicitor did not wish to be heard to resist the making of such an order.

The result is that it is proper in the circumstances to make the order disposing of the appeal by dismissing it. I repeat that, in my view, there is probably no ultimate prejudice to the appellant for I consider that, almost certainly, that would have been the order that would have been made on a full hearing of the appeal. But we shall never know. The matter was never finally disposed of by contest on the merits, as it could have been within the costs which were accumulated by the appointed hearing day. Instead, the case has been disposed of in the rather unfortunate way which I have now described.

Nonetheless, the appellant himself should pay one-third of the costs of the respondent of the appeal. The balance of two-thirds of the costs of the respondent of the appeal should be ordered to be paid by John J Pulco & Co., the solicitors on the record for the appellant. The appellant will have to pay his own costs of the appeal to those solicitors. However, such costs should not include any costs on or after 23 September 1994 when the proceedings were called over before Handley JA and the Court was assured, incorrectly as it has transpired, that the matter was ready for hearing.

Finally, I consider that the papers in these proceedings should be referred to the Law Society of New South Wales for such further consideration and investigation as appears appropriate to the Society."

A transcript of the judgment is available from the library.

It is clear from what his Honour said that:

- a costs order of the kind which his Honour thought should be made could, in appropriate circumstances, be made against a barrister; and

. that the "serious neglect" which his Honour found to have occurred could amount to unsatisfactory professional conduct or to professional misconduct.

Counsel should take his Honour's comments to heart. Barristers, as much as solicitors, should deal with their clients with courtesy and with attentive diligence. Barristers, as well as solicitors, may be ordered to compensate their clients in costs if they do not meet this obligation.

Barrister's entitlement to appear for corporation

In *Jiwira Pty Ltd v Primary Industry Bank of Australia Ltd* (ED 4574 of 1994, 17 February 1995 unreported) Master McLaughlin concluded that s.38I of the *Legal Profession Act* 1987 did not override the commandment of Part 4, r. 4 of the *Supreme Court Rules*, insofar as that rule provides (sub-r.2):

> " (2) Except as provided by or under any Act, a corporation (other than a solicitor corporation) may not commence or carry on any proceedings otherwise than by a solicitor)."

Master McLaughlin held that:

. s.38I did not mean that "the involvement of [counsel] in his role as an advocate in the proceedings entitles the first plaintiff" [a corporation] "to carry on the proceedings without a solicitor"; and
. s.38I did not authorise a plaintiff corporation to commence proceedings otherwise than by a solicitor.

Accordingly, Master McLaughlin concluded that the proceedings should be dismissed with costs.

A transcript of the judgment is available from the library.

Rule 101

Rule 101 provides that, with certain exceptions:

> "A barrister who has reasonable grounds to believe that there is a real possibility that the barrister may cease to be solely a disinterested advocate by becoming also a witness in the case or a defender of the barrister's own personal or professional conduct against criticism must return the brief as soon as it is possible to do so without unduly endangering the client's interests. ..."

Rule 101 is fundamental to the proper administration of justice. It means that a barrister can advocate a client's cause without having any personal stake in the outcome.

There may be situations where it is difficult to know whether or not to retain the brief. Certainly, counsel should not be persuaded lightly to return a brief unless they are satisfied that there is a real, as opposed to a fictitious, possibility that they may cease to be nothing more than disinterested advocates. If you are in any doubt, you should do as the rule suggests and seek a ruling.

Documents on subpoena

In a recent complaint, it was alleged that counsel had been guilty of unsatisfactory professional conduct in circumstances where:

. a subpoena for production of a medical file was issued and served;
. the medical practitioner upon whom the subpoena was served gave the relevant file to the solicitor for the party who had issued the subpoena, to be produced to the court;
. counsel retained by that solicitor had access to the file, before it was produced to the court, and utilised the file (or documents within it) in the course of cross-examinations.

A subpoena for production is a command of the court. It requires documents to be produced to the court. It frequently happens that a person to whom such subpoena is addressed gives the documents to the solicitor at whose request the subpoena is issued. Nonetheless, it is at least implied that the documents are provided to that solicitor in answer to the subpoena: that is to say, upon the basis that they are to be produced to the court. It is not a matter for counsel retained by that solicitor to assume that an order for access will be granted, or to anticipate such an order by utilising the documents in advance of it being made.

In the case in question, Bar Council concluded that the conduct complained of could amount to unsatisfactory professional conduct and resolved to take appropriate action.

Counsel should be aware that documents produced under the command of the court are to be given to the court and that access to those documents is to depend upon the order of the court. They should not assume that such an order will be made or act in anticipation of its making. ❑

Robert McDougall QC, Ethics Convenor

Butterworths has just published a book, Ethics in Law, subtitled Lawyers' Responsibility and Accountability in Australia. The editor is Dr Stan Ross of the Faculty of Law, University of New South Wales. Stan Ross has more than 20 years' experience of working and teaching in the area of legal ethics and professional responsibility.

The book aims to examine the nature of lawyers' ethical responsibility and accountability throughout Australia. Although it deals principally with the present, it places legal ethics in their historical context. The analysis is based on the Australian position, but is supplemented by extensive overseas analogues. A full review of the work will appear in a later edition of Bar News. ❑