Spring 1999

Bar News

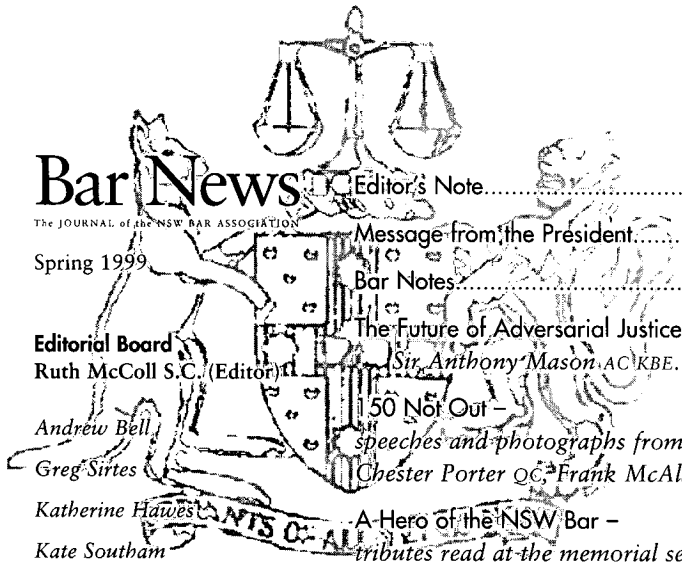
The JOURNAL of the NSW BAR ASSOCIATION

HERO of the NSW BAR

SIR MAURICE BYERS
CBE QC

1917 - 1999

CONTENTS



Bar News

The JOURNAL of the NSW BAR ASSOCIATION

Spring 1999

Editorial Print/Production
Rodenprint

Design and Layout
Watch This! Design

ISSN 0817-002

Contributions are welcome and should be addressed to the Editor, Ruth McColl S.C., 7th Floor, Wentworth Chambers, 180 Phillip Street, Sydney, NSW 2000. DX 399 Sydney or email: mccollsc@sevenwentworth.com.au

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

EDITOR'S NOTE

A VARIETY OF FACTORS have thwarted the publication of *Bar News* in recent years. In 1999 the combination of a rush of blood to the editor's head and a new editorial board inspired a return to production. This issue is intended both to bring current events to notice as well as to catch up with some which are more historical. On reviewing the materials received in recent years from authors with more confidence in the editor's reliability in the publication area than warranted by recent performance, it was felt that there were some articles which, though of (relative) antiquity nevertheless warranted publication. Similarly, a number of significant events have occurred since the last edition, both in terms of judicial appointments and, sadly, the passing of legal luminaries. Again, in the interests of conveying an historical perspective, a number of speeches and tributes relating to such events have been included in this issue. It has not been possible to include all speeches on all judicial appointments, nor to pay tribute to all who have left us. Omission of any event or tribute is not intended to be disrespectful.

Ruth McColl S.C.

MESSAGE FROM THE PRESIDENT

I DON'T KNOW HOW or why I obtained the document, but I recently came across publication No.2 of the Law Reform Commission of Uganda of October 1977 entitled *The Venereal Diseases Decree, 1977.* The document is actually a statement by His Excellency Al - Hajji Field Marshal Dr. Idi Amin Dada, V.C., D.S.O., M.C., C.B.E., Life President of Uganda (as he then was or perceived himself to be) It reads, in part:

> The Life President wishes also to remind all Provincial Governors and Chiefs and all Security Officers concerned that when the Life President makes laws, he expects them to be enforced with vigour and to be obeyed by all people without exception. It therefore causes him distress to see that despite this, there are many jobless people still roaming about in towns. These are the people who turn out to be kondos, particularly at night. These are the same people who harbour venereal diseases. Such people must be rounded up, treated and taken to places of training. Those who are taken to court and convicted must not be given useless light sentences. Courts too must rise up to the occasion, for they are serving in a Military Government.

The separation of powers in Uganda in 1977 became a little blurred; its judges had a somewhat fragile claim to independence. But some of the words have a familiar ring. How often in Australia in 1999 have you heard the populist clamour of politicians and others accusing judges of not doing their job, telling them they must try harder, they should bend to community attitudes and heed the strident demands of press and politicians? Sometimes the clamour goes so far as to demand that if judges make what the popular press perceives to be errors of judgment, they should resign.

Judicial independence from the Crown was a hard won victory for Parliament as well as the judiciary. *The Act of Settlement of 1701* was in parliament's interests. New South Wales parliaments are now unlikely to be in dispute with the Crown, but the need for the independence of judges from executive government is no less acute. Public perception of the judiciary is all important. Freedom of the press is all important. But the alacrity with which journalists are disposed to publicly denigrate judges, often in ignorance of all the circumstances in which a judge acted, can but serve to diminish judges in the eyes of people. The oafish attacks on Judge Kirkham, accusing him of responsibility for murder, are not atypical examples. Attacks on the judiciary in Australia are not a new phenomenon, but they seem to be increasing. His Honour Judge Docker of the District Court was often criticised (to put it mildly) by John Norton in the late 19th Century. By all accounts he was a less than perfect judge, being described by Cyril Pearl as 'irresponsible, savage, and class-biased'. Norton was fairly direct in his criticism publishing, amongst other things:

> Your consistent conduct on the subordinate bench has been alternately that of an idiot and a brutal bewigged bully. Some of your judicial obiter dicta - the obstreperous observations of an ignorant, irascible, jury-ranter - would seem to indicate that a padded room at Callan Park would be a fit and proper abiding place for you .... You are one of the opprobrious spawn of the old Convict system and would, had not Providence delayed your advent to this world in order to curse our Courts, have made an admirable member of the military rum-selling mob of martinets who mercilessly murdered, by the mockery of judicial process, men and women at the triangles and on the gallows. You are the hereditary lay descendant of that old parsonical pirate, the 'Reverend' Samuel Marsden ... Your vagaries on the bench recall the pothouse vapourings of a drunken man. A special session of Parliament ought to be called to put an end to your official existence. (*Wild Men of Sydney,* Cyril Pearl)

I do not know what happened to Judge Docker (usually referred to by Norton as Dingo Docker) but the District Court survived Norton. The problem these days is that too often the courts come under quite mindless political attack, which is then pursued by the press, enthusiastically supported by the same politicians. Typical of this sort of onslaught is when the sky fell after *Mabo* and *Wik*. For example, the member for Kalgoorlie disposed of the *Mabo* judgment by calling the High Court judges piss ants; others gleefully followed suit in less vulgar but equally destructive language. In recent years Chief Justices in Australia have become more willing to talk to the press, in face to face interviews, a process which I applaud. But judges cannot be expected, nor permitted, publicly to respond to unfair *ad hominem* attacks, thereby becoming embroiled in public controversy. For that reason, although the circumstances were extraordinary, I think Justice Bruce's appearance on *60 Minutes* was unfortunate. Attorneys General, neither Commonwealth nor State, seem inclined to come to the defence of judges; during the Kirkham controversy the Attorney's contribution was to support the Police Minister in his attack on the judge for discharging a jury. So if the judges can't defend themselves, and the Attorney General won't, it is left to the societies of lawyers to be astute to answer unfair criticism. It is, I think, an important function of the Bar Association. My own experience suggests that publicly defending a judge against attacks by a journalist carries with it certain hazards, but it does sometimes have the effect of waving a red rag at an angry bull, who then forgets about the original target. The judge thereby avoids further goring. At the very least, a reasoned public response by the Bar will enable the public to see that the story does have two sides. ***Ian Barker QC***

The Court of Appeal needs your assistance

LATE LAST YEAR there were two occasions when the Court of Appeal felt it necessary to take extra firm steps to remind members of the profession about their duties to the court concerning compliance with Rules and the diligent preparation and presentation of appeals. Although not common, these were not the only occasions when similar problems arose.

In *Whyte* v *Brosch* (1998) 44 NSWLR, Part 3 p vi a Bench of five was specially convened to address non-compliance with Pt 51 r47 (which requires written submissions and chronologies to be filed not later than 9 (appellant) and 4 (respondent) days before the hearing date). Non-compliance led to the barrister and solicitor involved being required to show cause why disciplinary steps should not be taken against them. An apology was accepted. However, the judgment of the Chief Justice outlines the remedies available to the Court in similar cases.

On another occasion no order as to costs was made in an appeal where the preparation and presentation of submissions by (senior) counsel on each side fell short of the standard expected by the court (*Lawrence* v *Carroll*, unreported 18 December 1998).

Mastery of a brief and the capacity to inform the court as to the applicable law are the central parts of the 'first and paramount ethical rule' described by Sir Owen Dixon in *Jesting Pilate*, p131. Along with compliance with rules such as Rule 47, these obligations are designed to ensure that the court may function effectively.

Judges are not ignorant of the pressures upon counsel. Sometimes pressing events in practice or private life cause defaults. Sometimes there are unexpected problems with fees or instructions. If these or other difficulties arise, common courtesy requires the court to be informed forthwith, and not just tender an apology at the hearing if the matter is raised by the court.

However, problems are sometimes caused by a careless attitude, the acceptance of a brief too many, or a perception that modern judges are a little soft. It is timely for the profession to be reminded that this is conduct up with which...

The Honorable Justice Keith Mason,
President of the Court of Appeal

Withdraw the Bar's cooperation

MOST BARRISTERS ARE familiar with being briefed in a difficult matter. After absorbing the written material conferences are held, advice given and preparation undertaken.

After perhaps years the matter is ready for trial and is listed before a judge for the purpose of having a hearing date allocated. All too often hearing dates within the range suggested by the court are not available to counsel retained in the matter. When informed of that matter the judge will inevitably respond with the likes of 'the court doesn't list matters to suit counsel's convenience'.

The fact that counsel may have been in the matter for years, finally understood the legal and factual complexities of the matter, established a rapport with his or her client and gained the confidence of both the attorney and the litigant means nothing.

Listing a matter during a period in which counsel is available is not primarily for counsel's convenience, but to enable a litigant to be represented by counsel of their choice.

All the more galling is the fact that one may have waited years for the callover whilst an inefficient court system grinds through a backlog of matters.

In the circumstances the court treats counsel and their request for consideration and consideration of the client's position as being irrelevant.

The Bar is providing enormous assistance to and support of the State's inadequate judicial system. For that support it receives little recognition and no reciprocation.

If the Bar did not provide Arbitrators, Acting Justices/Judges, earlier neutral evaluators and the like the inadequate manning of the court would be exposed and the disposal rate of cases would plummet alarmingly. The fault for such a decline would be exposed to lie where it should, namely at the feet of a parsimonious government.

I propose that unless and until adequate, sympathetic and professional consideration is accorded to the availability of counsel in the listing of matters before the court that the Bar withdraw its support and assistance in supplying band aid solutions in lieu of permanent judges.

D A Wheelahan QC

The Future of Adversarial Justice

Speech given by The Hon Sir Anthony Mason AC KBE
at the 17th Annual Australian Institute of Judicial Administration Conference
Adelaide, 7 August 1999.

Introduction

THE FUTURE OF ADVERSARIAL JUSTICE raises many questions, including the question – does adversarial justice have a future, more especially in the light of the growing popularity of Alternative Dispute Resolution (ADR) and in light of the suggestion that we should adopt the European 'inquisitorial' system of justice. They are the matters I shall discuss along with some of the many aspects of our adversarial system to which attention should be given.

My remarks are directed to civil justice, not to criminal justice. This limitation on the scope of my address entails looking at civil justice as if it were isolated from criminal justice, rather than looking at civil justice as an integral element in an entire system. We concentrate on the prospect of civil justice reform because we consider it more achievable than criminal justice reform, notwithstanding that the criminal justice system imposes an ever-expanding burden on the state. That system centres on the role of the jury and it is desirable that we survey jury performance and define more clearly the areas which should be the subject of jury trial.

Adversarial justice: What do we mean by it?

I take the expression 'adversarial justice' to mean a system of adjudication, such as our existing court system, in which the parties have at least the primary responsibility for presenting all aspects of their case.[1] Adversarial justice is an expression often used in opposition to the inquisitorial system which is an imprecise label given to the procedure of the European system, as applied particularly in criminal cases. That opposition has the potential to mislead, as there is a degree of commonality and convergence between the two systems.

It is a mistake to regard our system and the European system as static, having essential characteristics, which are incapable of change. Today the European system, which varies from country to country, places more emphasis on procedural fairness, giving the parties more opportunity to present their cases than was so formerly. The adversarial system, by moving to case management, begins to resemble the European system in expecting the judge to exercise more control over the litigation. Nevertheless, the defining criterion that distinguishes the two systems is the greater emphasis on procedural fairness which is characteristic of the adversarial system and leaves the parties rather than the court to determine what evidence is to be collected and led. Whether we should continue to give that greater emphasis to procedural fairness is a major question.

Associated with the difference in emphasis on procedural fairness is the greater attention we give to oral evidence with an emphasis on the importance of cross-examination. Indeed, it is a curious irony that the European system, which claims to pursue the truth, sets much less store than we do on cross-examination. On the other hand, ineffective cross-examination is a notorious thief of time in our system.

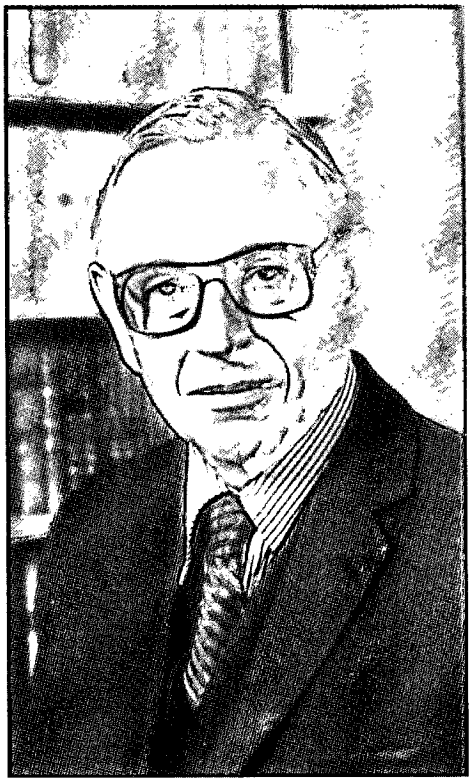
So, the contrast between the two systems has not been as stark as some commentators would have had us believe. To take one instance, the doctrine of precedent has not been applied as such in Europe. But it is an error to think that court decisions do not have significant influence on judicial reasoning in Europe. No system of justice could command public confidence if it were to ignore consistency in its decision-making and fail to respect previous decisions.

The present condition of adversarial justice

It is no exaggeration to say that there has been an erosion of faith in the virtues of adversarial justice as exemplified in the system of court adjudication. That

erosion of faith has not come about overnight. It has been developing over time. The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice. The deficiencies of court adjudication have been recognised in official reports in a number of jurisdictions.[2]

At an earlier time, that recognition led to the creation of a wide range of administrative tribunals capable of delivering a more informal kind of justice. Jurisdiction was given to these tribunals rather than to the courts where that could be done without infringing the separation of powers. In some tribunals, restrictions were imposed on the right of lawyers to appear simply because lawyers were, and still are, regarded as contributing to the deficiencies of adversarial justice.[3] For the most part administrative tribunals supplemented, but did not replace, court adjudication. The growth of administrative and tribunal decision-making brought in its train a great expansion in judicial review of administrative decisions but that did not slow the growth of administrative tribunals.



Sir Anthony Mason AC KBE

Court adjudication has become more costly as court cases became more complex and the materials were more voluminous. Long running cases are now more frequent and run longer than they did even 20 years ago. At the same time, it has become apparent that inequality of resources between parties and the disparity in quality of lawyers precludes the system of court adjudication from operating with complete fairness.

The complexity of modern litigation is in large measure a reflection of the complexity of modern legislation and corporate and commercial activity. The *Income Tax Assessment Act 1997* and the *Corporations Law* are daunting in their complexity. The human mind struggles when it is forced to grapple with the labyrinthine reaches of both statutes, most notably the former. But they are not alone. The *Trade Practices Act 1974* has spawned some massive litigation. There are other regulatory statutes governing transactions and conduct, providing for a range of remedies on a variety of grounds. Mention has been made also of equitable remedies grounded in unconscionability but they play a minor part in the scheme of things. In any event, these remedies are now to be found in statutes, such as the *Trade Practices Act 1974* and the *Contracts Review Act 1980* (NSW).

Court adjudication, it should be noted, has no monopoly in complex, long-running proceedings. Tribunal proceedings, particularly proceedings relating to television licences, sometimes exhibited these very characteristics. The tribunal proceedings, which exhibited these characteristics, were conducted according to adversarial procedures.

At an international conference at Cambridge four years ago, a leading English academic lawyer lamented the absence these days of the crisp, lucid and succinct judgments of the English Court of Appeal in the days of Fletcher Moulton and Vaughan Williams LJJ. My English friend seemed to think it was just a matter of style. But the judicial inhabitants of the Court of Appeal in the last quarter of the nineteenth century were not contending with the modern corporations and tax laws, let alone laws governing trade practices, consumer protection, environmental protection, anti-discrim-ination and human rights. They were judges who wrote in an age of Arcadian legal simplicity.

My English friend, though a legal academic, was expressing a yearning often voiced by lesser mortals, such as journalists, for a simpler legal world, far removed from the sophisticated world of law and litigation as we know it today. Unfortunately, there is an inherent tension between the desire for simplicity and the complexity of modern litigious disputes. And, as Justice Sackville has noted, there is a tension between the community's insistence that litigation be less complex, expensive and dilatory and the 'Holy Grail' of individualised justice.[4]

Some of the criticisms of individualised justice come from organisations and lawyers who voice the concerns of corporate Australia. There is a tendency, which is understandable, to identify the self-interest of corporate Australia with the interest of Australians generally. A striking example is the Allen Consulting Group's report 'Avoiding a more litigious society'.[5] The criticisms of the modern doctrine of unconscionability are another example. That doctrine affords relief to an individual who suffers from a special disability, of whom unconscientious advantage is taken, by another.[6] Why a powerful financial institution should be permitted to benefit from such action defies rationality. The economic advancement of Australia does not justify such an outcome. There is no reason why Australian law should follow the example of English law in offering special protection to banks and financial institutions.[7]

The alliance between adversarial justice and ADR

With a view to remedying evident deficiencies in court adjudication, governments in Australia, as in other

common law jurisdictions, notably the United States, have promoted the virtues of ADR in its various forms. This initiative has come from, or has been supported by, government. The purpose was not only to deflect criticism of the court system and of government for failing to adequately resource the court system, but also to reduce the cost to government of financing that system.

The various forms of ADR exist independently of the court system. The independent existence of ADR presents a competitive challenge to the court system. With a view to answering that challenge, the courts (or some of them) have annexed ADR ('court annexed ADR'). This development has conjured up the vision of 'the multi-doored courthouse'[8] which may be likened to a litigious hypermarket in which the litigant, like the shopper, can find the dispute resolution mechanism of their choice.

It is a curious irony that governments and lawyers have promoted the cause of ADR in order to take pressure off court adjudication. The idea is that by persuading litigants to resort to ADR, we will enable court adjudication to meet the demands which are made upon it. The arguments deployed in favour of ADR do not assert that it is superior to court adjudication; the arguments rather claim that the varieties of ADR are worthy of consideration because they offer a range of attractions. The vision of 'the multi-doored courthouse' was designed, at least in part, to preserve court adjudication from the potential threat to its existence presented by the competition from ADR.[9]

ADR as a threat to court adjudication

In the United States ADR was initially seen as offering such a threat. That apprehension has now given way to a more mature assessment that court adjudication is bound to survive.[10]

I doubt that ADR was seen in Australia as a threat to court adjudication. It was only natural that when judges saw their system in competition with ADR that they would want to offer ADR as well. Judicial imperialism is not an entirely fictitious concept.

In the United States, court annexed ADR circumvented the threat to court adjudication. In Australia, ADR has achieved considerable acceptance in the Federal Court. Court annexed arbitration also has had a significant impact in the Common Law Division of the Supreme Court of New South Wales.[11] And mediation is certainly more widely used, even in high profile cases. Indeed, there have been some long-running cases where the parties have resorted to mediation in order to terminate the ever-enlarging burden of costs.

Whether it is right to make mediation a compulsory obligation is another question. Because the costs of mediation can become an additional burden for a party who is financially weak, I do not think it right to make mediation compulsory.

Be this as it may, although ADR has achieved success in Australia, it has not reached such a level of popularity that it presents a threat to the survival of court adjudication. It seems to me that the threat to the survival of court adjudication lies not so much in competition from ADR as in the rhetoric which accompanies ADR, including some court annexed ADR, in which the virtues of court adjudication are downplayed, and in unsubstantiated criticisms made of court adjudication.

The 'new vision' of the courts

The old vision of the courts exercising judicial power by making, on behalf of the state, binding determinations of disputes between litigants has given way, in some jurisdictions, to a new and quite different vision. Thus, the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*[12] was able to say:

> The phrase 'civil justice system' evokes in most people the image of an imposing courthouse, an austere courtroom, an adversarial trial procedure and a trial judge as the ... arbiter of rights in dispute.

The Report then said:

> Our vision for the civil justice system in the twenty first century is of a system that:
> - provides many options to litigants for dispute resolution;
> - rests within a framework managed by the courts; and
> - provides an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

Have we come so far that we can now say that, in Australia, trials are 'a mechanism of valued but last resort'? Whatever be the position in Canada, I do not think that we can make a similar statement for Australia. Nor should we. Such a statement seems to suggest that court adjudication is simply a backstop to be invoked when all other expedients fail. That suggestion is scarcely consistent with the separation of powers and the vesting by the Australian Constitution of federal judicial power in Ch III courts. One can understand the view that other modes of dispute resolution are incidental to the exercise of judicial power, though there are difficulties in making good that proposition. But to treat court adjudication as if it is something less than the main game, in the context of Ch III courts under the Constitution, is to turn constitutional tradition on its head.

Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court.

The future of court adjudication

Quite apart from a lack of evidence to suggest that court adjudication will be eliminated or overwhelmed by ADR, there are several considerations which indicate that court adjudication will survive, even if it were not as dominant a mode of dispute resolution as it has been. First, there is the constitutional dimension to which I have just referred. The Australian Constitution entrenches the exercise of judicial power. Court adjudication is also an integral element in the constitutional framework of state government.

Secondly, it is difficult to conceive in modern

democratic society that such a society can survive without a strong integrated system of public court adjudication. The existence of such a system lies at the core of the separation of powers. Although it is possible that criminal and public law adjudication could provide the basis of such a system, a more wide-ranging system of court adjudication is not only desirable but also necessary for maintaining the rule of law. Court adjudication in civil cases is essential for the regulation of acts and transactions, in particular for the protection of commercial transactions and economic activity. The vitality of commercial life depends upon judicial enforcement of contractual rights and obligations.

How could a sufficiently public and comprehensive system of civil dispute resolution be provided otherwise by the state? The system must be public and comprehensive in its reach and must be provided by the state if the public is to have confidence in peaceful resolution of disputes instead of resorting to other means. ADR is in essence private and is offered by a range of private providers.

Another reason for predicting the survival of court civil adjudication is the increased emphasis on making it more efficient. Of the various reforms which have been adopted, case management is perhaps the most important, though the adoption of court standards has also been very important.

A final point is that the success of ADR depends upon the foundation that our system of court adjudication provides. Arbitration and mediation take place within a framework of certainty and predictability presented by the body of existing case law.

'No system of law can engender public confidence if it fails to be consistent in its decision-making and the European jurisdictions are not exceptions to that general proposition.'

Adversarial or inquisitorial justice?

The conclusion that court adjudication has a definite future does not mean that court adjudication must follow the adversarial system. The ALRC Issues Paper[13] explicitly raised the question whether we should adopt the 'inquisitorial model' and discard key elements of the 'adversarial model'. That suggestion has been made by others in the past.

There are some preliminary comments, which should be made about that suggestion. The first is that all too frequently discussion of the two systems has proceeded on the basis of stressing the contrasts and differences in the two systems, contributing to the impression that the opposition between the two systems is greater than it really is. As mentioned earlier, both systems are evolving and some degree of convergence is taking place. The integration of the United Kingdom in the European Union is contributing to that development. One element in the convergence is the practice of holding judicial exchanges (conferences) between senior English judges and senior European judges.

It is instructive to look at the European Court of Justice. Its procedures are largely European but English emphasis on procedural fairness is evident, as is recognition of the value of oral argument within strict time limits. United Kingdom and Irish counsel, as one might expect, are more effective advocates than their European counterparts.

I have already mentioned the absence of a doctrine of precedent in Europe. True it is that there is not such a doctrine. But to say that without further explanation is to risk giving a false impression. No system of law can engender public confidence if it fails to be consistent in its decision-making and the European jurisdictions are not exceptions to that general proposition. Past decisions are important and influential. Again, it is instructive to look at the decisions of the European Court of Justice where reference to earlier decisions plays an important part, though not the obsessive part, which it often plays in the common law judgment. This is an aspect of judgment writing, which deserves more attention.

The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of the truth. Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Whether European courts are effective in investigating the truth and actually finding out what is the truth is a vexed question and one which is beyond the scope of this address. Although there are those who assert that the European system is not notably successful on this score, it is probably rather more successful in this respect than the adversarial system.

The fact that the judges have more control in the European model offers the potential to redress some shortcomings in the adversarial system. To the extent that the court takes the initiative in ascertaining and finding facts, the burden on the parties and their legal representatives is reduced, particularly in the matter of costs. Because lawyers have a reduced role in the European model, inequality of competence in legal representation is less of a problem than it is in the adversarial system. That is an important consideration in an era in which participation in litigation by unrepresented persons is becoming more common.

It is significant that, in Europe, there is no substantial counterpart to the emergence of the large mega-firms that dominate legal practice in common law jurisdictions. The relative absence of such firms almost certainly testifies to the existence of a different legal culture. But the existence of that different legal culture may have its roots in, or be associated with, larger and deeper cultural differences that divide Europe from the common law world. The common law world places great emphasis on legislative supremacy, whereas Europe has a long history of bureaucratic decision-making, now carried on by the European Commission and the Council of Europe.

It would be a grave mistake to assume that transplanting the European model to Australian soil would necessarily result in a performance by that model which would be uninfluenced by our traditions, our culture and our expectations of litigation. It is at least possible, and in my view likely, that the model would take on new characteristics. It would also be a mistake to assume that the 'good' characteristics of the European model as critics of the adversarial system see them, that is the reduced role of lawyers and lower legal costs, will necessarily remain static, even in Europe. These characteristics may themselves be in process of change.

'I regard a shift to the European model as something that requires an extraordinary act of faith.'

These are not the only reasons for not adopting the European inquisitorial system. In order to service it, a much larger number of judges would be required than is required by the common law adversarial system. The cost of funding a system, which calls for a higher population of judges, would deter Australian governments from supporting a move to the European system. The fact that European judges enjoy a lower status than their common law counterparts might please our politicians but there is no guarantee that adoption of the European model would affect the status of our judges. As the European model gives judges more control of litigation, there is no reason to think that their status in the eyes of the public would decrease.

An important characteristic of the European model is that the judges are career judges. In other words, they are educated and trained specifically for service as judges. They do not enter the legal profession as a preliminary to judicial appointment. European judges take up judicial appointments at a comparatively young age, at least by our standards. This has led to some criticism in some countries, as the public becomes aware that controversial cases have been dealt with by young and apparently inexperienced judges. That has added force when criticism is made of departures from procedural fairness.

To be fair, much of the criticism of the European judiciary is associated with the inquisitorial system in its application to criminal cases. But if we are contemplating a shift to the European model in civil justice with a career judiciary, it makes little sense to make an exception for criminal cases and to continue to appoint judges from the profession to hear criminal cases. To make such an exception would mean that we would have two categories of judges. That is a recipe for disharmony, confusion and inefficiency.

A career judiciary would present a problem in education and training not only for new judges but also for the re-training of existing judges.

A move to the European model would also present a major culture shock for the legal profession and litigants. The advocate plays a lesser part in the trial than does the advocate in the common law system. Some people may say that would not be a bad thing. On the other hand, the move away from the present system would certainly disappoint expectations on the part of litigants who believe that their day in court entails the presentation of a case as shaped by their advocate, along with cross-examination of witnesses. The 'inquisitorial' procedures of immigration tribunals have been criticised on this ground.[14] Indeed, some of the resistance to the proposals in the 'Woolf Report' in England may be attributed to recommendations which, by giving the judge strong powers in relation to the calling of witnesses, notably expert witnesses, and other matters, would, if implemented, take England closer to the European model than the reformed adversarial model presently in operation in Australia.

For my part, I regard a shift to the European model as something that requires an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.

In saying that, I am far from denying that we can usefully take up some aspects of the European model. We are following that model in giving more control to the judge in the area of case management. How much further we should go will be determined in the light of further experience. For example, judges could impose limits on cross-examination. Although there are difficulties in doing so, they are not insuperable.

Nevertheless in adopting a selective approach to the

European model, we need to be cautious. Some aspects of the model which appear to be advantageous either depend for their effective operation upon characteristics of the model which we would not wish to adopt or would not migrate easily into our system. For example, the suggestion that primary responsibility for fact gathering should be assigned to the court, made by Professor Langbein,[15] would be too radical a step, involving judges in both investigation and decision-making. On the other hand, case management, which is now a feature of court procedures in Australia, though it is not a specific procedure in the European model, brings our adversarial system somewhat closer to the European model.

And, at the end of the day, if we were minded to adopt the European model, two major questions would confront us. The first is whether the constitutional concept of judicial power, which is vested by the Australian Constitution in Ch III courts, would extend to the determination of disputes according to the European model. The answer to that turns largely on the extent to which the concept of judicial power mandates common law conceptions of procedural fairness or natural justice. And there are indications in recent High Court judgments that the extent is substantial.[16]

The second major question is whether we are willing to make do with less of an emphasis on procedural fairness. Are we willing to allow the judge to decide (a) whether witnesses will be called and, if so, which witnesses and (b) to limit cross-examination that is not as significant an element in the European model as it is with us?

'It can be argued that we have gone to extreme lengths in insisting upon procedural fairness and that our insistence has led to unnecessary costs and inconvenience.'

It can be argued that we have gone to extreme lengths in insisting upon procedural fairness and that our insistence has led to unnecessary costs and inconvenience. But if that argument is to be carried to a convincing conclusion, it will necessitate analysis and evaluation that have not yet been undertaken.

Costs

I have one misgiving in rejecting the European model and that is about the cost to the litigant of the adversarial model. As will appear from my discussion of case management, it is not established that the reformed case managed adversarial model will significantly reduce costs to the litigant. That remains a possibility but no more than a possibility.

In order to address that problem, we need to do more to encourage use of lower level forms of dispute resolution such as small claims jurisdictions, consumer complaints tribunals and community justice agencies, outside the orthodox court system. In setting up such tribunals, we can, where it is thought appropriate, structure them in the light of the European model. In this way, we may alleviate the cost burden to the litigant and, at the same time, gain some experience in how an adapted European model would work in an Australian environment.

Case management

Judges, initially resistant to case management, have, for the most part, become converts after having experience of it. Case management has been questioned, if not criticised, on the ground that the professed benefits that it brings, in particular reduced costs, have not been conclusively demonstrated. Be that as it may, it is reasonably clear that steps which ensure that issues are clearly defined at an early stage, that early consideration is given to settlement, even by mediation, and that the case is brought on for trial and judgment expeditiously without unnecessary expense and inconvenience, will result in the efficient disposition of litigation. Case management will improve the quality of justice. That is the principal advantage now claimed for case management.

The 'single judge' or 'docket' system of case management introduced by the Federal Court is well regarded. A judge who deals with a case from beginning to end will be more efficient than a judge who comes in without prior knowledge of the case. The judge who is familiar with the case will save time and should reduce the costs otherwise payable. He or she will establish a rapport with the lawyers, who themselves will perform to the highest level of their ability when close attention is given to the case in the preliminary stages.

It is possible that the increased costs incurred in preparatory work and interlocutory hearings, including conferencing, may equal the cost savings resulting from quicker and shorter trials and from more settlements and earlier settlements.[17] Professor Zander has expressed the view that history demonstrates that lawyers are experts in ensuring that reforms do not result in lower legal costs. He asserts that the only effective way to reduce legal costs is to fix fees for legal services. That is the German expedient.[18] And it seems to have been successful.

Whether case management results in cost savings to government is likewise an unknown. The more time spent by judges in case management - and the time so spent may be quite considerable - the less time they have available for hearing and deciding contested cases.

Obviously judges can make effective use of qualified staff in case management activities and that is something that government must bear in mind in seeking to achieve the most effective use of judges. But if case management is to succeed, it must be undertaken primarily by judges. The exercise of their authority over lawyers is essential.

We must be careful to avoid 'over-management', in particular unnecessary interlocutory hearings and conferences, because they will result in an oppressive costs burden, as well as inconvenience. Techniques and procedures appropriate to complex cases should not be applied to simpler cases. Unfortunately, it is the complex 'big cases' that have dominated the debate and unduly influenced the reform agenda.[19]

At the same time we must accept that it is the judge who has control of the parties, not the plaintiff nor the parties. It is the judge who manages the timetable and who decides what has to be done in order to bring the case to trial. In controlling the litigation, the judge is asserting the authority of the court. The reputation of the court and public confidence in the administration of justice demands that cases be disposed of efficiently as well as justly. If the conduct of litigation is left to the parties, the court will not avoid blame for the delays, inconvenience and expense that result.

Although I have heard professional criticism of case management from some solicitors, my very strong impression is that there is strong professional acceptance of the Federal Court system of case management, subject to a minor qualification relating to a difference between 'pro-active' judges and some who are not. The acceptance of Federal Court case management is due to the fact that it was introduced after close consultation with interested groups most notably the legal profession. It was not a reform imposed from on high upon an uncomprehending and uninformed profession.

It is, however, imperative that judges and others who seek to extol the virtues of case management avoid the rhetoric of prompt disposition at the expense of just disposition. Over emphasis on prompt disposition will do nothing to encourage public confidence in the system. Nothing will do more damage than a belief that the justice system is in process of conversion into a production line.

The dangers presented by judicial rhetoric of this kind are also to be seen in too rigid an insistence on case management timetabling.

Compliance with case management timetabling

Some concern has been voiced over the majority decision of the High Court in *State of Queensland* v *J.L. Holdings*.[20] In that case, the primary judge refused leave to the defendants to amend their defence on one ground, though allowing leave on other grounds, after earlier amendments and interlocutory hearings, because the result in the vacation of the date for hearing estimated to take four months. Although the defence was fairly arguable, the judge considered that maintaining the date for hearing was a more pressing consideration. The High Court held (i) that a party in breach of a timetable stipulation should be entitled to pursue a fairly arguable point when any prejudice to the other side can be cured by an order for costs and (ii) that the principles of case management are not an end in themselves and are subordinate to the concept of ensuring that a party is able to properly present its case at trial. One would have thought that these principles are unexceptional. Criticism of them suggests that the critics have elevated case management to a position in which it is the paramount goal.

On the other hand it is proper that a court should not readily contemplate a departure from the stipulated timetable and should carefully consider what the consequences of such a departure would be. In *Sali* v *SPC*, the High Court said that the judge

> is entitled to consider claims by litigants in other cases awaiting hearing ... as well as the interests of the parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.[21]

There is no inconsistency between the two decisions. The criticism of *J.L.Holdings* seeks to elevate case management values to an absolute. No system with pretensions to doing justice could allow that to occur. The departure contemplated in *J.L.Holdings* is predicated on the availability of costs as an adequate recompense, though it is now accepted, and properly so, (i) that courts have been too ready to conclude that procedural failures can be made good by an order for costs[22] and (ii) that the public interest in achieving the most efficient use of court resources is a relevant consideration.

It may be that *J.L.Holdings* has been misinterpreted by some judges as an authority for excessive leniency. If so, appellate courts should ensure that the correct approach is adopted as a counter to the tendency already mentioned. There is no need for legislative intervention and it is by no means clear what the appropriate legislative intervention would be.

Case management and judicial discretion

A criticism made of case management in the United States is that it entrusts too much discretion to the judges. This has resulted in a departure from uniformity in favour of individualised procedure for particular cases.[23] Differential case management that contemplates allocation of cases to established channels has not been maintained. Judges enjoy having a judicial discretion and the more so because appeals from exercises of judicial discretion are problematic. Indeed, appellate courts are reluctant to intervene in an interlocutory matter and even more so when it is a matter of procedure.

The thinking behind the discretionary approach is that it will lead to prompt and economic disposition. So long as the exercise of discretion does not lead to unpredictability and uncertainty, it may be accepted as an element in case management. On the other hand, the United States criticism requires that we emphasise the necessity of maintaining both predictability and

certainty and that means keeping a close eye on uniformity.

One discrete aspect of case management and ADR, which calls for scrutiny, is the discretionary participation by judges in discussions, which lead to settlement. In the United States, concern has been expressed because the judge may play a coercive role in relation to settlement. That risk is all the greater because discussions of this kind are not subject to the publicity which attends court adjudication. There is no escape from the conclusion that case management and ADR enhance the part played by discretionary justice and incidentally make that exercise of discretionary justice less susceptible to public scrutiny. On the other hand, there is, I think, less of a risk that Australian judges will become 'settlement brokers'. Such a role is foreign to our judicial tradition. Even so, it is a matter that will require continuing attention.

'There must be a dedicated commitment to case management and a will to achieve the benefits which it can bring.'

Mediation

I shall confine myself to one comment about mediation. There is a case for codifying the principles according to which mediations should be conducted. Codification of principles will enable review to take place attended by public scrutiny.

Of course the new vision of the court system with its emphasis on prompt and efficient disposition does not favour review because it delays final disposition. But it is essential that we do not allow court proceedings to degenerate into private proceedings that are not subject to review and publicity. Openness and publicity have been an essential feature of our system.

Settlements

What I have said so far is not designed to criticise judicial facilitation of settlement negotiations. Settlements are to be encouraged. Most cases are settled, not adjudicated. Although that is so, settlements take place within a system of court adjudication in which the predictability of the court decision provides a reasonable framework within which a settlement can be arrived at. In a less than ideal world in which substantial court fees are payable, I have no objection to encouraging settlement by giving the parties a discount on court fees that might otherwise be payable.

Judicial attitudes

Judicial attitudes to case management and the introduction of court standards are divided. It was no secret, in England, that some judges were far from convinced of the virtues of Lord Woolf's *Access to Justice* reforms. It is also evident that some judges believe that the judge's role is that of an umpire who keeps the ring and that is all. I suspect that there are other judges who have little interest in case management, who regard it as some new-fangled device which has little to recommend it.

These attitudes must change. There must be a dedicated commitment to case management and a will to achieve the benefits which it can bring. There has been a strong judicial tendency to allow departures from procedural requirements if enforcement of compliance results in final judgment without a trial. Departures from procedural requirements must be justified. Judges should actively monitor compliance with directions and deal with lawyers who are responsible for delay, even to the point of making them responsible for costs.

Judicial attitudes are too closely geared to the trial as the ultimate goal of the adversarial system. There has been a tendency to leave questions to be determined at the trial when they could be advantageously decided in advance of the trial, thereby avoiding trial of some issues of fact. In applications for an interlocutory injunction, difficult questions of law are often left to the trial. It would be a more effective use of judicial time if they were decided at the interlocutory stage so long as they are capable of being decided on the materials then available. But if that course is to be viable, it may need the co-operation of appellate judges who are naturally reluctant to decide questions which can be left to the trial.

Judges consider that it is undesirable to decide questions of law in the abstract without having findings of fact to illuminate the question of law. Although that reluctance is understandable, in the interests of efficient resolution of the controversy between the parties it is desirable that questions of law should be answered in advance of the trial when the answer would avoid trial of unnecessary issues of fact and save expense.

The remedy of summary judgment should also be more frequently used. Justice Davies of the Queensland Court of Appeal has been a strong advocate of a more extensive use of the summary judgment procedure. That initiative merits strong support. In General *Steel Industries Inc* v *Commissioner for Railways (NSW)*,[24] Barwick CJ acknowledged that argument of an extensive kind may be necessary to convince a court that there is no reasonable cause of action and that

summary judgment should be entered. The same comment may be made about the absence of a fairly arguable defence. If entry of summary judgment depends upon the outcome of a question of law and does not depend upon a contested issue of fact, I see no reason why that question cannot be determined in summary proceedings, no matter how difficult the question of law may be. If amendment of court rules or legislative amendment is necessary to bring about this result, then that action should be taken.

In more complex and specialised litigation, where there is no disparity in the quality of the legal representation and the parties are well-resourced, there may be an advantage in separating the hearing on liability from a subsequent hearing on quantum. It has been suggested that some judges may be too reluctant to take this course even when it is convenient and economical to do so.

In less complex cases when there is a disparity in legal representation or in the resources of the parties, separation is generally inadvisable. Separation may result in unnecessary expense and a burden on witnesses who would be required to give evidence at both trials.

It is difficult to generalise. My comment is simply designed to make the point that there are some cases in which division of the hearing may be an advantageous exception to the general rule.

Judgments

I referred earlier to the decisions of the European Court of Justice. The critical question is for whom is the judgment written? For the parties, for the legal profession, for the community or for the author? Excluding the last alternative, the answer will depend on the court and the issue under consideration. The High Court judgment that makes or clarifies the law stands at one end of the spectrum. Even in the case of a High Court judgment, there is no reason to write it as if it were an article for publication in an American law review or even the *Law Quarterly Review.*

In the case of other courts, brevity in judgment is to be commended, so long as the substantial points argued are dealt with. Of course, by reason of complex facts, some judgments call for findings of fact which defy brevity. Not infrequently, exhaustive discussion of authorities is overdone, as if to convey the impression that the judicial author feels that he or she must establish his or her credentials, namely that he has undertaken a good deal of research and is therefore well qualified to decide the case. The discussion of authority is sometimes much more extensive or more impressive than the actual reasoning on which the decision ultimately turns.

The judgment is written primarily for the parties, particularly for the losing party; the judgment should explain to him why they lost. Depending upon the issue, it may also be written for the legal profession and the community. Even if written for the legal profession, it is not a legal monograph. If written for the community, the reasoning should be comprehensible by an intelligent well read lay person. The judgment is the principal means by which the courts speak to the community. That is what some judges tell us. Indeed, some judges would say that my statement should be qualified by substituting 'only means' for 'principal means'. If judges want the community to understand what they are doing, then they should write judgments suited to that end. That means writing a judgment which commentators and journalists can mediate to the public.

The short form judgment in appropriate cases has much to commend it. In other cases, the United States 'telegrammatic' style of judgment has distinct advantages. By these means unnecessary judicial labour can be eliminated.

In writing judgments and in speaking and writing outside the courtroom, judges need to remember that these days the public needs to be persuaded of the efficacy of court adjudication. The system has its critics. They include journalists, politicians and academic lawyers. Now that Attorneys General (or some of them) have declined to man the barricades, it is for the judges themselves to demonstrate the virtues of the system. In that they will be supported by the profession and some commentators. But support from the profession is discounted by the public for various reasons. Today the judges themselves are in the front line of communication. They must communicate in a way that is comprehensible to intelligent non-lawyers rather than in the language of a priestly class. They must be informative so people know the process better and what their rights are.

Judicial training

We must place more emphasis on judicial education and judicial training. Drawing from a wider field of candidates for judicial appointment makes well considered and comprehensive judicial training programmes a necessity. The need for these programmes is becoming more evident with the appointment of solicitors and academic lawyers as judges. But those who have practised as barristers would also profit from these programmes. The intellectual property lawyer appointed to the Bench may have less knowledge of criminal law than the solicitor or academic lawyer who becomes a judge.

A recently appointed judge who was a very experienced counsel and attended an introductory course for newly appointed judges told me that he derived great benefit from it, particularly that segment of the course that was directed to communication and relations with the community.

Judicial education is even more important in Australia than it is in England where the Recorder system provides prior probationary experience before permanent appointment. Subject to the obstacle presented by Ch III of the Australian Constitution, it is a course that we should consider. In its absence, judicial education becomes a matter of paramount importance.

Good work in this field has been done by the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales. But more could be achieved if a National Judicial College was established. It is important that judges should have at

least a very strong input into, if not control of, judicial education, in order to protect judicial independence.

Increased emphasis on judicial education is a very small step in the direction of the European model.

Technology

Technology can play an important part in court administration and the processing of data. Electronic filing and recording is now important. Judgments are put on the internet. Libraries can make use of the internet for judgments and academic materials. Video conferencing is increasingly used for the reception of evidence and for hearings, as well as pre-trial conferences and special leave applications. Work is advancing in relation to the introduction of electronic appeal books. Use of computers is made in particular cases and inquiries that are complex or involve extensive documentation. But I doubt that technology courts will be widely used simply because some litigants will be unable to use them or to afford lawyers who can do so. Video conferencing, electronic filings and use of computers significantly reduce costs that would otherwise be incurred.

Monitoring

There is a need for continuous data collection and monitoring of court performance. This is now achievable with the use of computers. In the past there was little attention given to data collection and assessment of court performance. Without continuous data collection and monitoring of performance, the courts cannot meet legitimate demands as and when they arise. Fortunately, in the area of court performance, the old judicial attitude, which was 're-active', has been replaced by an attitude, which emphasises assessment and planning for the future.

Consultation

Allied to data collection and monitoring is the need for close consultation with users. A case in point has been the Federal Court's consultation with the profession in relation to case management. Professional input was an important element in ultimately winning professional approval of the procedures. Continuing consultation will bring to light aspects of court performance that require attention.

Tribunals

Although I have made a passing reference to tribunals in the context of costs, tribunal proceedings stand outside the principal reach of my address. Nevertheless there is one point I should make. On reflection, I think that we made the mistake in the past of moulding some tribunals too closely to the court adjudication model. There is a definite place for some tribunals to be cast in the European mould, with a departmental officer as member of the tribunal, so that the tribunal can work in conjunction with an investigating officer; in other words, there are some administrative functions in which the European model can be adapted to tribunals. I hasten to add, however, that I do not suggest that all tribunal proceedings should conform to such a model. It is a matter of tailoring a model to suit the function, which is to be discharged.

As I have foreshadowed, experience with tribunals which conform more closely to the European model would enable us to assess more accurately the possibility of making particular changes to our court system.

Conclusion

Adversarial justice has a future. But it needs to be supported and defended against irresponsible criticism and criticism which is politically expedient. The virtues of adversarial justice need to be explained to the community. And the point needs to be strongly made, by Attorneys General, if only they will do so, that very considerable improvements have been made in Australian court systems in recent years and that we are willing to make further changes once it is established that they are desirable.

1 See J. Resnik, 'Failing Faith and Adjudicatory Procedure in Decline', (1986) 53 *Uni Chicago Law Review* 494 at 505.
2 *Access to Justice Advisory Committee, Access to Justice: An Action Plan* (1994); *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995 and the *Final Report*, July 1996 (referred to as 'the Woolf Report'); *Civil Justice Review (Ontario), First Report*, March 1995,and *Final Report*, November 1996; *Report of the Canadian Bar Association Task Force on Civil Systems of Justice*, August 1996.
3 Common complaints are that lawyers waste time in technicalities, point-taking and excessive cross-examination. Whether these complaints are justified as a matter of generalisation I do not pause to inquire.
4 Justice Ronald Sackville, 'The Civil Justice System - The Processes of Change', NILEPA and ALRC Conference, Griffith University,10-11 July 1997, p. 24.
5 September 1997.
6 *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447.
7 I have in mind the House of Lords decision in *Barclays Bank PPC* v *O'Brien* [1994] 1 AC 180 and the many cases which it has spawned in which the lender can rely on a certificate given by the solicitor for the lender or the husband as to the advice he (the solicitor) has given to the wife.
8 This expression can be traced back to 1976; see Professor F.E.A. Sander, 'Varieties of Dispute Processing' (1976) FRD 111 at 131.
9 J. Resnik, 'Many Doors? Closing Doors? Dispute Resolution and Adjudication' (1995) 10 *Ohio State Journal on Dispute Resolution* 211 at 217-218.
10 ibid.
11 *Supreme Court of NSW Annual Review* 1996 at p. 12.
12 August 1996, p. 23.
13 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No. 20, April 1997, at pp 134-135.
14 See M. Gawler, 'Judicial review for immigrants should stay', *Australian Financial Review*, 25 June 1999, p. 29. Whether the claim 'that few people believe they get a fair hearing at these tribunals' is more than a reflection of the views of lawyers is an important question.
15 J. Langbein, 'The German Advantage in Civil Procedure', (1998) *Uni Chicago Law Review* 823 at 824.
16 See, for example, *Bass* v *Permanent Trustee Co Ltd* (1999) 161 ALR 399.
17 See J. Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging', (1997) 49 *Alabama Law Review* 133 at 184-188.
18 A.A.S. Zuckerman, 'Lord Woolf's Access to Justice - Plus ça change...' (1996) 59 *Modern Law Review* 793.
19 See J. Resnik, 'Failing Faith: Adjudicatory Procedure in Decline', (1986) 53 *Uni Chicago Law Review* 494 at 511.
20 (1997) 189 CLR 146.
21 *Sali* v *SPC Ltd* (1993) 116 ALR 625 at 629.
22 *Ketteman* v *Hansel Properties Ltd* [1987] AC 189 at 220; Lord Woolf, *Access to Justice: Interim Report*, Lord Chancellor's Department, London (1995) at 154.
23 J. Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging', (1997) 49 *Alabama Law Review* 133 at 195 et seq.
24 (1964) 112 CLR 125 at 130.

150 Not Out

Ian Barker QC

YOUR HONOUR, THE CHIEF JUSTICE of Australia, Justice Gleeson, Your Honour the Chief Justice of NSW, Justice Spigelman, Your Honours, Guests of Honour, colleagues.

Tonight we happily celebrate 150 years of forensic, bare-knuckle fighting. Frank McAlary QC and Chester Porter QC, admitted in 1948, Tom Hughes QC in 1949.

We're going to have three speakers speaking respectively for them, so I won't take up your time, but I do feel compelled to say this – that in the 50s and early 60's when I was one of the state's longest serving and most impoverished articled clerks, I knew each of them, at least I knew of each of them - I kept a very respectful distance.

Chester Porter was a rising super-nova, Frank McAlary, indirectly responsible for what the Government now seems to see as a Greenslip crisis, as long ago as the 50s extracting by process of extortion, huge verdicts from juries and starting to own Australia, plodding along in the footprints of Sir Sydney Kidman.

And then Tom Hughes, of course, he was a soaring super-nova – he may not want to be reminded of this fact, but I remember him wearing a homburg, and I thought to myself – my god, I can't afford a down payment on a homburg! So he went on to greatness and I went to Alice Springs with a branch office at Tennant Creek.

Tony Bellanto QC

When Chester Porter was called to the Bar on Friday the 12 March 1948 Doctor Evatt was in his eleventh day of submissions in the High Court in the *Banking* case.

Monsoon looked like missing the Sydney Cup, the Court of Quarter Sessions was sitting at Balmain, *I Walk Alone* was showing at the Prince Edward Theatre and one could go ice-skating at the Glaciarium. *The Gracie Field Show* was broadcast direct from London at the 2GB Theatrette in Phillip Street - I was five.

There were two barristers admitted that day - Harold Glass was the other.

At 21 Chester was the youngest after Norman Jenkyn to practice at the Bar. Mind you, Frank McAlary was not far behind, they having shared time together at Sydney University.

He practised from Denman chambers at 182 Phillip St., where the Supreme Court now stands, and read with Bruce McFarlane. He came to the Bar well qualified, having graduated with first class honours, achieving seventh place in the year. He was articled at Blake Dawson Waldron to Bunny McIntyre.

Initially, he did landlord and tenant work, however his diverse skills soon emerged when, within three years, he juniored Jack Shand KC in the Royal Commission of Inquiry into the murder trial and conviction of Frederick McDermott, before Commissioner Kinsella. Shand and Porter appeared for McDermott and their joint forensic skills are widely regarded as uncovering evidence that proved pivotal in the release of their client.

It was during his work appearing for the Commissioner of Consumer Affairs in tenancy cases that Chester Porter again encountered Peter Clyne. They previously had been involved in the University debates. The New South Wales team at that time comprised Adrian Roden, Neville Wran and Clyne. Porter was the adjudicator. Clyne is recorded as saying of Porter's role: 'He had a tongue like a razor blade and the gentleness and delicacy of a rattlesnake on heat, but he was always very fair.'

Some years later Clyne found himself under cross-examination by Porter in tenancy proceedings where, appearing for himself, he was attempting to evict protected tenants. We have an insight into what it is like to feel the brunt of Porter's cross-examination when

described by a recipient.

Clyne said graphically:

> Being cross-examined by him is like having your throat cut quietly, courteously and swiftly - one moment you are cheerfully chatting away in the witness box, the next moment your head's rolling down the court room aisle.

I have no reason to doubt this hyperbole because it was in an article I read by John Slee. On the assumption that it's true however it prompts one to ask why is Chester Porter called the smiling funnel web when a more entomologically accurate reference would be to describe him as the praying mantis.

Moving on from landlord and tenant, he acquired a reputation as an expert in administrative law. In fact, David Hunt has described him as knowing more about prerogative writs than anyone. Of course, I assume that means anyone apart from David Hunt.

Rodney Parker remembers, with a tinge of embarrassment, an occasion when Chester Porter was in his room on the 12th floor of Selborne chambers looking for a case in the NSW Reports. Rodney said: 'You'll find every tin pot stated case in those reports'. Chester replied disdainfully: 'Yes and I was in every one of them'.

Chester was a foundation member of the 12th floor Selborne and he's still there today. His room is Dickensian, replete with walls of books.

This stability as an occupant of chambers is also reflected in his private life which he strives to keep private. Chester has lived in the same house since 1953, he's been married to the same gracious lady since 1953, and of course has occupied the same chambers since 1963.

Chester and Jean have three very gifted daughters. Josie and Mary are university medallists, and Dorothy is one of Australia's leading poets - *The Monkey's Mask* being her latest work. Melbourne based, she has apparently inherited some of her father's acerbic wit, describing our beloved harbour city when she comes to visit Sydney, as 'that glittering tart'.

Chester's grandfather was a dairyman and his affinity for the land and animals has been passed on, as Chester's house resembles a hobby farm. In fact, one of his hobbies is 'zoos of the world'. He has ducks, geese, dogs, pheasants, fruit trees and Australian natives abound. His interests extend to bush walking and, in particular, bird watching with Jean. Lee Stone recalls a case in the southern highlands when Chester took his binoculars and on a break in proceedings set off on an ornithological pursuit.

His other interests are reading Henry Lawson and *The Pickwick Papers* and the famous *Dean* case - which apart from its technical aspects serves as an instructive warning of the dangers of 'popular' justice and the disasters which result from allowing legal issues to pass into the political or sentimental sphere.

He has what could be described as old fashioned principles, one of which is that like Sir Garfield Barwick he made a rule never to invite solicitors to his home. He relaxed this rule once with far reaching and profound consequences. During the Chamberlain inquiry in which he was assisting Justice Morling he invited his instructing solicitor home for dinner. During the evening the solicitor was introduced to his daughter Mary. He is now Chester's son-in-law.

'He is the consummate advocate, at ease arguing cases at local trial and appellate level...'

Chester is really two people - the private and reclusive family man - in fact the name Chester is from the Latin meaning 'fortified camp' which is apposite to describe his non professional life, and the other is the self-effacing master tactician whose luminous intelligence has put him at the forefront of advocates of Australia.

When asked about his CV, he has said modestly: 'I was admitted in '48. I took Silk in '74 and I haven't been disbarred'.

In tonight's company, one is constrained in recounting his many and varied forensic triumphs. It should be stated however that in the early part of his career he was briefed regularly by the state and appeared in many prosecutions and other proceedings of significance. Then towards the middle of his career he was favoured by the Commonwealth Government and appeared in many prosecutions for the Commonwealth and its instrumentalities. He is the consummate advocate, at ease arguing cases at local trial and appellate level - and a few months ago he successfully argued the criminal appeal of *Fleming* in the High Court - concerning a self warning in judge alone trials.

In 1981 he appeared on behalf of the NSW Bar Association in the well publicised proceedings to oppose the admission of Wendy Bacon to the Bar. It is said that due largely to his incisive cross-examination the Bar Association was successful.

The law reports are replete with his many appearances.

However, it is only since the mid 80s that he has gained notoriety as a criminal defence Silk and been elevated to the status the media like to call 'high

profile'.

In late 1983, aged 57, he sustained severe injuries in a motor vehicle accident. Two things that weren't broken were his spirit and courage. He was hospitalised for some 10 weeks and remained away from practice for about eight months. He was heard to remark later that he would never drive a Volvo again, because it took too long to cut him out. True to his word, he now drives a Ford Laser.

On returning to the Bar, his professional life changed and in one of his few interviews he said, and I quote:

> The key to successful jury advocacy, apart from numerous other things, is understanding your fellow man, and, strangely enough, it does help you understand your fellow man if you have suffered yourself.

He seems to have adopted Lord Byron's words in *Don Juan*: 'Adversity is the first path to truth'.

In June 1985, he appeared for Roger Rogerson against Jack Hyatt Q.C. It was shortly after his acquittal that Rogerson made that now famous remark to Ray Martin on Channel Nine's *Mike Willisee* programme, and I quote: 'In 27 years on the police force I have never known a corrupt police officer.'

Chester Porter QC

Incidentally, it was 18 years earlier in 1967 that Chester was junior to Jack Hyatt in the second Voyager Royal Commission into the sinking in 1964 of the destroyer *Voyager*. They represented Lieutenant Commander Cabban whose evidence was crucial in clearing the name of Captain Robinson, Commander of the aircraft carrier *Melbourne*.

In September 1985 he appeared for Judge John Foord QC. His Honour was acquitted. It was after these victories that a group of admirers is said to have organised T-shirts bearing the message 'Chester Porter walks on water'.

In May 1988, he appeared for Andrew Kalajzich who was charged with the murder of his wife, Megan. This was not one of Chester's many successes and some time later when asked by a young barrister about this particular case, Chester was heard to respond: 'You'd think this fellow would be clever enough to ask me about one of my victories.'

A passion to become totally absorbed in his cases has been his trademark, as is the passion to win.

Rodney Parker was leaving chambers one bright sunny day carrying an umbrella when Chester asked the obvious question. Rodney replied 'Because I'm a pessimist.' - whereupon Chester said, 'So am I, I only think about the cases I lose'.

In 1990 he was counsel assisting Justice Jack Lee in the inquiry into the circumstances of the prosecution of Inspector 'Harry the Hat' Blackburn for a number of rapes. Again, after a lengthy and colourful investigation at Chester's direction, numerous deficiencies were revealed.

Then in 1991 he was counsel assisting an inquiry into the conviction of Alexander McLeod Lindsay who had been convicted of attempting to murder his wife in 1965. During the subsequent inquiry Chester arranged for an investigator to lie on the floor and cough with blood in his mouth in the direction of a white jacketed chemist. In the end Justice Loveday reported that the conviction should be set aside. McLeod Lindsay was ultimately released and paid substantial compensation.

In 1992 he appeared for the Minister of Environment, Mr Moore in the Greiner inquiry conducted at ICAC into the circumstances of the appointment of Dr Metherill to a position in the public service.

During the last decade he seems to have acquired a reputation for appearing in what he describes as 'wandering hand cases' appearing for medical practitioners before the Medical Tribunal.

In 1986 he was Rostrum Speaker of the Year, he has been past President of the Academy of Forensic Sciences and past President of the [Australian] Council of Professions. He has given much to the Bar and is a point of authority within the profession. To survive and maintain such an extremely successful practice in the glare of close public scrutiny is a remarkable achievement.

A fitting tribute was recently made by 50 of his friends and colleagues at a dinner in March last year. He was presented with a portrait of himself by Graeme Imson. Inscribed on the back with these words from John Bunyan:

> Who so beset him round
> with dismal stories do but themselves confound.
> His strength the more is.
> No foe shall stay his might
> though he with giants fight.

Chester Porter QC

Fellow members of the legal profession - you may appreciate that such an occasion is one that is rather devastating for the person who gives the address. I feel very nervous. I comfort myself with the reflection that I won't have to do this for another nine years. I've always mucked up formal occasions. 51 years ago I was admitted to the Supreme Court, and into the Bar. I felt

pretty proud of myself. I wasn't even 22 at the time and my brother was there and I sort of came out of court and I said: 'Pretty good sort of thing', and he said to me 'Don't you bother to take the price tag off your gown when you go into court?', and that was the beginning of many years of humiliation.

In those days they used to constantly give farewells to judges in which they said how wonderfully kind the judges were to young counsel appearing before them. Let me tell you with the wisdom of 51 years of experience - that ain't true!

I started off at the Bar with the name C.A. Porter. My father said to me 'Look, your name's Chester - it's an unusual name, you ought to use it.' And I thought that's not a bad idea because I wasn't getting much in the way of briefs, I can tell you! And so I changed my signature to Chester Porter, which it still is. So, as far as I know, I'm the only Chester Porter of the Bar, and probably the only one in the legal profession.

'...early in my career I discovered...that the law wasn't all that good at all, that innocent men could quite easily be convicted.'

I was named after a parson, which wasn't a good idea, and my mother had some ideas that I might be a parson but the prac work beat me. But anyhow, having adopted the name of Chester Porter, so everyone called me Chester, that was a good idea. The only trouble about this system is when you have an unusual name everyone knows your name and you don't know their name. Now, I myself have always had a shocking memory for names. I've got a very good memory for events - I know cases as to what they decide. I never know the names of the cases.

I have been constantly embarrassed by the fact that I meet people at the Bar, I mean people I know extremely well, I know the cases they were in, when they appeared against me, I could give you every detail of the case - the only thing I can't give is their names. Often my wife was with me and she'd say 'who was that', and I'd say 'it was a friend of mine'. But if, by chance, I've offended anyone by this sort of thing, may I apologise.

The other disadvantage of course of having an unusual name and people always calling you by your Christian name was - I remember in my very early years at the Bar, I'd only been at the Bar a couple of years I think, if that, I was in some case involving something or other at Central, but one of witnesses was a prostitute - quite an attractive girl actually - and everyone was calling me Chester - which was fair enough.

And anyhow, I'm walking down King Street some time later with a couple of barristers and this girl walks by - her profession was obvious - and with a great smile she said 'Hello Chester'. So it's not a good idea having an unusual name.

I look back on the law over 51 years and I wonder what are the great impressions I have of it. Well, early in my career I discovered, as not many people do quite so early, that the law wasn't all that good at all, that innocent men could quite easily be convicted.

I was only 25 when I appeared in the McDermott Royal Commission about a murder that had taken place when I was a 10 year old. I had a lot of time on my hands then, and to cut a long story short, the Crown case depended upon the suspect car's wheel tracks being 56 inches. So I said to my solicitors, if they weren't we've got something to go on. They looked back and said 'yes they were, they were 56 inches', and, because I had a lot of time in those days, the suspect car was a 1926 Essex Tourer and in those days in the Domain at the road to the Art Gallery there were lots of 1926/27/28 Essex's parked. This was 1951. So I got onto Moffatt, an old ex-Shanghai Police Inspector investigating officer of the Public Solicitor's Office and I said 'Look, let's measure them'. And sure enough they weren't - they were 54 7/8 inches in fact. Before that Royal Commission was over something like 200 blessed Essex's had been examined but what it showed to me was this that what seems to be the truth is often not the truth, only we never have the time to really look into it. That Royal Commission showed me that if you only had the time to do the investigations properly and thoroughly you'd find out that criminal law is terribly superficial. Innocent people can be convicted.

There's all sorts of arguments going on as to this and that in the criminal law, but fundamentally the difficulty is that sometimes juries make a mistake. Sometimes judges make a mistake - not of the law. I mean you've only got to have one sentence wrong to get a re-trial. But the fact that someone was on the jury who had an absolute prejudice against Catholics or Protestants or Indians, that doesn't matter because it could never be proved. And to me that, I think, is probably one of the greatest problems of the criminal law that has always worried me. It still worries me that if a jury makes a mistake, if a judge makes a mistake, it's so difficult to correct that mistake. I

mean, in my time I have endeavoured and in fact successfully corrected many fact mistakes, but always, by some silly means that look the judge said so and so, etc., but the fundamental thing was he made a mistake in fact, not in law at all. That's one aspect of the thing I should bring to your attention perhaps.

One of the problems of modern times, I think, we used to talk about deterrent and rehabilitation - now we talk about retribution, which if you like is simply revenge, is it not? Revenge - that's the great idea in punishment in criminal law these days - revenge. And we're supposed to be a Christian community that forgives sins - let's face it, I've never committed murder and I don't think I've ever committed rape or anything like that - but there's all sorts of things I have done. I mean, at the age of 73 I'd flatter myself, but it is quite astonishing how in modern times we, no not really in modern times, we've always been doing this, there's been a favourite crime and we have a public campaign against it. At one time it's white collar crime. In my early days at the Bar it was homosexuals, which are now lawful.

I think the current craze is paedophilia, but next week it will be something else. I think along these lines today and I thought I would look back to a book that was written in the year I was admitted to the Bar by Professor Radzinowicz - *The History of the Criminal Law*. Chapter eight is the chapter which of course they make all equity judges read before they can sit on the Court of Criminal Appeal. It's headed *The Doctrine of Maximum Severity* and is founded on a pamphlet written in the 18th century, *Hanging not Punishment Enough*. I don't how, I suppose it's only because Professor Radzinowicz went out of print some years ago, that the two contesting parties in the recent elections didn't get onto this pamphlet.

I mean if you want to stamp out dangerous driving what about crucifying all drunken drivers by the roadside. The result of the pamphlet *Hanging not Punishment Enough* was in fact the institution of the idea of gibbeting people after they were hanged, so that if you took a stage coach journey from London to York 150 years ago, you would see these gibbeted bodies by the roadside but interestingly enough law and order does not appear to have been improved by that interesting spectacle.

Years ago I used to appear for the Public Solicitor of New Guinea in appeals to the High Court from New Guinea and I particularly remember the case of *Wendo*, which is the leading case on some legal point or other, but there were either 34 or 44 appellants which means that added to a dozen or so other cases I have done, I have probably appeared in more High Court murder cases than anyone else. I mean I had a good start, but they were New Guinea gentlemen who had wiped out the village of Maga I think it was. They wanted to skite about having done it, they didn't want to deny it, so the only way the Public Solicitor could ensure that they got a trial was to train them to put their hands over their mouths and stand mute when they came before the court. I have a photo at home of the *Wendo* defendants actually being trained in the art of pleading 'not guilty' by putting their hands over their mouths.

That case is authority for the proposition that although confessions have to be voluntary you only have to prove it on the balance of probabilities and as a result the appeal was dismissed. It always struck me though that even on that test it was a bit far fetched. You see, I think it was forty four residents of Maga had been disposed of. The Police Inspector, who was also the Coroner, well they were budget cutting as we do these days, went out looking for witnesses and he instructed his police officers that if they ran away they're witnesses. They were then brought before him as Coroner in chains and then asked whether they had done it. This was a complicated process because they had to be asked in I think it went through English, Pigin, Kukukuku and the answer was 'yes' at the end. I was never utterly impressed by the justice of that but what intrigued me when I looked into it was that they had , in other cases in New Guinea, tried the idea of showing natives the death penalty in order to deter them, so they brought them down to Port Moresby, a dozen or so from the relevant village, they showed the gentlemen duly scragged and the natives thought that was the greatest thing they had ever seen, far from being a deterrent. They gave the whole idea away at that point.

The other thing that intrigued me about that was that Sir William Slim, the Governor General at the time, when presented with a list of commuted death sentences increased them, and we, being a good servile community, we didn't object.

It is true as Tony Bellanto said that I did have a car accident in 1983, and it's a weird experience to go through to actually endure a 100 mile an hour impact and not lose consciousness. It's a fascinating experience, although I don't recommend it, actually. I remembered I saw the car, it was a drunken driver, and he was on the other side of the road and he just came straight across. I saw him coming towards me. It's astonishing how slowly events move, and I remember all these running down cases I'd done and it was as clear as daylight I mustn't swerve to the right, I must swerve to the left. I did swerve to the left and he clobbered me, but fair dinkum. There was an enormous bang and then a dreadful silence and everything was red. I didn't realise it, it was because I had blood in my eyes. I didn't realise that for months later. But, the result of it all was that when I came back I thought, and perhaps it was true, that I was a better advocate than before. It is true that I believe that if you have been through it a bit you understand more what your fellow humans go through, and that is true - you do. When I addressed a jury and in my first case I was actually on crutches at the time, I felt a power that I've never had before, and it more or less lasted thereafter.

Appearing for people in criminal cases, the funny thing, I mean in the past I'd done everything - I'd done administrative law, I'd done equity. On one occasion, on a Friday, I think I appeared in the motion lists for common law, divorce, land and valuation, and equity.

Roddy Meagher used to reckon that equity was everything, but I can never quite accept it. I mean, when I started at the Bar, divorce and crime were regarded as naughty places, and the proper place to be was

interpreting wills and devising tax avoidance schemes. But I could never quite see it and I still can't see it - it seems to me the most important part of the law really is whether people are to be disgraced and confined for offences, and if we're going to do that, we have to be terribly careful. But I think we have improved a lot since I first came to the Bar. In those days, cases went through very quickly and many more people were convicted on police verbals. I'm glad to say that nowadays it's just about impossible to convict people on police verbals. I appeared in a double murder case a couple of years ago and there was the good old police verbal, you know the one 'are you prepared to submit yourself in front of the ERISP, ooh no no no no, are you prepared for me to type out the interview ooh no no no. Or, would you mind if I just noted it in my notebook as you say it. Oh, it's quite alright!'. And ... - well you laugh!

That was about the third or fourth time I'd heard that story, and I said to the jury 'This Sergeant really ought to get a new script writer - I mean that one's had it!' - and they agreed. But I don't think it is to the credit of the law really that it required the attention of some equity men in the High Court to wake up to the fact that police verbals have gone too far. Having substantially eliminated police verbals... oh no look we still get them, I mean on the way he said to me 'Look, I did it but I'm not going to tell you under the ERISP', but I'd had one or two of those but those ones are so silly they're not worth worrying about. We have eliminated police verbals, but on the other hand we've given away a lot of other safeguards. I'm not too sure how we stand now, but I am reasonably confident that it's a good deal more difficult for someone to be convicted of a crime if they haven't done it than it used to be.

We're not so fast, we're not so confident, we don't really think the law can never make a mistake, and if we have that in mind we might get somewhere. I must say that I was fascinated by the judgment of Michael Kirby in the High Court recently on appeals from findings of fact. You know how you say in these cases oh well, the trial judge - he could see them, he could see their demeanour.

The best witness I ever saw, whose demeanour was 100% perfect, was Australia's top con man. By and large, that's true, isn't it. I mean, on demeanour, how would you go on a case between Marilyn Monroe and Boris Karlov, who would win? I mean, it's the one bit of nonsense that we have in the law, it's this wonderful worship of demeanour.

51 years in the law and I can't tell whether they're lying or not, I haven't a clue. Not by just simply looking at them, but we have this faith. Never mind, we are battling towards the sunrise and in nine years time I'll tell you whether we've got there.

His Honour Judge John McGuire

When I arrived here tonight I told Barker that I'd been able to distil McAlary's history down to an hour. He turned and smiled at me saying that 'If I'd wanted to bore the witness I'd have got Poulos, or Conti or Maconachie to talk'.

Ladies and Gentlemen I don't propose to give you chapter and verse of McAlary's legal history. It's indeed difficult to talk seriously of a man who was variously known as Frank McAlary QC, the 'Bigger Boss', the 'Big White Fellow', the 'Roan Bull'. What I propose to do is to pass on a few reminiscences of this man who so endeared himself to me over the last 45 years.

First of all, let me tell you how it was that Frank came to the Bar. He flirted briefly with a career in the movies - you'll remember that role in *The Dancing Man*, however when he was not nominated for an Oscar in any category, didn't receive any offers from Fox or Metro Golden Mayer he looked further afield.

His first thought was to enter the church - his researches, however, disclosed that there had been no red headed popes of Irish descent.

The coppers, he thought. Perhaps a career in vice. Alas his hopes were dashed when he realised that Ray Kelly and Bumper Farrell had this niche effectively controlled.

Big, truculent, aggressive, opinionated, he was a natural for the law.

Chester Porter QC

You may be interested to know how it came to be that Frank took silk. I briefed Eric Miller to lead Frank in the claim for personal injuries for one Richardson. He had sustained serious facial injuries, as a result of which he was substantially blind.

He was accompanied everywhere by his mother, who led him about.

A conference was arranged, Miller had promised that he had read the brief thoroughly and he'd be on time. Typical of all silks, he did neither.

We waited patiently in his chambers for an hour.

That morning Mrs Richardson had had a number of skin cancers removed from her face and she was in a terrible mess.

Eventually Eric arrived, sailed across the room, knocked Richardson aside, stood in front of Mrs

Richardson and told her that she had indeed been grievously injured and he'd get her a huge verdict. After he'd picked Richardson up from the floor and arranged the introductions Eric beamed, and he said 'Your most astute solicitor has not only briefed me, the leader of the common law Bar, but he has briefed the most brilliant junior counsel in Phillip Street. And to demonstrate his talents I'm going to allow Frank to conduct this conference as if he was the leader.'

McAlary had been dozing away on the corner, sat bolt upright and conducted the conference. As we left the room McAlary turned to me and said 'If that's what being a Silk is all about I'll be in it.' He applied the very next day.

Frank has always been a most courageous and effective advocate, both in and out of court.

There was an occasion in the Court of Appeal, presided over by Mr Justice Moffitt, when Frank had a blazing row with Mr Justice Hutley. Even Frank thought he might have gone a little far, and this was confirmed when he received a note from Mr Justice Moffitt commanding him to attend his chambers at the conclusion of the hearing.

With some trepidation Frank was led into Moffitt's chambers to be greeted by Moffitt proffering a glass of whisky. He said 'Here Frank, take this and settle down, I haven't seen such a good show in years.'

He was most effective in his dealings with judges outside of court.

There was an occasion where he was briefed to appear in a District Court circuit at Newcastle. The judge heard that Frank was driving and requested a lift - Frank complied. The judge, who shall remain nameless - I must protect his reputation and that of the judges of the District Court - entered Frank's big brown Ford, he had one of those wide big seats, he was in the passenger seat, Frank's ever-loving Patti, without whom he rarely moved, was in the middle, and Frank was driving.

By the time we reached the Hawkesbury Bridge it had become too much for Frank - he jammed his foot on the brakes and he said 'George, I mean Judge' he said 'If you squeeze Patti's knee once more', he said 'George, I mean Judge, I'm gonna punch you in the nose and put you out on the side of the road. Get in the back!'. The trip proceeded uneventfully and Frank obtained magnificent results in that circuit.

Perhaps his finest hour was when he didn't open his mouth in Court. Because of Frank's great courtesy and consideration, understanding and kindness, which he'd extended to the Aboriginals on his vast holdings, he was literally revered in the Kimberley. He had a friend, one Wallace - an Aboriginal fellow, who formed a member of the Wombat Patrol - a group of good chaps who wandered around the streets of Derby at night to rescue drunks and put them in safe places before the Police could arrest them.

Wallace picked up such a chap and took him to his own home. When Wallace completed his patrol he found this chap in bed with this wife. Wallace dragged him outside and in the front of plenty of witnesses, administered the father of a hiding to him.

Wallace was charged. Frank drove into Derby, some 200km from one of his vast holdings, with his Manager - also part Aboriginal - Gordon Smith. Frank sat in the back of the Court to observe proceedings, the only white face amongst a sea of black chaps.

A succession of witnesses told the Magistrate that they didn't live in Derby and had never been there, and they certainly couldn't identify Wallace, didn't know him, there'd been no fight.

The Magistrate had no alternative but to discharge Wallace.

Frank turned to his Manager, Gordon Smith, and he said 'Gordon, that's remarkable. I understood there was a very strong prosecution case.'

Gordon said 'Bigger boss, that's not so remarkable. I told all those witnesses that if they gave evidence against the Big White Fellow's friends the Big White Fellow was here to deal with them.'

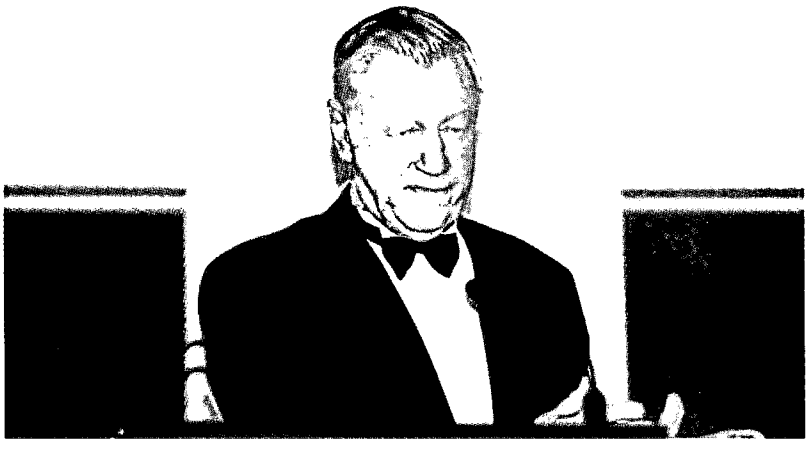
Frank has achieved prominence in appearing for a wide variety of sporting identities - Bart Cummings, horse trainer, Bill Mordey, fight promoter, the much misunderstood Robbie Waterhouse, and of more recent times, Ian Roberts.

Now, Frank has always fancied himself as being a ladies man - I've never seen any evidence to justify this view, and Bill Clinton he ain't.

Ian Roberts, 6'6", 16 stone, a veritable Adonis, a man with a fabulous physique who was want to display it naked together with his accoutrements in the centrefold pages of men's magazines.

He was being sued by one Gary Jack, another footballer. Jack claimed that Roberts had altered the shape of his face by punching him out. There were some 13,000 witnesses at this event, and Jack seemed to have a prima facie case, him being some six inches shorter and 5 stone lighter than Roberts.

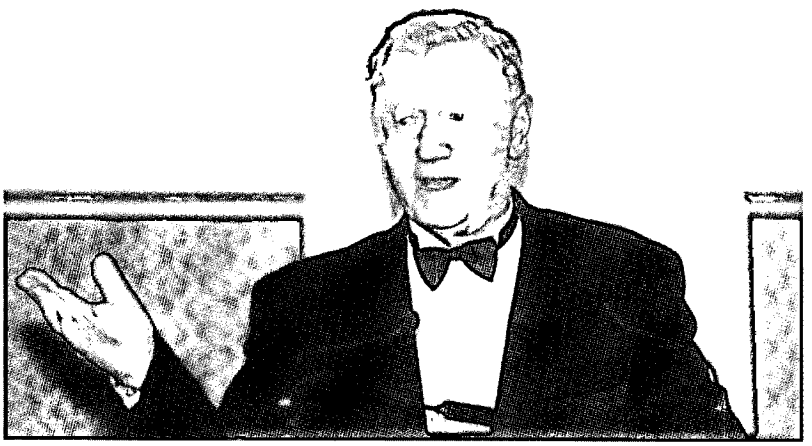
Now I'm confident that Hughes and Porter would've mounted some excellent defence on behalf of Roberts, but I don't believe that



Frank McAlary QC

they would have demonstrated the ingenuity and the cunning displayed by McAlary.

He and Ian Roberts were conferring and fashioning their defence which involved the proposition that it was Jack who had assaulted Roberts by his repeatedly smashing his face against Roberts' fists. Indeed, it was Roberts who was the aggrieved party - he had severely bruised and braised knuckles to show.



Frank McAlary QC

Now the young ladies on Frank's floor regarded Roberts as being a 'hunk'. And one by one they entered Frank's chambers on the flimsiest of pretexts to gaze at Roberts.

Roberts realised what was happening - he stood to his feet, at that stage there were four girls there - stating 'Girls, you have nothing to worry about from me.'

McAlary, not to be outdone, leapt to his feet, pulled in his stomach and said to the girls 'Well that's not so in my case. You've got a lot to worry about from me.'

The girls fell about and the case was settled.

Ladies and Gentlemen, it's not Frank's pre-eminence in the law, his gigantic status from the cattle industry, his vast land holdings, his successes in business that have endeared him to me.

It's rather his simple humility and goodness, the fact that he is a contributor.

By way of example, McAlary was at my place for a dinner party - Jim Staunton was there. Staunton floated the idea of Associate Judges for the District Court - not the scheme that obtains now. He wished to conduct an experiment by appointing Acting Judges from amongst prominent members of the Bar.

McAlary immediately volunteered and came forward. A man of his eminence disrupted his practice and, at a substantial cost to himself, served for a considerable period as a District Court judge.

Indeed, he was generally recognised as being the best Friday motions judge that we've seen. He established records for setting aside interlocutory judgments that they may never be surpassed.

I don't want to breach a confidence, but I have it on good authority that had he played his cards right, had he got a bit closer to Staunton, a District Court appointment could have been his.

Fearless in court, fearless on a horse, fearless in the boardroom, when it comes to his God this man demonstrates true humility. He is on his knees every day of his life, attending Mass and communion.

Now you may or may not be religious, but you will appreciate that a man held in such high esteem, a man so successful in everything he does, has a true appreciation of his real work in his relationship with his God.

As a further demonstration of his humility and faith, he attends a shrine at Madjagouria in Yugoslavia, where the faithful believe that the Virgin Mary revealed herself to a number of school children and continues so to do. To demonstrate that humility and faith, Frank joins with these believers in climbing a steep course of broken rocky steps up the side of a hill on his knees. This is the same man who appears so confidently, some say arrogantly, before the High Court.

On a Sunday when you and I are readying our yachts or powerboats for a trip around the harbour, loading the Mercedes to go down to the weekender at Moss Vale or Palm Beach, this man is at the Matthew Talbot Hostel, attending to those who are forsaken, who are forgotten, people who most of us wouldn't recognise or even know about.

Frank McAlary QC

Let no one say this is easy. Some men are born great, and Tom Hughes is the obvious choice for that. Some men achieve greatness, and Chester Porter has certainly done that. But the problem I face is that tonight greatness has been thrust upon me. And it's an ill-fitting suit, I don't know how I can wear it tonight, but I certainly can't wear it in the future. All I can say is thank you, thank you John, and I would thank all members of the Bar because the Bar and the law have been very good to me.

It may interest you to know that I came to the law as a complete outsider. My family, father and grandfather were cattle men, sheep men in far west of NSW. We had no legal background at all. When I was 10 my father died due to drought, and his death forced the family into Sydney. My mother decided that I should be a barrister, I had no choice in the matter. She decided it and it had to occur.

So in 1948, not knowing quite what to expect, I came to the Bar. What did I find? You might be interested to know. Well, it was a small community of 300 or 400. The hallmark of the society was individualism. All members knew everyone else, but there was a firm determination that there should be no conformity, eccentricity was the hallmark.

If one went to court with Eric Miller, in the morning we proceeded as follows. Eric would walk first. His junior was allowed to walk beside him and converse with him. Three paces behind was Eric's Clerk carrying Eric's brief. Two paces behind that was the solicitor, and then somewhere at the back was the client. Now, that procession had to be arranged every morning in Eric's chambers. It didn't have to occur at lunchtime.

But if you went with Clive Evatt it was totally different. You shuffled. Why did you shuffle? Because Clive never thought that there should be any laces in his shoes. He took the view that he could proceed to court and retain his footwear by personal attraction. The result was a shuffle.

But there were more interesting characters at the Bar. Does anyone remember Bill Hutton? Probably not. The Bill was a real person. He practised in divorce. The Chief Judge in divorce was Bonnie. Now Bonnie was well qualified to sit in divorce - he being the leading counsel in all copyright and trademark cases for 20 years. But the point about Bill was every year at the Christmas sales he would go and buy 12 collarless white shirts. Then he proceeded to wear them - one a month. When he put his shirt on, he never took it off. The wags used to bet whether Bill would last a month - wasn't much of a bet, he always did. Indeed, you always knew if Bill was around.

But there were others, more interesting characters at the Bar. Now, Tom should remember Harry May. Harry - little short fella, a great advocate, a great cross-examiner - if he was sober. The difficulty with Harry was that he was seldom sober. I remember fighting a case against Harry in the Supreme Court at Newcastle. And Harry was there, he was instructed as usual by Rupert Chance. When the occasion came to address the jury Harry stood there for a long while like this, sort of thing, then he said 'I'm for the defendant' - and sat down. I asked him afterwards 'Why?', and he said 'Rupert wasn't there to assist'. Now, Rupert was also well known as being the worse for wear. How the GIO managed to survive this combination, I don't know. Clive Evatt suggested to me that all I needed to do was to put another zero in the terms of settlement and no one would ever know. Of course, Clive had his own eccentricities. If the case was going against him, he would say to you 'Knock the water bottle over!' I'd look up and I'd see Bill Owens sitting up or Les Herron and I would say, 'no', and Clive would knock it over.

I remember Bill Owens say 'What? Another water bottle?'. But the great thing about Clive was that he had an ingrained habit of doing a runner. On the first or second day of the trial while you were sitting there thinking that the refreshers would add up to some particular figure, Clive would rise, bow and go. Now that meant that from then on you had to be able to examine in chief, cross-examine, address, and argue every point of law.

Clive was leading me in a case against Phil Woodward. Now, to frighten Phil was not the easiest. We weren't doing too well. So, on the second day of the trial Clive up, bows and vanishes. I go on for another three days, then Clive comes back as I'm addressing and I said to him 'Anything you want to tell me Clive?', he said 'Tell 'em about pain and suffering'.

So, now, I know Tom's going to say something afterwards, and it may be that in the big end of town we didn't have the same turbulent, chaotic affairs that went on down in the streets where I was practising. But down there, it was total chaos. There was no such things as statements to be exchanged weeks before the trial. The idea was that you kept your witnesses closely to your chest, and when the moment came you'd scream them on your opposition. The effect of that was to send the articled clerks and solicitors racing to take out subpoenas, chasing for new witnesses because the trial had developed in a different way. Chaos prevailed - I used to go to seminars where the academics would explain very loosely that we were engaged in trial by ambush. But it was very exciting. You never knew where you were, or what you were doing.

There is one thing that I'd like to say. One little trial that I'd like to tell you about. It took place in the number four jury court under the equity stairs. There was Jack O'Brien, not a very loveable character, presiding over a jury action. Now I was appearing for the plaintiff, as usual - I don't think I'd appeared for a defendant for 10-20 years, but I was appearing for this fella - he was a big man, about 6 foot 2 or 3, weighed 20 stone, and he had a bad back. The difficulty was that he also was a receiver, a thief, and underneath his house were great stores of tyres. Now, when I tell you that my opponent was Tom Hughes, you will realise what Tom was doing in the cross-examination of my client.

I was saved because of my solicitor, John McGuire. As we were going steadily down the tube, McGuire rushed into me and said, (handing me a piece of paper) 'Call her'. I looked and I could see this seemed to be a few notes from his wife. I said 'She can't give any evidence', he said, 'call her'. And then he added, under the dread words: 'If you lose this, you've lost us'.

It was too much for me - I called her. Now, wait a moment, wait a moment we haven't finished. In she came - about 5 foot 4, a pocket Venus, as sexy as Marilyn Monroe, the sour look on the jury's face vanished. There they were, they were fascinated - so was I! But Tom wasn't. He made an immediate decision that I would not get one word out of her. He'd object to every question I asked. Jack O'Brien made an identical decision. For 20 minutes I asked questions, Tom objected, Tom argued that I was misbehaving myself, that I was fooling with his Honour's rulings, Jack O'Brien was upholding him, the jury were watching, but ultimately she left the box, the jury watched her go. As she went she wiggled her bottom. Now, I was going to tell you about the way the addresses proceeded, but the time doesn't allow one. Let me tell you this, that in due course back came the jury with a verdict for the plaintiff.

Now you may think that this has been a tale for my personal glorification, but it hasn't. It's a geared Moppa song story, there's more to it than that. I went back to chambers, I was pretty tired after having battled with Tom for a couple of days, and Jack at the same time. After all, when you have a senior counsel being led by another on the bench it is difficult. So I thought I'd have a quiet beer. So I got up and I think it was for The Tudor, I think it might have been The Assembly, it doesn't matter which and there were a couple of the jurors. A bit the worse for wear, and when they saw me they beckoned me over. So over I went. The foreman said to me 'You really didn't deserve to win, but we couldn't let her down'.

Well, I've enjoyed life at the Bar, I have no great forensic successes to tell you about, I've just battled away - uphill and down dale. May I say that I promised McHugh that I'd say something about McHugh, but as I've got a couple of special leave applications in the High Court, discretion

is the better part of valour.

Let me say I've enjoyed the Bar, it's been very kind and good to me. I can't imagine a career that I could have pursued which I would have enjoyed better. To those of you who follow the same path as I've followed, I'd like to say 'Godspeed' to you, and may you enjoy the success and solicitude that I've received while I was practising at the NSW Bar.

Ian Harrison S.C.

We are privileged tonight to be able to demonstrate our collective astonishment at the attainment by our guests of honour of a remarkable 50 years at the Bar and it's my privilege to introduce the shyest member of the group, Tom Hughes.

Before doing so, I should note that, such is the Bar, it never misses an opportunity to make known its true feelings. Despite my best efforts, it has not been possible to prevent this evening becoming widely known as 'The Fossils Do'. This troubled me. I sought help. Justice Gummow suggested I look up the meaning of fossil. He lent me a copy of his *Macquarie Dictionary* so that I could. That told me that a fossil was something belonging to a past epoch or discarded system. I thought that's a bit tough - these guys are old but they're still vertical. In fact, Tom is writing a book at the moment, tentatively entitled *Filipinos Behaving Badly*.

Anyway, I thought I'd check with Tom to see if he was keeping abreast of state-of-the-art contemporary forensic concepts. I asked Tom 'What do you understand by the term case management?'. He looked at me with a very straight back (Tom has a very straight back) and said 'My boy, that's what the porter at the Dorchester does with your luggage when you arrive'. I thought I'd take a chance. I said 'Well, what about differential case management?'. He said 'That's just an instruction to the porter not to get my bags mixed up with those of my wife.'

Thomas Eyre Forrest Hughes was born, unlike McAlary who was quarried, and Porter who simply turned up one day wearing sensible shoes. He was called to the Bar on 11 February 1949 and he took Silk in 1962. He was President of the NSW Bar Association between 1973 and 1975. He was made an Officer of the Order of Australia in 1988. He has had the presence of mind to avoid judicial appointment before he turned 70. He continues to practice in full flight to this day, despite several lucrative and tempting offers to become a mediator or a District Court arbitrator. He has the sort of practice which the rest of us, with the possible exception of Barker, can only dream about. As far as I know, Tom has never had to cross-examine a dingo, but it took Tom Hughes to establish that Andrew Ettingshausen actually had a penis - and a very valuable one at that! But Tom only needs one house, it doesn't have a spa, and Tom has lost interest in communal bathing anyway.

Tom Hughes is famous, and the cases he appears in make headlines. Even his in-laws get moderate publicity. Despite all this, Tom is a modest and humble man and a true friend. Tom has, as most of you all know, to my mind the most remarkable ability never to forget a name. Despite infrequent contact over the last 20 years since I first appeared as a junior with Tom, he has always remembered my name. Curiously though, I think Lindsay Foster told me that he personally had never noticed this about Tom! I didn't ask Littlemore!

I spoke to Tom's delightful wife, Chris, who told me that Tom was a calm and placid man who never lost his temper. I mentioned this to Tom's beloved secretary, Anne. She thought I must have been speaking to someone else's wife! In a noisy restaurant I asked Belinda Lyus, Tom's Clerk, if Tom was placid. It must have been noisy because she said she wasn't able to comment on his personal life.

Tom Hughes QC

Tom loves words. His use of English is unsurpassed. He uses language in court which most of us have never heard. In fact Tom often uses words which no one has ever heard. For example, recently in *NRMA* v *Yates*, Tom launched an attack on an opponent's affidavit as a 'A gallimaufry of tittle-tattle, an ill-assorted ragout of gossip and scandal'. Now of course, those words were, for once, not Tom's own work. They will have a familiar ring to members of the common law Bar. That phrase was originally coined by Crittle, who has used it to great effect for years with beguiling skill to charm and seduce juries at places like Moree, Campbelltown and Cobar.

Tom Hughes entered Federal Parliament in 1963 where he remained until 1972. He was the Commonwealth Attorney-General between 1969 and 1971. He was not uncontroversial. Most of us will remember his confrontation with a group of protesters outside his home. It was big news. It was on all the television screens throughout the country. It was the only occasion in living memory when Tom's eloquence required back-up. He took to the protesters with that cricket bat. The bat is now as famous as Tom. It sold at auction at Sothebys most recently in 1994 for an undisclosed six figure sum to an Indian cricket fanatic. It now occupies pride of place above the Tandoori oven in the 'Curry-Bazaar' restaurant

attached to the Calcutta Cricket Club. The bat remains versatile. It is still occasionally used by the chef to kill cobras and crush garlic. It no longer smells of linseed oil. As a surprise gesture tonight, that bat has been purchased by the NSW Bar Association for return to its rightful owner.

Tom is a keen sportsman. He regularly jogs in Centennial Park with Justice Meagher. He owns thoroughbred racehorses. He's a familiar sight outside Court 19A between special leave applications with his yellow form guide and his transistor pressed to his ear.

Tom Hughes is an impressive man with a commanding presence. This is never more evident than when he is in full flight in a first instance court. If you don't believe me, ask Rose Porteous. Tom is perhaps best known for the disarming way in which he cross-examines witnesses standing side-on with one hand on the lectern, while simultaneously staring towards the back of the court. This technique is notoriously effective but it has unintended consequences. Members of the public gallery often break down and answer his questions.

After 50 glorious years at the Bar Tom Hughes' enthusiasm and powers of persuasion show no signs of attenuation.

Tom Hughes QC

Friends and colleagues, all. Thank you Ian. You picked my few strong points and all the weak ones. A very penetrating analysis of a funny old character. I want to say something about my friend McAlary, whose speech I loved because it bought back to me memories of times past, those marvellous days when there was such a thing as trial by ambush, which was very good for all of us - and sharpened our wits! There's everything to be said having regard to the complexities in modern litigation drafting in chambers statements pages long which are then read, or not read, in public, read by the judge and so the case proceeds. But there was a great element of fun in those old days when Frank McAlary was being led by Eric Miller.

He said that I belonged to the big end of town. You know, I didn't start that way - I started as a practitioner in the Workers Compensation Commission and then in the District Court, doing personal injury cases for many years, and many enjoyable years, appearing before judges such as Judge X who when on one occasion, I rose to cross-examine a witness and asked my first question, said 'Absent any objection by my opponent - you can't ask that question', and I said 'Your Honour why?', and he said 'Because that has already been dealt with in chief'. Now X was a Chairman of District Court Judges many long years ago, and that was the sort of environment in which one had to do one's battles - it was great fun. The environment is perhaps more civilised today - I think very largely it's more civilised today, but Frank and I have had, what could fairly be described as a sort of love-hate relationship in our respective careers at the Bar.

We've done a lot of cases against each other, a lot of hard fights, and he mentioned, or somebody mentioned, Bart Cummings tonight. Now Bart Cummings is one of the great men of the turf, and I had occasion in a case against Frank when I was appearing for a firm of accountants to cross-examine Bart Cummings, and I had to do so for a day or two. Bart is a great character, but he has a short span of concentration. He manifested a determined refusal to attend to the question. So out of this actually came a firm friendship of the turf. Somebody said I was interested in racing - I am, not very successfully. But I said 'Look Mr Cummings, we've got to get this case moving and can I suggest to you, (and Frank was very co-operative), that when you start to stray from the answer that you should be giving to the question, I'll put my hand up and say 'Mr Cummings golden rule.' The golden rule, I explained to him, was that he must attend to the question and answer it. Well, it served a purpose, and the case went on more quickly, and the result doesn't matter. It was a hard fought case and out of it I meet Bart Cummings at the races when I go, and we always have a friendly chat, and he said to me once, he said 'You know, you ought to let me buy a good racehorse for you', which I thought was the nicest offer that somebody who had to put up with the irritation of the cross-examination by me could make. I haven't accepted the offer because I don't have quite enough money for his sort of racehorses.

Let me say something about the Bar. The Bar to me has been a profession of absolute fascination. If you don't enjoy what you're doing at the Bar, don't be there. I've enjoyed every minute of it and in the result, I've had the occasion to spend money on other activities, not altogether wisely, such as grazing. I love the country, I love looking after my cattle and my sheep when I go up there and my wife looks after our horses - and that's great fun, but it's not enriching at the moment. But one always has to be an optimist. Racehorses, well, they're great fun, but my most recent experiences is that having had a horse out for eight weeks with a lung infection - is cured of the lung infection and it's now out for three months with a swollen fetlock. So, you can't win, except occasionally. Let me come back to the Bar. How it has changed since Frank and I started 50 odd years ago. Of course I'm the junior tonight, both Chester and Frank are my seniors, and I should observe the appropriate decorum and speak briefly - I'll try to. The Bar in which we grew up was one in which the numbers were few 3 - 400, I thought more like three in 1949. You knew everyone by name, people like Alan Taylor, who was one of the giants, was able to take, except in extraordinary circumstances, half a day a week off to play golf, others were able to do the same thing with tennis. It was a more relaxed environment - people weren't working at the pace, with the demands that we have to cope with today.

Selborne Chambers was a funny old place. That's where I lived for the first seven or eight years of my life at the Bar. It was a cavernous sort of building with wide corridors on the ground and first floors, and upstairs is a sort of mysterious world in which there was a taxidermist; it had been a house of assignation. Those days were past because there were two old ladies of impeccable respectability who used to totter up and down from the ground floor to the second floor. Every day you saw them. We had a clerk, dear old Jack Sheahan, who had had a stroke and was deaf, I am talking about 1949/1950. He was the clerk to people like Jack Shand, Martin Hardy, Jack Cassidy, John Evans. He didn't have a telephone exchange, he had a number of

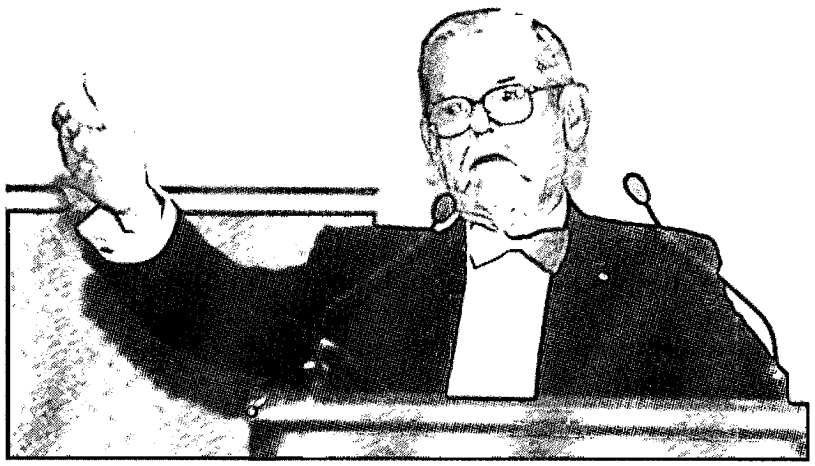
telephones on his desk, all individual, which used to ring at times in unison, and they were seldom if ever answered.

It was, compared with the today's world, a strange, old fashioned world. I remember cutting my teeth, if not having them broken, by doing cases in the District Court, against the likes of Sir Maurice Byers, who was always charming; he didn't break your teeth, he just spirited the case away from me with easy charm. Ray Reynolds: that was a tooth breaking exercise! With Ray, who became and remained a friend, no quarter was asked, and no quarter given. Very salutary experience for a young scrubber like myself.

Well, I could go on, I'm deeply grateful to all of you for coming here tonight to honour Chester, Frank and myself. It's particularly pleasing to me to sit next to two Chief Justices, with each of whom I've done cases, and to see at the table over there Michael Kirby, with whom I once or twice did a case. The one I remember was a probate case in of all unlikely venues, Grafton in the beginning of 1973. I remember travelling up on some ancient aircraft with Michael to Grafton to do this possibly quite interesting case which was settled on the morning of the hearing. And we trundled back to Sydney. I'm very grateful to all of you for having come here tonight.

I'm grateful for the many many juniors who've had to put up with my idiosyncrasies and times of short patience, or lack of patience. You've been a very forebearing lot. Even Sir Laurence down there, we did a case together just after I took Silk. So there are three people down there, with all of whom I've had the privilege to do cases as a very young Silk.

I just want to say one thing before I stop - this is a rather disconnected speech. It's disconnected in the sense because I feel fairly emotional about tonight. I'd trotted out on a list the number of members of the NSW Bar who made that step into the unknown of politics in the last 50 years, and they are, and I hope I haven't missed any out; Percy Spender - I remember Percy Spender when I was an Associate in jury actions before my judge, [the late Sir William] Bill Owen after [Percy had] travelled down in the train from Canberra from the House of Reps back in 1948. Harold Beale - now he went into Parliament in 1946. He wasn't a great advocate, but he found his niche in another very important walk of life. He became a very successful ambassador to the United States after having served in Menzies ministries. Gough Whitlam who went into the Parliament in 1952. He and I were opposed to each other when I was Attorney-General, of course he used to ask me questions and we carried on an agreeable game of banter across the chamber. Barwick went in 1958 and became Chief Justice, of course, six years later. I entered the House of Representatives in 1963, Nigel Bowen in 1964. Then there was Kep Enderby, who I'm delighted to see here tonight. When I left the Parliament in 1972 I was able to leave with the thought that I had no fewer friends on the Opposition side of the House of Representatives than on my own side, and that's perhaps a reflection of what I thought about the state of the Liberal Party of the time. Then there was Bob Ellicott who went in 1974. John Spender who entered the House in 1980,



Tom Hughes QC

now Ambassador in Paris. And my friend and floor colleague Maurie Neill, who was in the Parliament for one term. When I went into the House, Maurie, they used to call me a 'Oncer', and I always replied by saying 'Better to be oncer than a twicer', and it was a pity that you were a one term member, but you were there. And then of course I must mention one of the most famous of all, in many respects, Lionel Murphy, who paid me the compliment of having me as his counsel in some of his cases. And then Ian Sinclair, although he hardly ever practised. He did not practise full time at the Bar.

So, you take a line through 1946 to the 1980s, and you find that only 12 members of the Bar of NSW made that fateful step full of uncertainties into politics. And it is a pity because once upon a time the Bar was regarded as the nursery of politicians. I do hope that in the future some of the young will see it that way because the qualities that you learn in the rough and tumble of politics are qualities, which on any side of the Parliament, are useful and should be deployed by more barristers than has been the case in the last 50 years. There's room in politics for lawyers and there have been too few of us.

My years in politics were sort of up and down years, the end was down because I saw the Liberal Party – I'm not going to go into this, this is for a chapter in a book – I saw the Liberal Party as heading in a course which wouldn't have made me happy to stay very long there, so I went back to my first love, the law. But politics is a chancy game, it's a tough game, but it still has its fascination and more of us should try our luck even if only for short time. I'm very proud that my darling daughter has decided to chance her hand in an area of politics, namely city politics. I'm very proud of that and I think she'll do well.

Well, this is a disconnected sort of speech and it is, as I say, so because I feel very deeply about what you've all done to honour us. I'm very lucky that I have the acquired and retained so many close friendships with my colleagues, forensic comradeship notwithstanding. Thank you all.

A Hero of the NSW Bar

Memorial Service for Sir Maurice Byers CBE QC
St Mary's Cathedral
8 February 1999

On 12 March the 1997 Silks presented the Bar Association with a portrait of Sir Maurice painted by Gary Shead. The photographs illustrating this memorial were taken at the presentation.

Tribute by Sir Anthony Mason AC KBE

IN MY MIND'S EYE the image I have of Maurice Byers goes back to the first occasion on which I encountered him. He was appearing for one of a number of tenants in a case at Central in which the landlord was seeking to recover possession of city premises. As an articled clerk I was instructing a particularly stolid and obdurate counsel for another tenant. I was fascinated by Maurice's performance. So much so that I endeavoured to persuade my master solicitor to brief him - to no avail, my advocacy being distinctly inferior to that of Maurice.

As the years passed, our paths crossed in a fortuitous fashion, as happens at the Bar. Sometimes I appeared as his junior and at other times against him. Working with him, as many here will know, was a wonderful experience. His good humour and goodwill were legendary. He always had his own ideas about the way a case should be conducted. Like all good counsel, he nourished a healthy scepticism of judges. Infallibility was a characteristic of the Pope and not one that his Holiness condescended to share with judges.

Maurice was both a distinctive personality and a distinctive advocate. His background was not that of a typical barrister. His father was both a hotel keeper and a bookmaker at a time when the punter did not enjoy a playing field as level as it is today. Much of Maurice's early life was spent living in the family accommodation in the Great Southern Hotel and the Forbes Hotel in the heart of the city. Despite the vicissitudes of fortune caused by the Great Depression, he had a very happy childhood. To his friends in later life it would come as no surprise to learn that, as a schoolboy, he was no lean and hungry Cassius. In fact. he was tubby, giving promise of the outline with which we became so familiar. Even then his good nature shielded him from the taunts that might otherwise have come his way.

Educated at St Aloysius College, he was continuously top of his class. He graduated from the Sydney Law School with First Class Honours. Despite that, he lacked connections with the legal profession. He had to make his own way at the Bar, relying on work from less fashionable and smaller firms of solicitors whose clients needed a clever but responsible counsel to argue a legal point when very often that was all that there was to go on.

He developed a reputation for what in those days was called ingenuity but these days is called creativity. In a High Court judgment Sir Owen Dixon described one of his arguments as 'ingenious', in a context in which the comment was intended as a tribute.

On one occasion when I accused him of presenting a Jesuitical argument - an accusation for which, in this Church, I must pray forgiveness - his reply was 'People only call a man Jesuitical when they are beaten in argument.' For good measure, he told me that I was a casuist.

Later, with his reputation established, he was sought after by the larger firms, then often described as 'well respected', a term no longer in vogue, at least in its application to the modern lawyer.

More than any other counsel he appeared in odd cases. On one occasion in 1962 Rod Meagher and I appeared with him in a case involving interference by a lessor with an exiguous area 4 feet wide in front of a

dry-cleaning counter in the Wynyard Ramp. The application for an interlocutory injunction took place over 5 days, in which every possible point of law was argued and some others besides. Jacobs J delivered a lengthy judgment in which he developed a new legal concept – 'the apparent accommodation' – a concept of which Maurice was critical. Maurice was looking forward to arguing the case in the Privy Council. Unfortunately for counsel, the case was settled. At about that time and thereafter he appeared in a number of cases in the Privy Council.

It was his appointment as Solicitor-General that marked him out as the leading constitutional counsel of his generation. He had always been keenly interested in constitutional law. It was a field that suited his talents, as he quickly demonstrated. While he was Solicitor-General and afterwards, his successful arguments in the High Court changed the Australian constitutional landscape.

He was, without any doubt, the most successful Australian Solicitor-General of modern times and, with the possible exception of Sir Robert Garran, of all time, a fact that was implicitly recognised by an editorial in the *Sydney Morning Herald*. That 'journal of record', to use Tom Hughes' standard description of the newspaper in defamation cases, noted that he won 88% of the cases in which he appeared as Solicitor-General. That a newspaper editorial should be devoted to his retirement as Solicitor-General was a remarkable recognition of his renown.

Lady Byers

But his impact on the Australian Constitution was not confined to his work as Solicitor-General, ground-breaking though that was. The decisions are so well known that I can pass them by. After he returned to the Bar his success continued unabated, notably in the aboriginal land rights cases *Mabo* and *Wik*, *ACT TV* and *Kable*. *Kable*, in particular, was a great victory because he succeeded in the face of the very considerable physical disability that was already afflicting him.

His outstanding performances were in the High Court. There his exhibition of the conversational style of advocacy was to be seen in full flower. Unlike the author, the argument itself was lean and spare. He conveyed the impression, quite deliberately, that he was talking to the cognoscenti. A favourite tactic, in referring to authority, was to say 'It will be very well known to your Honours'. Often I had never heard of the case and I was comforted to find that I was not alone in my ignorance. What he had to say was always directed to the critical grey area of the case, unlike some counsel who were strong on the approaches but weak once they embarked upon the grey area. He believed that the sooner one got to the critical point, the better. He never forgot that advocacy is, or should be, an exercise in persuasion.

In many ways his advocacy was a projection of his personality and inner character. Genial, tolerant and humorous, rational and articulate, he radiated sincerity and integrity. Discussion with Maurice on an argument in court could be as enjoyable as conversation with him out of court.

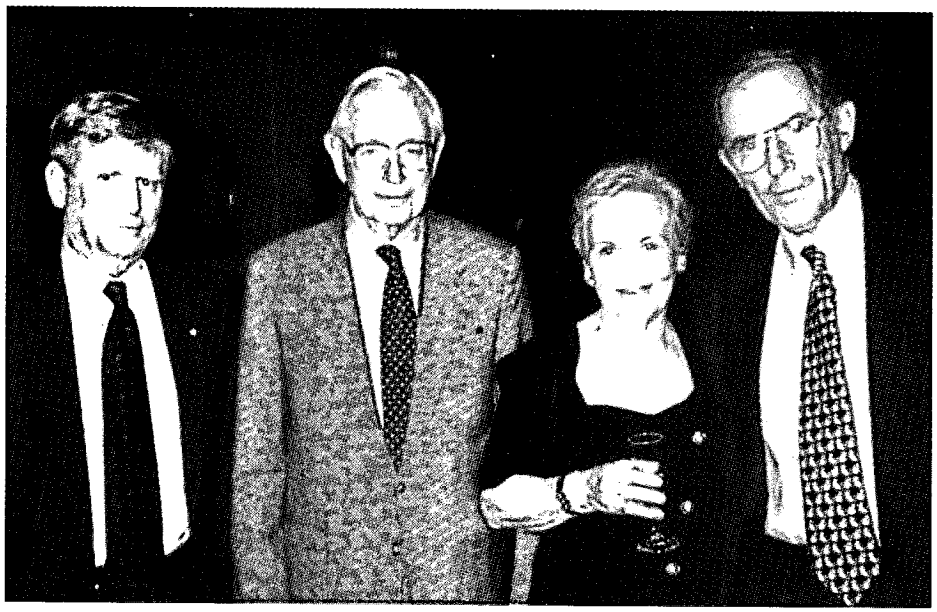
That feature of Maurice's personality was the essence of his advocacy and of his capacity to deal with Sir Garfield Barwick when he was Chief Justice. Appearance before Sir Garfield was the ultimate test of counsel's agility of mind and tenacity, qualities that Maurice possessed in abundance. More than that, he had wit and humour. And Sir Garfield lacked his usual sureness in the presence of someone who employed wit and humour. Maurice's tactic of countering the Barwick broadsword with an endless series of disarming chuckles

was extremely effective.

His personality and style marked him out from other lawyers. Yet in an indefinable way, he was the personification of the very qualities we would want to associate with the leader of the Bar. By his achievements he demonstrated the very influential and, at times, decisive contribution that counsel can make, not only to the outcome of cases, but also to the shaping of the law.

In some ways it was unfortunate that he was not appointed to the High Court, a position he would have filled with great distinction. But he had the satisfaction, perhaps the greater satisfaction, of knowing that he may well have achieved more than any Australian judge of his generation. That success came about not because, as he once modestly and irreverently suggested, he simply put the ball in the scrum and let the politics of the High Court take over, but because he was from the very beginning to the very end a counsel who put his heart and soul as well as his mind into the cause of his client. He passionately believed in justice, due process, liberty and the rights of the individual. That is why he was the counsel par excellence for *Wik*.

His companionship was one of the great joys of life.



The Hon A M Gleeson AC, Chief Justice of Australia, The Hon. Sir Anthony Mason AC KBE, Lady Byers and The Hon Justice L J Priestley JA

Conversation and discussion with him, no matter on what subject, was something always eagerly to be awaited. The realisation invariably matched the expectation. For all of us here, and especially for his family, his departure is an irreplaceable loss. Many of us will recall with gratitude his warm friendship and generous assistance. In my own case, his friendship and unobtrusive but unfailing assistance was a pillar of support at all times, He was singularly fortunate. He was sustained in his lifetime, as he will be hereafter, by the warm love and affection of Lady Patricia, his children Barbara, Mark and Peter, and by his wider family.

Tribute by Chief Justice Murray Gleeson

Down through the ages the Church has prayed endlessly for the souls of the faithful departed; asking eternal rest, perpetual light, and peace.

Most of us, when we join that company, will be judged more obviously departed than faithful. But every now and then someone dies whose life was one of conspicuous fidelity; someone who was an example of what was meant by those familiar biblical metaphors: the salt of the earth; a light; a city set on a mountain top that cannot be hidden.

Maurice Byers was such a person.

He was, of course, an immensely talented lawyer. However, talented lawyers are probably not the country's greatest need. Maurice Byers was a great deal more than that.

Mark Byers has just told us that his father's wish as to what should be said of him after he died was simply that it should be said that he loved his family. That is nothing more than the plain, unvarnished truth. It would not have escaped Maurice's notice, however, that, in the place where he was heading, it would also constitute extremely effective advocacy.

Maurice Byers' faithfulness infused his life. Like his learning, his faith was one he carried lightly. He understood, and acted upon, the essence of the principles he had learned from childhood. These principles were manifest in his love of his family, the breadth and the warmth of his friendships, his generosity of mind and spirit, the liberality of his professional practice, and the integrity and passion for justice which he brought to the public life of the nation during his years as Commonwealth Solicitor-General.

Maurice's family do not need to be reminded of what a good man he was. However, the legal profession, and the public, should be reminded that he was not just a skilled legal practitioner; he was a man who hungered, and thirsted, after justice.

I do not mean to suggest that he despised the skills of his profession. On the contrary, he was well aware that they were necessary to achieve his purposes. But he never regarded them as sufficient.

Maurice Byers belonged to the legal profession before some people gained the insight that it would serve the public better if it were a business. In his day, advertisement and self-promotion were regarded as unethical. One result of this was that his view of the right way to behave was unclouded by any desire for applause. In his style of life, and professional conduct, he was a man of striking, and impressive, simplicity.

Maurice Byers' role in the affairs of the nation is probably not yet fully understood, even within the legal profession. However, his fidelity to principle, the unshakeable ethical foundation of his professional conduct, in both private practice and governmental affairs, was the rock upon which his life's work was built.

Pat Byers, and her children and relatives, must be very proud of the enormous contribution Maurice made to his profession and his country. They must also be greatly consoled by the conviction, that, after a long journey, he has surely merited eternal rest.

Tribute by Justice Gummow

To be involved in the preparation and presentation of a case by Sir Maurice while he was Australia's second law officer was a remarkable experience.

This was so for several reasons. The first appeared when one arrived at his chambers in Canberra. In the anteroom there was his devoted and highly efficient secretary, Dawn Searle. There was no atmosphere of strain or stress. How different, one thought, from the anterooms of other great figures in the law.

Within, Sir Maurice sat, sometimes alone, sometimes with a bevy of assistants and advisers. Again, no sense of dread. Rather, there was an atmosphere of optimism that the problem in hand was to be solved by the application of calm thought. Later, when the matter was called on in the High Court, it became Sir Maurice's task to assuage judicial doubt and replace it by similar optimism which encouraged acceptance of his arguments.

Earlier, a written outline of submissions would be prepared. The production of the outline received much attention. It was never more than five or six pages. There was a number of drafts. The suggestions of all would be entertained. Succinct expression was encouraged. The smart, sharp but shallow debating point was a tradition – not a happy one - of the New South Wales Bar. Here, it was quietly but firmly put aside. Always the emphasis was on submissions which would draw the court into the heart of the matter and turn it towards the result for which the Commonwealth contended.

The reasons for Sir Maurice approaching cases at this level were both personal and pragmatic. His temperament favoured solutions that were preceded by reflection and speculation, not by the imposition of a false logical inevitability. Secondly, it was his brief not only to win the case but to advance the interests of the Commonwealth – the national interest – by a strong precedent which would stand the test of scrutiny over the decades ahead.

And so to court. Here the bench would be beguiled, never belaboured. One aims, I was once told, to please. Many here today will recall the mellifluous voice, the courtly gestures by which judges were persuaded that they could best rise to the occasion and the duties of their office, first by attaining the level upon which the Solicitor-General was presenting his arguments, and then by taking the apparently short step to accepting them.

The Honorable Sir F.G. Brennan AC KBE and Stephen Gageler S.C.

Ruth McColl S.C. and Peter McEwen S.C.

On these many memorable scenes, and in Sir Maurice's dealings with colleagues and practitioners who over time came to span many generations in Australian law, there was nothing false or mean. The professional courtesies were unfailing and unforced. Here was a senior figure admired as a formidable opponent, for the reach of his intellect and forensic skills, never feared for his tongue or displays of temperament.

It was these qualities which carried him into an active and serene old age. He was spared what I suspect he would have found the many tediums of judicial life and any anguish at being prematurely parted from them. Instead, he never really retired. A new generation of counsel came to work with and admire him and, one hopes, to see the attraction of the virtues he embodied. Then, in his 79th year, Sir Maurice, after half a century, left the lectern at the High Court, successful in the last two of his many significant cases.

To the many in this congregation who had the experience of working with him, the world now seems smaller and narrower.

It is for this life in the law that we give thanks today.

The 50th Anniversary of *Melbourne Corporation* v *The Commonwealth*

Address by The Honourable J W Shaw QC MLC NSW Attorney General to the Macquarie University Law Society on 7 May 1997 on the occasion of a dinner held to commemorate the 50th anniversary of Melbourne Corporation v The Commonwealth (1947) 74 CLR 31.

THE LAST TIME I ADDRESSED the undergraduate law students of Macquarie University was in 1995 when I spoke at the Macquarie University Law Society Annual Dinner on the *Balmain Ferry* case[1]. I have to admit that it was somewhat easier to prepare a speech for a dinner on false imprisonment, bombastic Balmain barristers and their girlfriends, and circular quay turnstiles than it was to confront the question of state banking and the constitutional principles involved in the *Melbourne Corporation* case.

Nonetheless I think there are some interesting things to say about the *Melbourne Corporation* case. The two issues that I wish to touch on are workable federalism and the question of implications in the Australian Constitution, an issue which leads to the broader issue of judges making law.

I will begin by dealing briefly with the facts of the *Melbourne Corporation* case.

Melbourne Corporation v *The Commonwealth* concerned an attempt by the federal government to establish the Commonwealth Bank as the central bank in Australia which was to handle all government business. The mechanism it used to do this included passing the *Banking Act 1945* and the *Commonwealth Bank Act 1945*. Section 48 of the *Banking Act* provided that without the written consent of the federal Treasurer, a bank was not permitted to conduct any banking business for a state or for any authority of a state, including a local government authority. The effect of this mechanism was that if a state did not have a state bank (a public bank), a state government and its instrumentalities would be required to bank with the Commonwealth Bank.

The section was challenged by the Melbourne City Council which wanted to choose which bank it used. The Council sought a declaration in the High Court that section 48 was invalid because it was beyond the enumerated powers of the Commonwealth government provided in the Constitution.

The High Court found that the section was unconstitutional, that is, the federal government could not force a state authority to organise its banking in a particular way. The six members of the majority reached this conclusion from different approaches. I will focus on the judgment of Sir Owen Dixon because it is the approach which has endured.

Dixon J found that the *Banking Act* fell within the constitutional section 51(xiii), the banking power[2]. Despite coming under a head of power, the section of the Act in question was unconstitutional because it was a law aimed at the restriction or control of a state in the exercise of its executive authority. He found that the law directly operated to deny to the states banking facilities open to others, and so discriminated against the states or imposed a disability upon them[3]. Sir Owen Dixon acknowledged that such a restriction was unwritten in the Constitution, but implied it from the frame or the structure of the Constitution[4]. This question of implications in the Constitution has, of course, been a matter of contemporary controversy.

It is interesting to note that the *Melbourne Corporation* case led the Chifley government to adopt a more extreme policy of bank nationalisation as L.F. Crisp describes in his biography of Ben Chifley[5]. This scheme was itself denied constitutional validity in the *Bank Nationalisation* cases, later in the 1940s[6]. The question of nationalising banks is a far cry from today's policies towards banks which have seen the privatisation of the Commonwealth Bank and continuing deregulation of the banking sector. However the deeper issue of the High Court having a direct impact in federal and state politics continues, as the current native title debate illustrates.

Federalism

Somewhat surprisingly, there is little in the Constitution which deals directly with the question of how the two levels of governments (state and federal) should interact with each other[7]. This gap has been filled by judicial interpretation of the appropriate relationship.

The decision in the *Melbourne Corporation* case profoundly shifted the way the High Court interpreted the federal balance contained in the Constitution. In my view, it created a greater degree of balance between the two levels of government compared to the relationship which existed before the case. Until *Melbourne Corporation*, the question of the constitutional embodiment of federalism had been set in the landmark 1920 case, the *Engineer's* case[8]. In *Engineers*, the High Court swept aside the doctrine of reserved powers which had existed up until that time. Additionally, the Commonwealth power was to be read as complete, without any deference to the immunities of a state.

While *Melbourne Corporation* did not revive the untenable reserve powers doctrine, the case did increase the independence of the states to some extent. The result

was that while *Engineers* provided that either party to the Federation could make general laws that bound the other party, *Melbourne Corporation* forbad either party from interfering substantially with the other or from discriminating against the other.[9] The relationship between Engineers and Melbourne Corporation was well summed up by Professor P H Lane:

> The first case was explaining (I cannot say deliberately) that in the Federation the parties desired union, the second that the parties did not go to the length of desiring unity[10]

The territory which marks out the area into which the Commonwealth may not venture has been further delineated by the *Queensland Electricity* case[11] and the *Australian Education Union* case in 1995[12].

Despite the shift in the federal balance slightly in the direction of the States contained in this case, it has not stopped the seemingly inexorable movement towards centralisation of power which has occurred throughout the century. In the 1970s the federal government relied heavily on the corporations power to expand its legislative control. In the 1980s, the focus moved to the external affairs power which lead to the celebrated *Koowarta*[13] and *Tasmanian Dams*[14] cases and the use of treaties to enact legislation for remarkably diverse areas of law including unfair dismissals[15] and decriminalisation of homosexuality in Tasmania[16].

Implications in the Constitution

The other major issue raised by the case is the broader issue of constitutional interpretation. In the *Engineers* case, the court established a general approach to interpreting the Constitution which could be described as 'strict legalism'. The text of the Constitution was to determine how the court decides a case. The context of the particular words, the constitutional conventions, the political debate or the society they applied to, were considered to be irrelevant.

Melbourne Corporation moved away from this approach and acknowledged the need when interpreting the Constitution to imply meaning from the structure and the context of the constitution. As I noted earlier, Sir Owen Dixon implied the restriction on the federal government found in the *Melbourne Corporation* case from the frame of the Constitution. His Honour recognised that it is meaningless to try to distinguish between legal and political considerations in constitutional cases. The more useful question is whether a consideration is compelling[17].

The *Melbourne Corporation* case puts some of the hyperbole for the current debate about the High Court into perspective. The implied rights cases and *Wik* have been the most recent foci of that debate.

The conservatives of the Samuel Griffiths Society complain about the High Court's propensity to imply terms of Constitution. They don't like the *Theophanous*[18] decision which implies a freedom of political discourse (see also *Nationwide News*[19] and *Australian Capital Television*[20]).

Melbourne Corporation shows that the implication of terms into the Constitution has a long pedigree, and also has respectability by reason of its authorship in the judge of Sir Owen Dixon, a judge who stood for 'strict and complete legalism'. Moreover, the doyen of black letter lawyers, Sir Garfield Barwick, put, as counsel, a robust argument to the court in favour of the implications which should be drawn from the mere fact of federalism. He stated:

> It flows naturally from the federal structure that neither Commonwealth nor State is competent to aim its legislation at the other so as to tend to weaken or destroy the functions of the other. You do not look in any of the placita of s. 51 to this incompetence; you get it from the federal structure... You must start with the implication.[21]

The recognition of the political pressures and effects of constitutional law, and the willingness to imply meaning into the structure and context of the constitution are welcome. They amount to judicial recognition that the Constitution is a living document that is more than a set of rules or relationships. This document defines us as a political community and establishes our ideas about how our community functions.

The *Melbourne Corporation* case, and particularly its decision on interpretation, is also relevant to the wider debate about whether judges should or should not 'make law'. In my view, the case shows that it is a myth to think that judges can do anything but make law. Judges always have made law. The only difference of late is that they have become more willing to publicly acknowledge the fact than their predecessors.

This is eloquently illustrated by Lord Reid:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.[22]

The High Court's foray into implied constitutional rights and the widespread acknowledgment (after *Wik*) that judges do make law are part of the process of the High Court defining its role in the Australian polity. The *Engineers* case was the most visible symbol of the tradition of the supposedly non-political approach of the Court. *Melbourne Corporation* was an early acknowledgment of the view that law and politics overlap and are often difficult to distinguish.

1 J.W. Shaw QC MLC 'Some Observations on *Robertson* v *Balmain New Ferry Company*' (1995) *Bar News* 13
2 (1947) 74 CLR 31 at 78-80.
3 Ibid at 84
4 Ibid at 83
5 Crisp, L. F. (1963) *Ben Chifley: A Biography* Longmans, London. pp 323 - 329.
6 (1948) 76 CLR 1; (1949) 79 CLR 497.
7 Lane, P. H. (1995) *A Manual of Australian Constitutional Law* 6th Edition, The Law Book Company, Sydney. p 387.
8 *Amalgamated Society of Engineers* v *Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129
9 op.cit. p 387 - 388
10 Ibid. p 387
11 *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192
12 *Australian Education Union* (1995) 128 ALR 609
13 *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168
14 *Commonwealth* v *Tasmania* (1983) 158 CLR 1
15 *Industrial Relations Reform Act 1993*
16 *Human Rights (Sexual Conduct) Act 1994*
17 (1947) 74 CLR 31 at 82
18 *Theophanous* v *Herald and Weekly Times* (1994) 182 CLR 104
19 *Nationwide News* v *Wills* (1992) 177 CLR 1
20 *Australian Capital Television Pty. Ltd.* v *The Commonwealth* (1992) 177 CLR 106
21 (1947) 74 CLR 31 at 41
22 Lord Reid (1972) 'The Judge as Law-Maker' 12 *JSPTL* 22

Right to Silence

A response to The Honourable Justice GL Davies' paper

by Mark Ierace

THE PAPER DELIVERED BY Justice Davies at the 1996 NSW Legal Convention, which was published in the last issue of *Bar News*,[1] proposed fundamental changes to the criminal justice system.

His Honour said: 'There is now, in my view, an imbalance in favour of accused persons against the interests of the community. The proposals which I shall mention are aimed at restoring that balance.' Essentially his Honour proposed that the accused be required to disclose his or her defence prior to trial and that the right to silence, committals and the judicial discretion to exclude illegally or improperly obtained evidence be abolished.

In the NSW context, these proposals followed on the abolition of the dock statement, the repeal of the statutory bar to judicial comment on the accused not giving evidence, further restrictions on committals and periodic debate about the introduction of majority verdicts. In March 1999 the NSW government was re-elected on a platform which included pre-trial defence disclosure. The pendulum has been 'restoring that balance' in NSW since the 1980s and is not losing momentum.

Curbing the right to silence is the most significant of his Honour's proposals, since it would reverberate on the onus of proof. The right to silence is vulnerable to legislative change, since diminution of it is likely to find favour with that part of the electorate which has to date fuelled the so-called reforms. Since Justice Davies' paper, the right to silence has also come under attack from the NSW Police Commissioner and the NSW Director of Public Prosecutions. It is currently the subject of a reference to the NSW Law Reform Commission, which places consideration of it on the NSW political agenda. It is similarly under review in Victoria[2] and Western Australia[3], and it was a campaign issue in the 1997 Northern Territory elections.

The Right to Silence Generally

There are two aspects to the right to silence; the right of a suspect to not respond to police interrogation, and the right of an accused to not give evidence at his or her trial. Prior to the abolition of the dock statement in 1994, it was virtually unknown for an accused to stand mute. This is the unspoken relevance of the growing prominence of the issue; as the critics would have it, having been denied the option of the dock statement, the accused should now be discouraged from hiding behind the veil of silence.

Justice Davies, and other advocates of change,[4] have preferred to define their target as merely the immunity against an adverse inference being drawn from the failure of an accused to respond to the allegations, whether when interviewed by police or at trial. Thus if the immunity is removed, declining to answer police questions or to give evidence remains an option for the suspect and accused.

This approach is artificial since it ignores the necessary consequence of allowing an adverse inference from silence to be drawn. The prohibition of adverse inference gives the right substance; the right without that prohibition is meaningless. In *Petty & Maiden* v *R* (1991) 173 CLR 95 at 99.3 the majority judgment of the High Court stated:

> A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned... That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied to the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless.[5]

The High Court has taken a different view of the right to silence in court. In *Weissensteiner* (1993) 178 CLR 217 it held that the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to respond to the evidence, has failed to do so. The *Uniform Evidence Act* 1995 (NSW and Commonwealth) allows judicial comment by the trial judge on the failure of a defendant to give evidence, but not so as to suggest the motive was a consciousness of guilt[6]. The *Weissensteiner* direction is becoming commonplace where the accused does not give evidence; in *R* v *Davis* [1999] NSWCCA the New South Wales Court of Criminal Appeal considered it was appropriate even where the jury has before it an

ERISP[7] in which the accused has provided a detailed account of the relevant events.[8]

The UK Legislation

Justice Davies pointed to the UK experience as a suitable model, where the right was removed in Northern Ireland in 1988[9] and in England and Wales in 1994.[10]

Under the UK legislation[11], 'an adverse inference may be drawn if the accused failed to mention to investigating police any fact relied on in his or her defence which he or she could reasonably have been expected to mention.' Similar provisions apply to a failure by the accused to account to police for his or her presence at the scene of a crime or possession of an item or mark which police consider is attributable to his or her participation in an offence.[12]

'As the critics would have it, having been denied the option of the dock statement, the accused should now be discouraged from hiding behind the veil of silence.'

If the accused declines to give evidence, the jury may be invited to draw an adverse inference from the accused's silence[13]. The UK Court of Appeal has approved the following jury direction where the accused fails to give evidence:

> If the only sensible explanation for his decision not to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination, then it would be open to you to hold against him his failure to give evidence.[14]

One would have thought that the UK criminal justice system was a flawed model for the removal of protections of the accused. It has been discredited by the revelation that since the 1970's a number of people have served lengthy sentences following on wrongful convictions; the 'Guildford Four' (15 years), the 'Birmingham Six' (16 years), Judith Ward (17 years),[15] and most recently, the 'Bridgewater Three' (18 years). The ensuing public outcry prompted the government in June 1991 to establish the Royal Commission on Criminal Justice (the 'Royal Commission').

The catalyst for the UK government legislating against the right of silence was its concern about the conviction rate of terrorist suspects in Northern Ireland. As one commentator has observed: '[it] was prompted primarily by the need to encourage those who were suspected of terrorist activity to answer questions when there was not enough evidence to convict them.'[16] It followed on the suspension in Northern Ireland of trial by jury for a number of offences. The order passed through parliament within a month of the government stating its intention, hardly suggesting the careful political debate one would expect when curtailing a long-standing (once thought inalienable) right.

The government delayed extending the legislation beyond Northern Ireland until after the Royal Commission examined the issue, which it had included as a term of reference. As had its predecessor, the Royal Commission on Criminal Procedure in 1981, the Royal Commission recommended against any change to the right of silence.[17] In spite of this recommendation, the government extended the abolition to England and Wales.

The legislation was not entirely without precedent; similar legislation had been enacted in Singapore in 1976.[18]

Consideration of the Arguments for Abolition

Implicit in the advocacy of abolition is a 'presumption of guilt' behind silence; that only a guilty accused would avoid the witness box. Justice Davies referred to Jeremy Bentham's observations[19], that he imagined an innocent person would wish to give evidence.[20] Bentham is often invoked by those who advocate abolition[21] but he was writing in support of the notion of the accused giving evidence at a time when the accused was not permitted to give evidence at all and had no right of counsel.[22] It is speculative to assume Bentham thought that, given the opportunity, a failure to give evidence should count against the accused.[23]

There are many reasons why a suspect may decline to answer questions. As JD Heydon and Mark Ockeiton have observed:

> A man may be silent in the face of an accusation for many reasons other than guilt. He may not have heard or understood what was said; he may not consider the charge to have been addressed to him; he may be silent because he is attempting to work out the meaning of an ambiguous statement. The accusation may be so sudden as to make him silent through confusion, as where he has just woken up. He may fear misreporting of any reply he makes; he may be shocked into silence by a false but serious charge; he may contemptuously consider it beneath his dignity to begin a debate about baseless and dishonourable accusations. He may not answer because he lacks knowledge of the matter in question. He may fear that to protest too much will be taken as a sign of guilt. He may believe he has a right of silence of which he wishes to avail

himself, perhaps because he thinks an early disclosure of his defence will enable the other side to interfere with his witnesses. He may be silent because he wishes to protect others or to avoid disclosing discreditable but irrelevant facts about himself or others. Further, human reactions vary so much; the guilty may deny guilt strongly while the innocent remain silent.[24]

There are also many reasons, other than an apprehension of guilt, why defence counsel advise their client against giving evidence and, other than a consciousness of guilt, why accused persons decline to do so.

For instance, research carried out by the Royal Commission suggested that in at least 12% of cases where the suspect exercised the right, the motive was the protection of others.[25] The only way the accused could explain to the jury his or her silence at interrogation would be to forego the right to silence at the trial, enter the witness box and be subjected to cross-examination generally. The onus would have shifted. The accused would be on the back foot, having to explain his or her silence rather than solely address the evidence offered by the Crown.

Justice Davies stated: 'At present the so-called right to silence, it seems to me, remains a sanctuary for the sophisticated or practised offender.'[26] This impression was not supported by the findings of the Royal Commission, which examined this issue and concluded:

> The research evidence neither confirms nor refutes the suggestion that, though [the right of silence] may be exercised in only a minority of cases, that minority includes a disproportionate number of experienced criminals who exploit the system in order to obtain an acquittal.[27]

Another argument sometimes advanced in support of abolition is that it would require the suspect to disclose his or her defence, so that the prosecution could not be ambushed at trial. Surely though, this is a rarity; in the overwhelming proportion of trials the prosecution has more than a fair idea as to what in general terms will be advanced by the defence, and is not disadvantaged. The Royal Commission research suggests that at most 5% of cases involved a defence which might be regarded as ambush.[28]

Warming to his agenda, Justice Davies posed that we could go beyond the UK model:

> I wonder even whether we should go further than this. Why should not a judge, in some cases in which an accused declines to give evidence, nevertheless ask him or her some questions. The accused could not, of course, be compelled to answer them but shouldn't the jury be able to draw such inferences as are proper from the failure to do so?[29]

What would remain of the impartiality of the bench, if the trial judge was to take up the cudgels of the prosecution and question the accused, against his or her will, in the dock? This proposal has a distinct resonance with the inquisitorial Court of the Star Chamber, whose practices prompted the generic right against self-incrimination in the first place.[30]

Intellectual Disability

Justice Davies justified his proposal in light of the increased educational level in the community,[31] and said: '[The right of silence] no longer serves, if it ever did, the interests of the weak, the confused or the nervous who are the least likely to have the presence of mind to assert the right.'[32]

The UK provision allows comment if the accused who fails to give evidence is aged 14 or over, unless in the opinion of the trial judge 'the physical or mental condition of the accused makes it undesirable for him to give evidence.'[33] There is no similar legislative restriction to the use to be made of the failure of the accused to respond to police questioning.

Improvements in the education standards in modern times are not uniform, and those who are tried before the court are often not only the least educated, but also the least intelligent. Research carried out for the NSW Law Reform Commission in 1995 revealed that 23% of persons who appear in NSW Local Courts have either an intellectual disability or borderline intellectual disability (IQ below 79).[34] As surprising as this first seems, research conducted by the UK Royal Commission, in which psychologists tested 156 suspects in two police stations, found that the average IQ was 82 - within the bottom 5% of the population – and 51% had an IQ below 79.[35] In spite of the findings, only two of the 156 had been recognised by the police as having an intellectual disability. As the authors of the report observed: '...there is no doubt that by observation alone over a short period of time, proper identification of mild mental handicap, even by trained clinicians, is a very difficult task.'[36]

'There are also many reasons, other than an apprehension of guilt, why defense counsel advise their client against giving evidence and, other than a conciousness of guilt, why accused persons decline to do so...'

If the right to silence is affected in the manner proposed, a new caution must be devised to inform a

suspect of the consequences of failing to answer questions. However, research suggests that people with an intellectual disability have considerable difficulty in understanding our current caution, let alone a more complex one.[37] Criminal barristers are familiar with the difficulties that many young people, aboriginal people and people for whom English is a second language have in understanding the present caution.

The caution devised in the UK is:

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.

Not surprisingly there are reports suggesting that many members of the general population in the UK believe it means that they have to answer police questions.[38]

In amending the operation of the criminal justice system our standard for the education, age, intelligence and cultural background of the user must bear some relationship to the statistical indications of that profile. There is not much point in having a system which requires an educational or intelligence level far beyond that which a significant proportion of defendants possess. An understanding of the caution, and beyond that the perilous position in which the accused would be placed when interviewed by police if there was a radically curtailed right to silence, is fundamental.

Conclusion

An implicit presumption behind these proposed reforms is that there is something which sets apart the modern age from those past dark eras in which the present rules were formed, and that consequent to our enlightenment and present educational standards, the old protections are no longer needed; no accused will ever again be prejudiced by police interrogation or cross-examination on their sworn evidence.

However concern for the vulnerable suspect was pivotal in the recommendation of the Royal Commission to not abolish or erode the right to silence:

> The majority of us ... believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent... It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging.[39]

There are simpler and fairer ways to improve our criminal justice system. Reducing delay is the single most urgently required reform, which would impact positively on both the prosecution and defence, and also on victims of crime. The Supreme Court is increasingly reluctant to deny bail to defendants who would otherwise be on remand for extended periods, which then results in the trial losing priority. As time passes the memories of both prosecution and defence witnesses fade and become open to attack on that ground alone. Delay has particular relevance to trials where the memories of prosecution witnesses are critical, such as in relation to identification evidence, and in child sexual assault trials.

Reducing delay is a reform which, happily, is seen universally to serve the interests of justice.

1 The Hon Justice GL Davies (Judge of the Court of Appeal, Qld): "Justice Reform: A Personal Perspective". *NSW Bar News* Summer 1996 page 5 at 5.10.
2 Reference by the Victorian AG on 13.11.97 to the Scrutiny of Acts and Regulations Committee.
3 A current reference to the Law Reform Commission of Western Australia.
4 for instance Bernard Robertson in "The Right to Silence Considered" (1991) 21 *Victoria University of Wellington Law Review* 139 at 140.8; *R* v *Cowan* [1 9961 QB 373 at 378.G per Lord Taylor delivering the judgment of the Court
5 At 99.3 per Mason CJ, Deane, Toohey & McHugh JJ
6 See section 20 of the *Evidence Act 1995*. Section 407 of the Crimes Act, which forbade judicial and prosecutorial comment, was repealed at the same time as the NSW *Evidence Act* commenced. For a consideration of the effect of section 20 on Weissensteiner, see OGD (1997) 98 *ACR* 151 (NSW CCA) per Gleeson CJ (Grove & Sperling JJ agreeing) at 157-8.
7 ERISP: "electronically recorded interview of a suspected person."
8 Per Wood CJ at CL (Spigelman CJ & McInerney J agreeing) at page 19.
9 Criminal Evidence (Northern Ireland) Order 1988.
10 The *Criminal Justice and Public Order Act, 1994*, which came into force on 10 April 1995.
11 ibid, section 34. The adverse inference is available for the determination of whether to commit to trial and whether there is a prima facie case, as well as for the ultimate determination of whether the accused is guilty.
12 ibid, sections 36 and 37.
13 ibid, section 35.
14 From a specimen direction suggested by the Judicial Studies Board, and adopted by the Court of Appeal in *R* v *Cowan* ibid per Lord Taylor delivering the judgment of the Court. Similarly the Court approved a jury direction in respect of a failure to appropriately inform the police in *R* v *Condron* [1977] 1 Cr. App. R. 185 per judgment of the Court at 193D, 195A.
15 See *R* v *Ward* (1993) 96 Cr App R 1
16 J.D. Jackson "Curtailing the Right of Silence: Lessons from Northern Ireland" [1991] Crim LR 404 at 404.1 0.
17 The Report of the RCCJ, July 1993, Chap. 4, paras. 23-4 .
18 Meng Heong Yeo; *'Diminishing the Right to Silence: The Singapore Experience'*. [1983] Crim LR 89.
19 Davies J at page 10.3
20 D.J. Galligan; "The Right to Silence Reconsidered" *Current Legal Problems*, vol. 41 (1988), 69 at page 70.3.
21 Ibid 70.4
22 The accused became a competent witness under the *Criminal Evidence Act, 1898*
23 Jeremy Bentham, *Rationale of Judicial Evidence* ed. J.S. Mill, (1827), Vol. 1, Book 11, Pps. 446448; 589-591.
24 Page 144.5 JD Heydon & Mark Ockeiton *Evidence Cases and Materials* Butterworths 4th Edn 1996
25 "The Right to Silence in Police Interrogation: A Study of some of the Issues Underlying the Debate" (RCCJ Research Study No 10, 1993), p. 20.
26 Davies J, ibid. at page 11.2.
27 Royal Commission Report, Chapter 4 paragraph 17
28 RCCJ Research Study No 1 0 at p. 58.
29 Davies J, ibid. at page 10.9.
30 Professor Leonard W. Levy; *Origins of the Fifth Amendment*, Oxford University Press 1969.
31 Davies J, ibid. at page 5.8.
32 Davies J, ibid. at page 11.3.
33 The *Criminal Justice and Public Order Act, 1994*, section 35 (1) (b)
34 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Research Report No. 4, page 53.
35 RCCJ Research Study No 12 at p. 24.3.
36 RCCJ Research Study No 12 at p. 26.5.
37 NSW Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System, Research Report No. 3, page 50.
38 *The Independent* newspaper, 3.1.96 page 14 referring to research by Dr. Eric Shepherd.
39 RCCJ Report, paras 4.22 & 4.23.

Ceremonial Sitting to Mark the 175th Anniversary of the Supreme Court of New South Wales

2. Pryke/The Australian

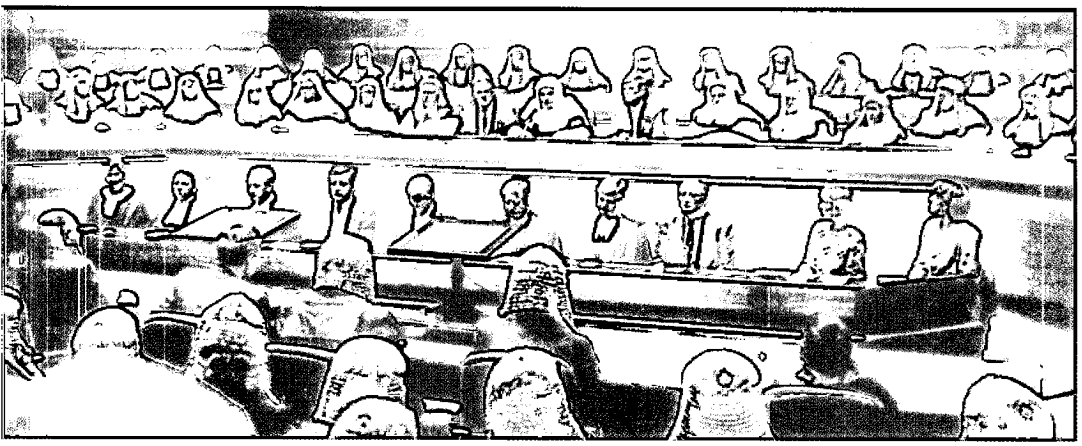
THE 175TH ANNIVERSARY of the Supreme Court of New South Wales took place in the Banco Court on 17 May 1999. Chief Justice Spigelman presided over the ceremony. Chief Justice Gleeson AC and Sir Laurence Street AC, KCMG, both former Chief Justices of the Court sat on the Bench with him.

Aunty Ali Golding, a member of Sydney's Aboriginal community, welcomed all present to the Eora homeland. The Court was addressed by the Honourable Premier of New South Wales, R J Carr MP, the Honourable E G Whitlam AC QC on behalf of the Bar of NSW and the Honourable Prime Minister of Australia, J Howard MP, on behalf of the solicitors of NSW.

Full text of the speeches can be found at: www.lawlink.nsw.gov.au/sc

1. Pryke/The Australian

3. Pryke/The Australian



Pryke/The Australian

4.

5. Pryke/The Australian

1. The Prime Minister The Hon. John Howard MP, the Premier, The Hon. R. J. Carr MP and The Hon. E.G. Whitlam AC QC 2. The Hon. J.J. Spigelman, Chief Justice of NSW 3. The Prime Minister (left), counsel, other members of the legal profession and visitors wait for the Justices of the Supreme Court to arrive in the Banco Court 4. The Chief Justice of NSW with The Hon. Sir Laurence Street AC KCMG and The Hon. A M Gleeson AC, Chief Justice of Australia on either side and the Justices of the Supreme Court 5. The Chief Justice with Aunty Ali Golding who made the welcome address on behalf of the Aboriginal community

Dinner to Mark the 175th Anniversary of the Supreme Court of New South Wales

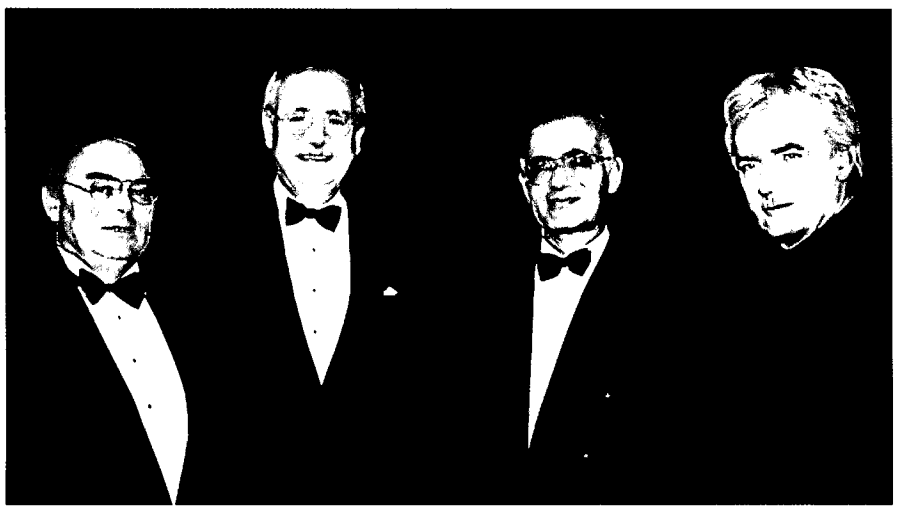
A DINNER TO COMMEMORATE the 175th anniversary of the Supreme Court of NSW was held on 19 May 1999. All judges and members of the legal profession of NSW were invited to attend. The dinner was addressed by the Hon Murray Gleeson AC, Chief Justice of Australia. He told the audience:

'For all its problems, and for all the shortcomings resulting from the human imperfections of those who have participated in its work, the Court, for 175 years, has adhered faithfully to its central commitment to maintain the rule of law. The citizens of this State are able to take for granted that the Government, and the people, are both bound, and protected, by law. This is the ultimate safeguard of their liberty and their dignity. This is their inheritance....Whatever changes be ahead, the essence of the Court's character will remain unchanged. As in the past, so in the future, it will be as explained by Francis Forbes: uncontrolled and independent, bowing to no power but the supremacy of law.'

The full text of the Chief Justice's speech can be found at www.hcourt.gov.au

1.

2.



3.

4.

5.

1. The Hon E G Whitlam AC QC with David Bennett QC, Commonwealth Solicitor-General, 2. Ian Barker QC, The Hon Justice G James, The Hon Justice J A Miles AO, Chief Justice of the ACT and The Hon Justice Kenneth Hayne 3. The Hon J J Spigelman, Chief Justice of NSW, John McCarthy QC, The Hon Justice C Einstein and Chris Murphy 4. The Hon A M Gleeson AC, Chief Justice of Australia 5. The Hon J J Spigelman, Chief Justice of NSW

6.

7.

8.

9.

6. The Hon Justice RO Blanch, The Hon Justice P L Stein and The Hon Justice M. Pearlman AM. 7. The Hon Justice K R Handley AO and The Hon Justice J P Bryson 8. Katzmann SC and Justice Wood 9. Porter QC, Leigh Johnson, David Elliott and James Gleeson QC 10. The Hon Justice R P Meagher JA, Tony Bellanto QC and The Hon E F Hughes AO QC and Mrs Chrissie Hughes

10.

Lord Denning of Whitchurch

25 January 1899 – 5 March 1999

By Steven Rares S.C.

ON 5 MARCH 1999, six weeks after his 100th birthday, Alfred Thompson (Tom) Denning, passed away. Lord Denning left a rich legacy to generations of current and expired lawyers... to some, his judicial decisions were heresy, to others, they epitomized justice according to law.

Who else could have commenced a judgment which sought to revolutionize the law of estoppel with the words 'Old Peter Beswick was a coal merchant in Eccles, Lancashire'.[1] The authors of *Equity: Doctrine and Remedies*[2] cannot be said to be his most enduring admirers. Castigating Lord Denning's judicial style they said:

> To speak of well-established and soundly-based authorities as 'trip wires' over which the bold judge must step in his quest for his idea of justice (*Hill* v *Parsons* [1972] Ch 305 at 316) is to debase legal method. To offer as authority moral precepts from Holy Writ and one's own previous utterances is to provide no substitute.

But Lord Denning continued his work with undiminished vigour.[3]

Unfortunately, as the same authors noted at the conclusion of this tirade, many of his Lordship's 'inventions' had 'not yet perished utterly' – indeed a number, such as the right to work which Equity protects[4], and that fell creature, the *Mareva* injunction[5] are now established law both in England and Australia. One can be sure that Meagher, Gummow and Lehane did not intend to compliment Lord Denning[6] when explaining how limits came to be fashioned around the edges of the Mareva remedy:

> It is as if the leaders of the Gadarene Swine murmured to each other as they approached the cliff 'I wonder who has maneuvered us into this position?'
> Other remedies devised by his Lordship's fertile brain did not fare so well. The 'deserted wive's equity' in a matrimonial home in the husband's name was 'blow[n]...to smithereens'.[7]

Career

Lord Denning came from a remarkable Hampshire family; one of five brothers, two of whom perished in the carnage of the First World War, one of the surviving brothers became an admiral, another a general, and, Tom, the Master of the Rolls. In 1922 after graduating from Oxford, he was called to the Bar as a member of Lincoln's Inn. He took silk in 1938 and was appointed as a judge in 1944 attached to the Probate, Divorce and Admiralty Division. In 1945 he moved to the King's Bench Division and by July 1946 he had unleashed one of his most influential judgments: the *High Trees* case.[8] In contrast to the discursive judgments given today, the reasoning in that decision occupies 3 pages of the report,[9] its thrust – the principle of promissory estoppel – summed up in the pithy, direct and homely style which characterizes his work.[10]

> I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.

He was appointed a Lord Justice of Appeal in 1948 where, again, his ingenuity flourished. The action for negligent misstatement was anticipated in his landmark dissenting judgment in *Candler* v *Crane Christmas & Co.*[11]

By 1957 he was appointed a Lord of Appeal in Ordinary, a misdescription, so he said, for 'really extra-ordinary'.[12] Of accepting his promotion, he wrote: "I was hesitant about it. We all know the quip: 'The House of Lords is like Heaven: Everyone wants to get there but not just yet.' "[13]

He had summarized his philosophy under three headings:[14]
(i)Let justice be done; (ii) Freedom under the law; (iii) Put your trust in God.

The first heading he put in his coat of arms *Fiat justitia*. And in *re Vandervell's Trusts (no. 2)*[15] he gave vent to his philosophy in unmistakable terms:

> Mr Balcombe realised that the claim of the executors here had no merit whatsoever. He started off by reminding us that 'hard cases make bad law'. He repeated it time after time. He treated it as if it was an ultimate truth. But it is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: 'Unjust decisions make good law': whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law. But in the present case it has been prayed in aid to do injustice on a large scale – to defeat the intentions of a dead man – to deprive his children of the benefits he provided for them – and to expose his estate to the payment of tax of over £600,000. I am glad to find that we can overcome this most unjust result.

But 5 years after becoming a Lord, he was appointed Master of the Rolls, a position he held till retiring, in controversy, in 1982. That office has existed since at least 1290; but there was nothing in the Denning style of presiding in the civil division of the Court of Appeal which appeared as fusty.

As always in collegiate courts, Lord Denning frequently was in the minority. Sometimes, it was a minority which occurred because the practice of the Court of Appeal had been to deliver *ex tempore* judgments at the conclusion of oral argument. Lord Denning's[16] judgments were often masterpieces of phrasing and reasoning. Sir Frederick Lawton[17] recalled the time that he and Lord Denning had reached one view, and Lord Brandon of Oakbrook had disagreed, saying: "As we came out, Tom said to Henry Brandon: 'I think you're right and I was wrong' That's the sort of man he was."[18]

No doubt the losing litigant received little comfort from that - though one does not know if the House of Lords reversed in that case. Lord Donaldson of Lymington, who succeeded him as Master of the Rolls recalled of Lord Denning that "He might come to a different conclusion overnight, so as the number two judge you had to be ready with a fully worked up judgment and not just think you could say, 'I agree'".

'...justice is not a temporal thing, it is eternal; a thing of this world.'

In June 1963 he was appointed to enquire into the Profumo affair - the Secretary of State for Defence John Profumo had had a liaison with a call girl – Christine Keeler - described by Lord Denning in his report as a person who 'had undoubted physical attractions'. The report was 'a best seller'.[19] Another call girl involved, Mandy Rice-Davies at the trial of their pimp, Stephen Ward, famously said in response to Lord Astor's denial of her allegations 'He would, wouldn't he.'

Retirement

In 1981-82, he wrote another book *What Next in the Law*. When it was launched it attracted widespread criticism for his remarks that some coloured or black jurors should not have served on a jury. He announced that he had decided to retire, though a cartoon in *Private Eye* had one barrister saying to another 'I expect the House of Lords will overrule his decision'. That did not occur, but in *George Mitchell (Chesterall) Ltd* v *Finney Lock Seids Ltd*[20] Lord Diplock referred to 'the inimitable style of Lord Denning MR's judgment', upon the grounds of which the House (unusually perhaps) dismissed the appeal saying:

> I cannot refrain from noting with regret, which is, I am sure, shared by all members of the Appellate Committee of this House, that Lord Denning M.R.'s judgment in the instant case, which was delivered on September 29, 1982 is probably the last in which your Lordships will have the opportunity of enjoying his eminently readable style of exposition and his stimulating and percipient approach to the continuing development of the common law to which he has himself in his judicial lifetime made so outstanding a contribution.

Whether '[i]t was bluebell time in Kent' is problematic but Lord Denning's farewell[21] commences with:[22]

> **In outline**
> Many of you know Lewis Carroll's *Through the Looking Glass*. In it there are these words (Ch.IV):
>
> " "The time has come', the Walrus said,
> 'To talk of many things:
> Of shoes-and ships-and sealing-wax-
> Of cabbages-and kings-'".
>
> Today it is not *of cabbages and kings* – but of cabbages and what-nots.

And, of course, Lord Denning in that case overturned an exclusion clause, a favourite stalking-horse. In 1985 he wrote as Chairman of the Magna Carta Trust[23] that the decision of Moore DCJ in *Reg.* v *McConnell*[24] to discharge an accused who had been brought to trial in breach of the promise of in Magna Carta that 'To no one will we sell, to no one will we will deny right or justice' was 'a decision after my own heart.'

Sadly, the source of the influence which pervaded the law schools and courts of the common law world for practically 40 years while he sat as a judge has now left us. Lord Denning was a remarkable man - a hero to many – a villain to others – Sir Leslie Herron CJ welcomed him to the opening of our law term in 1967[25] in terms as having 'been truly described as an apostle of justice'.

Lord Denning rejoined:[26]

> Finally, sitting in this Court, I would remind you of our task to do justice. You may well ask: 'What is justice?' Many men have asked that question-you and me- and no one has found a satisfactory answer. Plato asked it 2000 years ago. But justice is not a temporal thing, it is eternal; a thing of this world. The nearest approach to a definition which I can give is that justice is what the right-thinking members of the community believe to be fair.

The efflorescence of the common law and equity in the last two decades of this century owes no small part to Lord Denning. The evaluation of whether his creativity and leadership has enhanced or detracted from justice will be made for years to come. But the world of law is the poorer for his passing, the richer for his erstwhile presence.

1 *Beswick* v *Beswick* [1966] Ch 538 at p.549C
2 (3rd ed) Meagher, Gummow and Lehane at e.g. pars [306], [2186] - [2188]
3 At par [306]
4 *Buckley* v *Tutty* (1971) 125 CLR 353 following *Nagle* v *Feilden* [1966] 2 QB 689
5 *Jackson* v *Sterling Industries Ltd* (1987) 162 CLR 612
6 op. cit at par [2188]
7 *The Due Process of Law* (1980) Lord Denning p.215 in *National Provincial Bank Ltd* v *Ainsworth* [1965] AC 1175
8 *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130
9 pp.138.7-136.3
10 p.136.2
11 [1951] 2 KB 164; the dissent inspiring the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465 to change the law; cf here: *The Mutual Life & Citizens' Assurance Co Ltd* v *Evatt* (1968) 122 CLR 556 (HC); (1970) 122 CLR 628; [1971] AC 793 (PC)
12 *The Family Story* (1981) Lord Denning p.184
13 *Ibid* p.184
14 *Ibid* p.172
15 [1974] Ch 269 at p.322B-D
16 And his colleagues'
17 A former Lord Justice
18 See *The Times* 6 March 1999: Lord Denning: Tributes: 'Champion of the Little Man'
19 *The Due Process of Law* (1980) Lord Denning p.68
20 [1983] 2 AC 803 at p.810F-G
21 [1983] QB 284
22 p.294B-C and note the signature heading
23 Letter to the author 5 August 1985
24 (1985) 2 *NSWLR* 269 (since reversed: *Jago* v *The District Court of New South Wales* (1989) 168 CLR 23)
25 See [1967] 1 *NSWR* at p.9
26 [1967] 1 *NSWR* at p.10

Issue Waiver – Doctrine or Heresy?

by Justin Gleeson

THE FULL FEDERAL COURT held on 24 July 1998 (by majority) in litigation between Telstra and BT[1] that a party loses the entitlement to rely upon client legal privilege if, by reason of some conduct on the part of the privilege holder, it would be unfair to the other party, in a way which goes to the integrity of the legal process, for the privilege to be maintained. More specifically, the Full Court held that where a party asserts a cause of action an element of which is the state of mind of the party (including the quality of the party's assent to a transaction), the party loses privilege in respect of legal advice which the party had, before or at the time of the relevant events, material to the formation of that state of mind.

The majority reached this decision under Section 122 (1) *Evidence Act 1995* (Cth): in the circumstances, the privilege holder has impliedly consented to the loss of the privilege. The logic of the majority's decision would also mean that privilege is waived at common law in these circumstances.

The issue arose in this case on a motion challenging the adequacy of BT's discovery. The loss of privilege was found to arise from the pleading by BT under sections 52 and 82 of the *Trade Practices Act 1974*, taken together with witness statements filed on behalf of BT (but not yet read in evidence) which showed that officers of BT claimed to have believed representations to the effect of those pleaded by BT, notwithstanding that they received legal advice during the critical negotiations which could bear on their state of mind.

Beaumont J dissented in the Full Court. He held that no consent by BT could be implied at this stage of the proceedings: the legal advice received by BT may bear upon the question of reliance but had not yet been shown to be central to that issue. He left open the possibility that during the course of the trial circumstances would indicate an unfairness in BT's insistence upon its right to claim privilege[2].

At first instance, Sackville J had held that consent within Section 122 (1) did not extend to a consent imputed against the will of a party and that there was no consent by BT in this case[3].

The majority Full Court decision was the subject of an appeal to the High Court which was fully argued in December 1998. Before judgment could be delivered, the matter was settled between the parties. The terms included a withdrawal of the appeal.[4]

In argument, a number of the justices of the High Court asked questions which indicated a disquiet about the majority Full Court decision. Criticisms levelled at the majority decision included:

(a) Client legal privilege has been recognised in a series of High Court decisions[5] as a fundamental right and not merely a rule of evidence. The privilege is regarded as so important that it prevails over the conflicting public interest in all relevant evidence being available. Its supremacy is recognised by the fact that an accused in a criminal trial is not entitled to obtain material the subject of the privilege even if that could avoid an unjust conviction[6]. The fact that a party may succeed on an issue tendered by it, notwithstanding that it has used the privilege to keep back from the opposing party and the court evidence of communications which if received might have destroyed its case, is but another example of the supremacy accorded by the courts to the privilege.

(b) The law should not impose a waiver or impute a consent to loss of privilege as an automatic consequence of the party tendering an issue which makes legal communications relevant; rather, the privilege holder should have the choice, at its own peril, whether to maintain the privilege or expressly to waive it: if the privilege holder chooses to maintain the privilege, the court may be left in the position where it concludes that the privilege holder has not discharged the onus of proof which it bears on that issue. A similar view had been expressed by McHugh J sitting as a single judge in a taxation of costs dispute.[7]

Arguments which might be put in response to these criticisms of the majority Full Court decision include:

(1) The majority Full Court decision does not cut across the proposition that there must be a voluntary and deliberate act by the privilege holder before the privilege can be lost. The privilege holder is not required to tender the issue for the court which necessarily has bound up within it the content of privileged communications; but if it chooses to do so then a known consequence which the law imposes in respect of such voluntary and deliberate conduct is the loss of the privilege.

(2) The decision in *Wentworth v Lloyd*[8] establishes that it is not open to the court to draw an inference adverse to the case of a privilege holder merely from the fact that the privilege has been claimed. While that decision remains intact, the non-privilege holder is in a precarious position in these cases. It may be that through the skill of the cross-examiner the witnesses called by the privilege holder will seem to be telling only a part of the story, such that although the court does not draw inference against the privilege holder merely from the fact that the privilege is claimed, nevertheless the court says that the evidence before it is insufficient to discharge the burden of proof. However, it may equally be the case that the privilege holder's witnesses present impressively and the cross-examiner's lack of access to the documents recording the privileged communications results in an ineffective cross-examination: the court may be left with the only conclusion being that although it knows it does not have all the relevant evidence, the evidence before it is plausible and not specifically shown to be inaccurate so that the verdict must be in favour of the privilege holder. To overturn the majority Full Court decision would mean that at least in some cases a privilege holder will obtain a decision which is unjust in circumstances where it has been allowed both to tender the issue and to use the privilege so as to withhold relevant evidence from the court. This is a form of approbation and reprobation which the courts should not countenance, not only because it will lead to unjust results in individual cases, but also because it represents an encouragement to parties and their advisers deliberately to craft evidence which is misleading through its incompleteness.

In New South Wales, there is no binding decision at appellate level on this point. There is a 1939 decision of the Full Court *obiter* with the leading judgment given by Jordan CJ: *Thomason v Campbelltown Council*[9].

At first instance in *Ampolex v Perpetual Trustee Co (Canberra) Limited*[10], Giles J, applying the common law of privilege, reached a result similar to that of the majority Full Court in BT in holding that a party asserting an estoppel was required to make discovery of legal advice which, on the evidence, was likely to have contributed to the state of mind asserted as part of the estoppel case. There was no dispute in this case as to the correctness of *Thomason*.

In *Standard Chartered Bank v Antico*[11] Hodgson J considered that the principle in *Thomason* may have been too widely stated. Hodgson J reformulated the proposition more narrowly as follows: if a party, by pleadings or evidence, expressly or impliedly makes an assertion about the content of confidential communications between that party and a legal adviser, then fairness to the other party may mean that this assertion has to be taken as a waiver of any privilege attaching to the communication.

There may be a difficulty in teasing out when it is that a party impliedly makes an assertion (especially a negative one) about the content of a privileged communication. Assume that a party in an action under Section 52 of the *Trade Practices Act 1974* asserts that it was led to enter an agreement by reason of statements made by the other party about the legal rights that would pertain under that agreement. Assume that there is evidence that the party asserting it was mislead received advice from lawyers at the time the agreement was entered which might concern this very topic. Has the party asserting misleading conduct thereby made any implied assertion about the content of privileged communications? That party might say to the court that it simply makes no assertion one way or the other as to what was in the privileged communications or whether they had any bearing upon the state of mind which it otherwise asserts. The other party may submit that it has established, from other evidence, that there is a real prospect that the legal advice concerned the very subject matter upon which the former party was asserting misrepresentation; and that the former party must impliedly be making a negative assertion about those privileged communications; i.e. asserting that they do not in any way qualify the state of mind otherwise being asserted. How is this to be resolved?

In the earlier (unanimous) Full Federal Court decision of *Adelaide Steamship Co Ltd v Spalvins*[12], *obiter* on this point, the issue waiver cases had been reformulated in this way: privilege is waived or lost where in order to establish a particular right, claim or defence a party needs to show that legal advice did or did not have a particular character, for example, that it did not address or properly address a matter which, if addressed or properly addressed, would defeat or call into question the right or claim asserted; in this sense, the privilege holder has put in issue the very advice received.

Do the formulations in *BT, Antico* or *Adsteam* differ in result? Take as an example the principle laid down by the High Court in *Garcia v National Australia Bank*.[13] A third party mortgagor could plead that she or he had entered a transaction not understanding its terms or effect in circumstances where the lender knew, or was put on notice, that the mortgagor's spouse may not have provided a full explanation of the transaction to the mortgagor. Assume that the mortgagor in fact received competent, independent and disinterested legal advice prior to entering the mortgage. Assume that the mortgagor does not refer to the existence or content of that legal advice in her or his pleading or witness statements. The legal advice, being relevant, is a discoverable document. Can it properly be placed in Part 2 with the privileged documents?

The defendant is in the difficult position of not being able to plead the content of the advice as an affirmative

defence until the advice has been obtained. It cannot be obtained until there has been an act on the part of the privilege holder amounting to a loss of privilege. With difficulty, this could be accommodated as a waiver under the *Antico* or *Adsteam* approach. It can be accommodated readily as a waiver under the approach of the majority in *BT*.

There are a number of decisions of single judges of states other than New South Wales which take a broad approach to issue waiver consistent with the majority in *BT*. These are decisions on the common law of privilege. They include *Hong Kong Bank v Murphy*[14] (the plaintiff pleaded that it entered an assignment not knowing it involved a breach of trust on the part of another party, thereby waiving privilege in the contents of legal advice received by the plaintiff prior to executing the assignment agreement and bearing on its validity); *Pickering v Edmunds*[15] (the plaintiff pleaded it had entered an agreement in a mistaken belief induced by the defendant that an earlier agreement was illegal and enforceable, thereby waiving privilege in legal advice which the plaintiff received before entering that earlier agreement); and *Wardrope v Dunne*[16].

In the United States, a majority of federal appellate circuits have taken a broad view of the issue waiver doctrine along the lines of the majority in *BT*[17]. A narrower decision is that of the Court of Appeals for the 3rd Circuit in *Rhone-Poulenc Inc v Home Indemnity Insurance Company*[18], which held that privilege is waived only when the party asserts a claim or defence and attempts to prove it by disclosing or describing the client/attorney communication.

Where practically does this leave counsel?

First, as a matter of authority, a single judge of the Full Federal Court should follow the majority decision in *BT* giving the doctrine of issue waiver a wide scope. A single judge in New South Wales is not bound by any appellate decision. Due weight would be given to the *obiter* of the Full Court in *Thomason*, and to the formulation of Giles J in *Ampolex* and the apparently narrower formulation of Hodgson J in *Antico*. In some cases, the difference between the last two formulations may be material.

Second, there is a fair prospect that, if the matter is brought again to the High Court, the doctrine of issue waiver, at least in its broadest formulation, will be overturned: what will be left will be the formulation of *Antico* or *Adsteam* or something even narrower.

Third, where counsel settles a pleading which asserts the client's state of mind on a matter to which legal advice may have contributed, or more broadly makes assertions where fairness would require that the opposing party be entitled to inspect otherwise privileged communications to test the assertions, then the client should be advised that such a pleading, either by itself or when followed up by statements or affidavits or when pursued at the trial, will either as a matter of law result in the loss of privilege in relevant legal communications or as a matter of practicality require the client later to waive the privilege or run the peril of failing to discharge the burden of proof.

Fourth, if counsel is required to advise at the stage of discovery or to settle statements or affidavits, a decision needs to be taken whether the effect of the pleading has been to cause a loss of the privilege; and if not whether the client's interests are best served by, on the one hand, maintaining the privilege and thus keeping secret privileged documents and crafting witness statements or affidavits so as not to refer to privileged material or, on the other hand, making a disclosure of such material and addressing it in the statements or affidavits.

Fifth, if counsel is acting for the non-privilege holder, at the stage of discovery or statements or affidavits being filed, counsel may need to advise whether a motion for further discovery should be filed in the event that the other party maintains its claim to privilege.

Sixth, at the trial itself, if privilege has not been previously waived or held to be waived, it will be a task of cross-examining counsel to manoeuvre the other party's witnesses to a point where the continued retention of the privilege makes the claim asserted by the privilege holder implausible in the court's eyes, forcing the other party to waive privilege at the late stage (with possible consequences for adjournment, costs and additional cross-examination of witnesses) or to go to judgment with a risk that the judge will find the burden of proof has not been satisfied. It may also be that in the course of the trial the skill of the cross-examiner is such that the court (as contemplated in *Antico*) requires the privilege holder to state what precisely it is that the privilege holder asks the court to find in respect to the content of the privilege communications. A waiver may then be held to occur.

It is the writer's view that authoritative recognition of a broad doctrine of issue waiver would be consistent with the policy underlying the privilege; would simplify the task of counsel; and would render decisions of the courts more just.

1. *Telstra Corporation Limited and Anor* v *BT Australasia Pty Limited and Anor* (1998) 156 ALR 634 especially at 647-8
2. ibid at 639
3. *BT Australasia Pty Limited* v *State of NSW and Another* (No. 7) (1998) 153 ALR 722 especially at 739-741
4. A separate question for consideration in the appeal was whether the Evidence Act or the common law of waiver applied at the stage of discovery. Subsequent decisions hold that it is the common law: *Northern Territory of Australia* v *GPAO* (1999) 161 ALR 318 at 324; *Esso Australia Resources Ltd* v *The Federal Commissioner of Taxation* (1998) 159 ALR 664 at 676
5. Commencing with *Baker* v *Campbell* (1983) 153 CLR 52
6. *Carter* v *Northmore, Hale, Davy and Leake* (1995) 183 CLR 121
7. Giannarelli v Wraith [No. 2] (1991) 171 CLR 592 at 605
8. (1864) 10 HL Cas 589 at 590-592; 11 ER 1154 at 1154-5
9. (1939) 39 SR (NSW) 347 at 358-9 , followed by Asprey JA in *Barilla* v *James* (1964) 81 WN (Pt 1) (NSW) 457
10. (1995) 37 NSWLR 405 at 411-5
11. (1995) 36 NSWLR 87 at 93-5
12. (1998) 152 ALR 418 at 427
13. (1998) 155 ALR 614 at 623-5
14. [1993] 2 VR 419
15. (1994) 63 SASR 357
16. [1996] 1 Qd R 224
17. *United States* v *Bilzerian* 926 F. 2d 1285 (1991 2nd Circuit); *United States* v *Woodall* 438 F.2d 1317 (1970 5th Circuit); *Lorenz* v *Valley Forge Insurance Co.* 815 F. 2d 1095 (1987 7th Circuit); *Sedco International SA* v *Cory* 683 F. 2d 1201 (1982 9th Circuit); *Hearn* v *Rhay* 68 FRD 574 (E.D. Wash. 1975)
18. 32 F.3d 851 (1994). Note, however, that in subsequent decisions in the 3rd Circuit *Rhone-Poulenc* has not been read broadly: *Glenmede Trust Company* v *Thompson* 56 F.3d 476 (1995) and *Livingstone* v *North Belle Vernan Borough* 91 F.3d 515 (1996)

Jim McClelland

Tribute by The Honourable Jerrold Cripps QC.

JIM MCCLELLAND died at home on 16 January aged 83. He was the Chief Judge of the Land and Environment Court from 1980 to 1985 after being a judge of the Industrial Commission. The judiciary was his third and penultimate career. After serving in the armed forces in WWII he returned to Australia and was, for many years, an enterprising and successful solicitor. Later he entered politics as a New South Wales Senator and was one of the few successful politicians in the Whitlam Government. After he left the Land and Environment Court he wrote witty and perspicacious articles for the *Sydney Morning Herald*.

At the public ceremony at the Town Hall, which followed a private ceremony at Wentworth Falls, a number of prominent people spoke of his contribution to Australia. The speakers included an ex-trade union leader, a prominent theatrical figure, parliamentarians from both sides of politics, two former Prime Ministers, a member of the Aboriginal community and, as well, his wife Gil Appleton. Every speaker remembered at least one witty epigram. Some have long since passed into the language such as 'the politics of the warm inner glow' which, incidentally, when made, was not intended to refer to people who ineffectually mean well but to people who love humanity but can't stand the humans.

One of his memorable utterances which was not referred to was made in the course of a debate in the House concerning the location of the new Parliament House. At issue was whether it should be located on Camp Hill or higher up on Capital Hill where it now is. Jim said 'in the matter of parliamentary edifices I have always been camp and opposed to presumptuous erections'.

The appointment of Jim as the first Chief Judge of the Land and Environment Court was a stroke of genius. The Court was created to administer a new environmental regime. He was the energetic and forceful figure the Court needed in its early days. From the outset he was wholly unfazed by the legal complexities of modern planning. And for that reason his appointment was viewed with concern by some members of the club. But Jim understood, better than his critics, that planning decisions, within the framework of the legislation, were essentially political decisions and that excessive legalism should be avoided. He made his position clear after his appointment when he said he saw his role as standing between, on the one hand, those who wanted to throw up high rise in Hyde Park and, on the other, those who wanted to turn Pitt Street into a rainforest.

Judicial prose, stripped of adjectives and humour was, as a rule, not for him. He was a brilliant writer and those of us who worked with him were envious of his style. But it was an envy tinged with misgiving. We were never sure what would come next. In a heated dispute about a marina development an energetic resident presented Jim with numerous photographs of minor breaches of the law. She said she had to steel herself to the sticking point when recording these matters because her station in life and previous experience had sheltered her from such things. Jim wrote in his judgment she "was the guiding spirit and founding mother of the local Resident Action Committee. Her sole mission in life was to mount up an environmental posse to flush out dark doings in the neighbourhood. The camera rarely left her 'trembling' hands".

He wrote that a Kings Cross development would not, except perhaps to the mind of the architect who designed it, be mistaken for a creation of Frank Lloyd Wright's but from the point of view of the local residents it would be an improvement on the 'can and condom littered moonscape on which they now gaze'.

One of his judgments resulted in some prominent architects blacklisting the Court. They supported Council's rejection of a development application on the ground that it infringed the 'gateway' concept which, they believed, was essential for CBD planning. Jim had difficulty understanding what they were talking about, but when he did, he said he thought it was a 'concept teetering on the edge of absurdity'.

A Touch of Class, one of Sydney's finer institutions, had been functioning successfully and unobtrusively for many years until the Sydney City Council in a burst of moral enthusiasm decided it should be closed. The issue before Jim was a question of law only, namely, whether the planning laws of the State could be used to close the brothel. Jim said that, on the authority of the High Court, he felt able to determine they could not. I say

'felt able' because his interpretation of the High Court's decision was fairly generous. But it gave him great satisfaction to employ the legal subtleties of planning law in the service of a noble end. Later he gave a speech to the Journalists Club. He referred to the musical 'Chicago' which was written in the 30s and which had a song called 'The Place that Billy Sunday couldn't close'. This was a place, said Jim, not unlike A Touch of Class. He said he hoped that when he was finally called to his maker someone would chisel on his tombstone the words 'A Touch of Class – the place that Jim McClelland wouldn't close'. But, he added:

> credit should be given where credit is due – the continued existence of A Touch of Class is owed not to the legal ingenuity of a humble judge of the Land and Environment Court but to a decision of those bewigged persons who ply their trade on the shores of Lake Burley Griffin.

A year before he was due to retire from the Court he was asked to preside over the Royal Commission into British nuclear testing at Maralinga. For many years Jim believed that the treatment of aboriginals by Europeans was a national disgrace and he welcomed the opportunity to unearth, if that were possible, skulduggery in high places. He told me he was relieved to be once again involved in executive decision making believing, apparently, that up until then he had exercised great restraint in the discharge of his judicial duties. He had a lovely time holding court in the desert, visiting London and jousting with England's brightest legal talent. And who can forget, at the end of the London hearings, the sight of Jim having, to use his words, 'taken the edge off my sobriety' in a BBC television interview fixedly opining that Margaret Thatcher was dressed by the KGB.

'In my assessment the common thread in all was his wit and insight and, above all, his great understanding of, and attachment to, his fellow man.'

The litigation for which he will be remembered by most serious lawyers was the *Parramatta Park* case. It was, as they now say, a landmark decision. Nowadays, if the facts repeated themselves, there could be no doubt about the outcome. But in those days it was seen as an adventurous decision. This Parramatta City Council was anxious to establish a stadium in Parramatta Park – Australia's second oldest park. Every government department was opposed to it and the prospect of a stadium generated enormous opposition in the nearby locality. Notwithstanding this the Council spent a few minutes debating the matter before it granted development consent subject to almost meaningless conditions. In those days it was generally assumed that unless there was corruption or bad faith a decision of a Council, open to it on the law, was legally impregnable. Jim decided that not only had the Council not taken into account matters of relevance when assessing the development application but that its ultimate decision was unreasonable in the *Wednesbury* sense. By a majority of two to one his decision was upheld on the first ground by the Court of Appeal.

Jim was a staunch defender of judicial independence and the importance of maintaining the integrity of judicial institutions. His outspoken public comments in support of both were at least a decade ahead of others and, unlike many since, were always timely and accurate. When legislation was passed to make legal the decision to establish a stadium at Parramatta Park, Jim wrote that while he did not deny to the Parliament the legal entitlement to change the law it was inappropriate for the Government to invite Parliament to maintain the law but to change the result.

But Jim's most blistering broadside came when the Parliament terminated the legal challenge to a number of decisions affecting land at Botany. In the week before the trial counsel for the Government asked the Court to vacate the hearing date because, it was said, the Government intended introducing legislation into Parliament which would have the effect of making lawful any decisions previously taken by the Government even if they had been unlawful when made. The application for an adjournment was opposed, and refused, on the ground that it could not be assumed that Parliament was merely the cat's paw of the Executive. It was also said that in any event enormous costs had already been incurred and it would be necessary for the Court to determine many of the issues in order to make appropriate cost orders. The following Monday morning legislation making lawful the earlier decisions was presented to the Court. It identified the litigation and provided, in terms, that the Land and Environment Court had no jurisdiction to consider the matter further. To make certain that no aspect of the litigation should ever become public it expressly provided that the Land and Environment Court had no jurisdiction to make any cost orders. This brought Jim out on to the streets once more. He said that the action of the Government and the Parliament had the effect of diminishing public confidence in the Land and Environment Court and of legal institutions generally and that without public confidence courts could not function properly. In later years, some have said that his criticisms were the result of the falling out between him and some members of the Government. That was not so. I never sought the details of his severed relationship with the Premier but I do know it took place a long time after the public statements referred to above.

I have mentioned some colourful aspects of Jim's judicial career. As I have earlier said, it was one of four. In my assessment the common thread in all was his wit and insight and, above all, his great understanding of, and attachment to, his fellow man.

Portrait of the Barrister as an Artist

*By Francois Kunc**

SOME BARRISTERS MAY OCCASIONALLY be heard speaking to art dealers in between taking calls from solicitors. They are usually discussing their next acquisition. When Gary Gregg is on the phone to his dealer, they are talking about his next exhibition. Gary Gregg is a rarity: a successful barrister who is now achieving public success as an artist. In doing so, he happens to exemplify what Spigelman CJ urged on the profession at his swearing in, that 'it is ... important for all lawyers ... to participate in community life beyond the law.' If in his 'day job' he is only as good as his last case, Gregg the painter is only as good as his last canvas.

Most lawyers will usually tell you they wanted to be something else. A number have excelled in other fields, often as writers or directors, less frequently as musicians. Few, if any, have made careers as artists. Cezanne, Degas and Matisse never finished their legal studies. For Gregg, there were no early signs of artistic talent. He had no interest in the topic at school. After finishing his law degree he spent 4 years at Dawson Waldron before coming to the Bar in 1984. He has established a broad based common law practice with a special interest in professional negligence work.

During the 1980s, for reasons he can't explain, Gregg says that painting 'started to draw me in (no pun intended)'. By 1990 painting had become so important to him that 'I wanted to know if I was any good'. Work meant there was no time for art school, so he taught himself by voracious reading and frequent gallery visits. 'If it was worthy of hanging, it was worthy of my attention'. He would deconstruct the paintings he saw, then go away and do a lot of painting, applying and developing what he had seen and read to see where it led him.

Gregg's style emerged through this process. His concerns are colour and movement, although in any one painting the range of colours may be quite limited. The method on canvas is strongly physical and energetic, the method on paper sparer, precise and finely balanced. On canvas he utilises the palette knife as well as the brush, whilst on paper indian ink, collage, pencil, charcoal, acrylic, oil, oil stick, or oil pastel may feature. 'It is disastrous to name ourselves' said the great abstract expressionist Willem de Kooning. When pushed, Gregg describes himself as an abstract painter, but only because he is not a narrative artist.

The reference to de Kooning is appropriate. His favourite painting is de Kooning's *Excavation*, 1950. In *American Visions* Robert Hughes identifies it as 'the best single picture de Kooning ever painted ... that tangled, not-quite-monochrome, dirty-cream image of – what?'. (The reader will have to consult Hughes' book to find the answer).

Gregg's paintings do not have stories, they explore ideas. 'A painting is a journey, not a problem to be solved. It's a dialogue between you and the surface of the painting.' Above all else he says that he has an affinity with the process, which for him eclipses the end result. His attitude is best summed up by a quote from Kurt Vonnegut's Bluebeard that features in Gregg's first solo exhibition catalogue: 'There was general agreement that if we were put into individual capsules with our art materials and fired out into different parts of outer space we would still have everything we loved about painting, which was the opportunity to lay on paint.'

That first solo exhibition was at the Crawford Gallery in 1995. Other solo exhibitions followed there in 1996 and 1997. The paintings sold and now appear in a number of public, corporate and private collections. While he works, his children sometimes watch and suggest titles. Justice Meagher owns a yellow and white canvas which Gregg's teenage daughter christened *Funky Chicken.*

Perhaps the best indicator of Gregg's rise in the Sydney art scene is that he has been taken on by Coventry Gallery in Sutherland Street, Paddington, one of the city's premier galleries. With its long track record of picking and promoting talented artists early in their careers, joining Coventry's stable is a major achievement.

A successful debut at Coventry in February 1998 in the annual group show Coventry Diary was followed by a solo show in August/September 1998 - *Gary Gregg: Paintings and Drawings.* That solo show was a virtual sell-out and attracted a great deal of attention and favourable critical response (e.g. Dr Gene Sherman (Sherman Galleries) purchased a work for her private collection).

Gregg paints at night and on weekends as often as

possible. Whilst he painted for years in an old external laundry at his Northwood home, eighteen months ago Gregg went in search of a larger studio. He thought he might have to rent a warehouse at Artarmon. But his plight came to the attention of a friend and near neighbour, the son of the late Lloyd Rees. The next thing he knew was that he had been offered full-time use of the late artist's studio, untouched since Rees' death. According to Gregg, Rees' smock still hangs behind the door and his jars and brushes are on the window sill. A photo of the artist (seen on the cover of *Framed*, the recent book of photos of artists in their studios by Michel Lawrence) is on the wall. I asked Gregg if he was inspired by his surroundings. "Not really, but I'm not intimidated either. I look at Lloyd's photo and think 'I know you're happy that I am working here, your son's happy and I'm happy'".

Does being a lawyer affect him as an artist? No. 'You're a painter. You see things the way a painter sees them. The fact that you do other things doesn't change that'. Does being an artist affect him as a lawyer? Maybe. 'It encourages creativity. You look at a brief conventionally and then look at it a second time and see what it's really about. I like to think about a brief and be creative. You try to offer a cohesive explanation as to why what happened did happen'. But just as when describing a good painting, simple classifications like 'lawyer' and 'artist' do an injustice to the more complex reality. 'I want to be a good painter, husband, father, barrister. All these give me my identity and other things as well. I need all of them and if you took any of them away I'd feel diminished'.

Gregg is part of the 1999 Coventry Diary show (16 March to 10 April). His next solo exhibition opens at the Coventry Gallery in September 1999. 'It will be fresh but not alienating' says the artist. 'You'll see painting in the modernist tradition. I hope it will strike chords of recognition: space, colour and time. These are elements that all abstract painters are concerned with. It will be my attempt to execute my ideas in a number of works, both on paper and on canvas. A painter must find his own voice and I believe my voice is starting to come through'.

Late last year following a suggestion by Justice Meagher, Gary Gregg donated a framed work on paper to the Bar Association. See *Stop Press* February 1999. It is understood that this work, which at Gregg's suggestion was chosen by Justice Meagher, will be hung in the Common Room.

Gary Gregg with his painting *In the half light* at the opening of the 1999 Wynne Prize Exhibition at the Art Gallery of New South Wales.

Just prior to this article going to press, Gary Gregg was selected as a finalist for the 1999 Wynne Prize for his painting *In the half light*. The Wynne Prize (for landscape) is run by the Art Gallery of New South Wales in conjunction with the Archibald, Sulman and Dobell Prizes.

In the half light has a strong sense of landscape, no doubt flowing from his concerns with the use of space, and is a very light and open work in tones of grey, cream, Paynes Grey, and light red oxide. The painting has been beautifully hung in a splendid room next to a strong work by John Peart. Also hung in this room are works by Aida Tomescu (another Coventry painter, and a previous winner of the Wynne Prize), John Firth-Smith and the winner of the 1999 Wynne Prize, Gloria Petyarre for her multi panelled work *Leaves*.

While he hopes his next show at Coventry will be a success (and there is no reason to think otherwise), the result probably won't change much for Gary Gregg. He'll go on being a barrister. 'I love being a barrister. I love running cases and wouldn't give it up'. But he'll also go on painting. 'I paint for myself, not for dealers, shows or anyone else. I'm grateful that I've been given the opportunity to show but, if not, I'd still paint. I have to paint. It's a passion. It's just something I do.'

**11 Selborne. One of Francois Kunc's first jobs as a teenager was helping in the stockroom of the Rudy Komon Gallery. His colleagues occasionally entrust him with their money to buy art for the Floor's collection, which includes a work by Gary Gregg.*

Appointments & Retirements

Retirement of the Honourable Justice Dennis Mahoney AO, President of the Court of Appeal
- *18 December 1996*

Swearing in of the Honourable Justice Keith Mason, President of the Court of Appeal
- *4 February 1997*

Swearing in of the Honourable J.J. Spigelman, Chief Justice of NSW
- *25 May 1998*

Swearing in of His Honour Justice LDS Waddy RFD, Family Court of Australia
- *1 July 1998*

Swearing in of His Honour Judge K O'Connor, District Court of NSW, President of the NSW Administrative Decisions Tribunal
- *10 August 1998*

Retirement of the Honourable Justice ML Foster, Federal Court of Australia
- *26 November 1998*

Retirement of the Honourable Mr Justice JJ Cahill, Vice President of the Industrial Relations Commission of NSW
- *10 December 1998*

Retirement of the Honourable Justice BJK Cohen, Equity Division of the Supreme Court of NSW
- *1 March 1999*

Swearing in of the Honourable Justice Paddy Bergin, Supreme Court of NSW
- *1 March 1999*

Swearing in of the Honourable Justice Virginia Bell, Supreme Court of NSW
- *25 March 1999*

Retirement of the Honourable Justice Dennis Mahoney AO

Gleeson CJ:
In 1941, at the New South Wales School-boys Athletics Championships, the under 17 100 yards sprint was won by Dennis Mahoney of St Patrick's College, Strathfield. The history which I have just recounted suggests that he has never slowed down. Now at the formal end of his judicial career, retiring at the age of 72 by statutory compulsion, he is entitled to say, in the words of St Paul: 'I have fought the good fight. I have run my race to the finish. I have kept the faith'.

Burbidge QC: Your Honour prior to judicial appointment had a distinguished career at the Bar practising extensively in commercial law and revenue matters. Your Honour's capability in these areas was rewarded with an enviable press of work, which work you began to measure in 15 minute intervals, a first for the Bar, and an example which even today few have the stature or courage to emulate. Your Honour was a formidable worker at the Bar and when engrossed by a task would on occasion lock your door against the intrusions of those fellow-floor members whose obligations were less onerous, emerging from your chrysalis only when the problem was resolved. At a personal level your Honour was always willing to assist, and had the marvellous attribute of advising without preaching. Your Honour perfected the art of conveying, with no more than a cocked eyebrow, that some proposed line of action might easily result in well-deserved disaster.

Mahoney J: Chief Justice, you have been more than kind in what you have said: you have been indulgent. You and I have been friends too long not to be a little cynical about what is said on occasions such as this. But I must confess: when such things have been said of others, I have smiled: now, I can see that they may have been true, after all.

Compliments are allowed when one is on the point of retirement. When I was young, I thought that compliments should be dispensed in tea spoons; as I grew older, I thought table spoons more appropriate; but now I am inclined to think that ladles are the proper measure.

It has been in the Court of Appeal that I have served most of my judicial life: from 1974 to 1996, over 22

years. I have served with two Presidents of the Court of Appeal: with Mr Justice Moffitt and with Mr Justice Kirby. Mr Justice Moffitt conducted a firm and professional Court of Appeal, direct and to the point. Mr. Justice Kirby has been the greatest publicist for the law that we have known and he has, by what he has said, given the law a more human face than it might otherwise have had.

I take this occasion to apologise for my error on the few occasions when I have over-ruled what you have decided. As you know, an appellate judge cannot be right all of the time and I hope that you will understand.

The Bar has been a great part of my life: before and after I became a judge. One of the great achievements of the common law system is to have the legal profession – especially the Bar – accept that the great power they have is subject to equally great duties, to the client and to the court. If that should ever change, the public and the courts will be much the worse for it.

It is now fashionable to talk of what lawyers do in terms of efficiency and of 'level playing fields'. It is right that we talk of these things. But the wind can blow cold across a level playing field, cold and hard, and there is nowhere to hide when the powerful do what they do to the less powerful of us. If, because of efficiency and competition, a client cannot trust what her lawyer says or this Court cannot trust what lawyers say to it, we will have lost values which, after all, are the real point of the justice system.

The Australian judiciary is a great institution: one of which all Australians should be proud.

It has had its critics, usually they have been less than fully informed. I know the Australian judiciary perhaps better than almost anyone. I was Chairman and Deputy Chairman of the Australian Institute of Judicial Administration for four years and more. For some ten years I dealt with the federal judges as Chairman of the Australian Remuneration Tribunal. I have been a member of the General Council of the Judicial Conference of Australia. I know the judges and the judiciary from the inside: their standards, their aspirations and the (true) level of their performance.

I have worked with the judiciaries of other countries: with the judges in England, the United States, New Zealand and the Philippines. I have been Chairman of the Judicial Section of Lawasia for some ten years with the Chief Justices of India and then of the Philippines; and I have had acquaintance with judges and the judiciary in China, Russia and most of the countries of South-East Asia.

It is because I know these things that I may say that the Australian judiciary is an institution of which we should be very proud. Its impartiality, its honesty and its standard of professional capacity is exceeded by no other judiciary with which I have had contact.

Judges have some faults. Only God and critics - and perhaps you and I, Chief Justice – are without fault. Occasionally a judge will fall below what is expected of him or her. That will happen: of course it will. That is life. It will be remarked on, as it should be. I think it will be remarked on the more because the standards are so high and the exceptions are so few.

'I would like to explore with my judicial colleagues and the profession the greater use of time limits for the giving of evidence and hearing of argument, and the confining of debate to real issues clearly raised in written submissions delivered well in advance.'

Swearing in of the Honourable Justice Keith Mason

As Solicitor General I was privileged to argue a range of fascinating cases extending well beyond constitutional and public law issues. I have even argued two child custody cases; one was fought at trial on its merits (whilst incidentally involving a challenge to the State's monopoly on adoptions). Occasionally my brief might be best described as damage control, but more often it involved significant points of legal principle. I regard the case of the *Environment Protection Authority v Caltex* as the most interesting and important case I argued. The outcome carrying a reminder that the justification for conferring legal rights and immunities upon corporations, both aggregate and politic, depends on the extent to which they serve the needs and aspirations of human beings.

Of particular fascination was the work done as Solicitor General in and out of court around the edges of elections, some of which could or did result in a change of government. Like a legal Vicar of Bray I have vigorously served dying administrations, but only until the moment of their despatch. I have had my riding instructions reversed by a change of government occurring during a pending case: in one instance I found myself having to put to the High Court the very opposite of what was previously planned.

Things have always been more interesting (for a Solicitor General at least) with politically opposed governments in Canberra and Sydney, and I was fortunate to have those sorts of opportunities. Six years ago New South Wales stood alone against the Commonwealth and the other states as the only Conservative government. For some time now it has stood alone as the only ALP government. Such are the fortunes of political war.

Apart from my political masters, many things have changed in my ten years as Solicitor General. For example, the majority of constitutional cases now involve human rights issues as distinct from federal issues. In several senses *Kable's* case in 1996 stands in counterpoise to the *BLF* case in 1986. And

government has become increasingly sensitive to environmental issues in recent years. Almost a third of my practice in the 1990s has become environmental and planning law. Sometimes I have acted as prosecutor for the Environment Protection Authority (once against another agency of the Crown); but more often I have striven to keep government agencies from being entrenched in the toils of environmental and planning laws probably intended to catch others.

The frequently asked question: 'Keith, when are you coming back to the Bar?' betrayed a fundamental misunderstanding of the office of Solicitor General. Until midnight last night I never left it. True I did have but one client, 'the Crown' or 'the State', although it sometimes turned out to be a many headed animal in legal controversy within itself. Like all lawyers, there were times when I knew the advice which my client hoped it would receive, but I can truly say that I was never placed under any pressure (except time pressure) to tailor my advice. When he was Attorney General, Justice Dowd used frequently to say to the Crown Solicitor and myself, 'I would rather learn privately from you that I cannot do X rather than have a tame adviser tell me I can, only to fall flat on my face when challenged in parliament or the court'. Each of the Attorneys General under whom I was privileged to serve applied a similar principle. Outsiders might be surprised to know how often the Crown law officers (the Crown Solicitor and myself) deliver unpalatable legal advice to government, and how the rule of law is served in this state by the certainty that unambiguous advice as to the legality of proposed governmental action is scrupulously followed. Of course there is often a follow-up brief asking: 'Can it be done some other way?'

As I look ahead, I see increasing difficulties with the equitable and efficient delivery of justice. There are no easy solutions. Obviously all who are responsible for law and its administration will have to redouble their efforts if the slippage is not to become a slide. Parliament and the Executive cannot continue seeking to cure all ills by regulating society through complex and open-ended legal rules and withholding the resources to police and enforce them effectively. Otherwise the rule of law becomes a sham. And equality of men, women and children before the law is equally a sham unless litigation costs are kept down and there is an adequate system of legal aid, efficiently and equitably administered, to act as a safety net.

Between them, the legal profession and the judiciary have the primary responsibility of ensuring the fair and effective delivery of justice. I believe that we must acknowledge that justice is a limited resource and that perfect justice is unattainable. After all, we cannot agree on its identity, we its agents are human, and its administration costs money which is also required for health, education and other human aspirations.

Subject to the enacted law, and to procedural fairness, judges have (I believe) broad leeway's of choice as to the procedures they may impose on individual litigants and their legal representatives at both trial and appellate level. The difficulty lies in balancing concern for the interests of the litigants at hand and those of others also seeking to gain or avoid their just deserts. But unless we (especially the judges) keep the wider concerns as a primary focus, our legal system will slip back to that depicted by Dickens in *Bleak House* when the Court of Chancery gave 'to monied might the means abundantly of wearying out the tight'. And this can happen, indirectly, even if all litigants in a particular case are so rich or so poor that they are happy to fight till the cows come home, because their pre-emption of scarce judicial resources leaves less for others who claim their share of the total resources. I would like to explore with my judicial colleagues and the profession the greater use of time limits for the giving of evidence and hearing of argument, and the confining of debate to real issues clearly raised in written submissions delivered well in advance.

It was Pascal who once wrote, 'I have made this letter longer than usual only because I have not had the time to make it shorter'. This sentiment applies to what I have said today, and will doubtless apply to judgments I shall come to deliver. Of course, what I have said represents my own roughly-formed thoughts, and I will have the pleasure and corrective of working in a team situation where any opinion counts as nought unless it can gain at least one judicial adherent. The move to a team role, away from the relative isolation of a single player, is for me a particularly pleasing aspect of today's transition. I mean to work co-operatively with colleagues who already have my respect and affection. Since however I, like Learned Hand, have an open mind not an empty one, I have thought it proper to expose some views for debate and criticism, or at least studied neglect.

Swearing in of the Honourable JJ Spigelman

Shaw QC MLC: Your Honour's advocacy skills are illustrated by the remarkable results you had in two very recent cases before the High Court. In *Newcrest Mining (WA) Limited* v *BHP Minerals Limited & Commonwealth* (1997) 71 ALJR 1346 your Honour represented the mining company. You successfully argued that the extinguishment of mining leases as a result of the proclamation of Stage 3 of Kakadu National Park was an acquisition of property by the Commonwealth and therefore subject to section 51(xxxi) of the Constitution, that is the Commonwealth was obliged to acquire the property on just terms. Just months later, in *Commonwealth* v *Western Mining Corporation Resources Limited* (1998) 72 ALJR 280, your honour appeared before the High Court on behalf of the Commonwealth and successfully argued that the extinguishment of oil exploration permits in the Timor Gap, as a result of *Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990*, did not constitute an acquisition of property. Such a juxtaposition of advocacy is, of course, part of the attraction of life as a barrister.

You are our second Jewish Chief Justice and the welcome you have received is eloquent testimony to how far we have become an open, tolerant society since the time of our first, more than a century ago. When Julian Salomons was appointed the fifth Chief Justice of

New South Wales, his appointment was gazetted on 13 November 1886, but hostility from his colleagues led to him to resign six days later, before he had been sworn in. In his professional life, it was not the only time that he came under attack for his race. But that is long past history.

On a happier note you have followed your predecessor in other ways. Like yourself, Julian Salomons acted for a time as Solicitor-General, then in the ministry, and as a trustee of the Art Gallery. You do not have Salomons' cross eyes or squeaky voice but other likenesses may be found, in the contemporary description of Salomons as having a mordant wit and being quite the fastest, long distant talker of his time. However, the option of following him into a knighthood has passed.

Minorities who have known persecution tend to bring up children who are keen to seek justice for all people. It is perhaps literature's loss that you did not follow a vocation as a writer of fiction. But it prefigures the adult that the boy in his last year at Sydney Boys' High wrote in its magazine *The Record* a short story that condemned the White Australia policy and criticised the treatment of the Chinese in our history. The story did not flinch from saying harsh things about trade union phobias against the Chinese. When you were at school the few Chinese students in our schools tended to be side-lined. Young Jim Spigelman, provoked by some gush of enthusiasm from the authorities over an American student, formed the Asia Society, as a forum for communication with the Chinese students.

Your part in the Freedom Rides of 1965 has been much reported in recent days. They were days of hope when it was possible for the young to believe that the walls of prejudice must fall. We have made gains, but the struggle against intolerance and injustice continues. While the Freedom Riders are well-remembered, the student activist took up many other issues. You advocated a 'poverty law' option at the Law School and, as President of the Students Representative Council, championed student representation on Faculty committees.

The Hon. Justice D Kirby and The Hon. J J Spigelman, Chief Justice of NSW

Swearing in of the Honourable Justice LDS Waddy RFD

Walker S.C.: Whatever may be royal about your Honour's political attachments, whatever may be splendid about your entourage, domestically, the fact is you have always been the very furthest from regal in your dealings with your colleagues, with those whom you appear for, those whom you appear against to cross-examine and those before whom you appear. The greatest augur of your Honour's career on the bench is precisely that mixture of courtesy, humility and fairness which we at the Law Council are quite confident will provide the most solid foundation for you to go forward.

The importance of this court as one of the nation's great federal courts, is one which the Law Council wishes to make quite plain in its welcome to you. Your job ahead is one which will require all of what is known of your Honour's application both to the learning of the law and to the human side of the law. Mr Cameron has already made mention of the fact that in your long, varied and hard-working career at the Bar, you became attached or known from time to time for some of the longer, more intensive, complex inquiries or cases, including, as is well known, in the Trade Practices area.

Of some counsel, of some lawyers, it can be said if a case was not big they would make it big. Of you, that could never be said and another good augur for your performance on the bench in which we have great confidence. If the complex will not deter you, that which appears long will not deter you and what is even better, you will not lengthen it at all. Except in that most pleasant of ways which rarely increases counsel's remuneration at all, namely, by the levity and humour with which you have been known to ease many an awkward moment and which we are sure will continue to be displayed with taste and tact on the bench.

McColl S.C.: The life of a judge is not an easy one. A judge, particularly in this jurisdiction, bears the burden of having to make hard decisions which profoundly affect the lives of the litigants and their families who appear before the court. There will never be a perfect solution to the sort of disputes which are brought before this - or indeed any - court. Judges must strive in a necessarily imperfect way to reach their decisions as fairly and equitably as possible and it must be apparent to all that that is the manner in which that decision has been made.

On occasions, administering justice so that the litigants and the public appreciate the even-handedness which is involved, will itself be

difficult in the face of the tensions and emotions which will frequently attend on matters such as residence, contact and property in this jurisdiction. In order to satisfy all those competing demands, we expect our judges to display independence of mind, the wisdom of Solomon and the patience of Job. Your Honour is eminently qualified to live up to all those expectations.

You are clearly capable of great achievement. The personal history Mr Carneron has recited bears eloquent testimony to that. Less well known, perhaps, is the fact that you wrote the history of The King's School in less than three weeks. Not satisfied with that achievement, you then managed to present the history both to the Queen, and notwithstanding being an orthodox Anglican, to the Pope. Photographs indicate that the Pope was somewhat bemused but nevertheless suitably appreciative. The Queen was a more predictable recipient. As one of your former colleagues on the Eight Floor of Wentworth Chambers said recently, your Honour is a King's boy who has remained a Queen's man.

You have carried that commitment to the Queen forward in being a founding member and since 1992, chairman of Australians for Constitutional Monarchy. That position required fortitude and courage of conviction in the face of intense media scrutiny and public controversy. Your Honour demonstrated great ability to deal with the public debate which surrounded that organisation with reasoned argument, patience, wit and good humour.

Waddy J: I always practiced law on the basis that we are paid a great deal as lawyers to fight our client's cases but not a cent to fight each other. Playing the ball and not the man has always been my unwavering intention, the lasting legacy of my education.

The varied beliefs of attorneys in barristers' abilities are the one reason I've never thought floor parties were a good idea. Why put all your suppliers together in one room and let them discover the truth when with a little effort you can fool most of them most of the time if you keep them apart?

I mention these early matters to disclose that a great judge of the Matrimonial Causes Division, Mr Justice David Selby, is my ideal for gentlemanly courtesy on the bench. If I had an aspiration it would be to conduct a court room as relaxed but effective as he did, although I believe I could never fully attain his erudition and compassion. But the judge who towers above all in my life in the law was Sir Owen Dixon, followed closely in the United Kingdom by Lord Denning, whose friendship Edwina and I have enjoyed for over a quarter of a century. Lord Gardiner and Sir Garfield Barwick must rank as the greatest advocates and Lord Hailsham, also a close family friend, as this century's greatest Lord Chancellor. But for impact on the law, the duo of the double Ds, it's Dixon and Denning.

The pressures of litigation, the proper expectations of the public and the far from inexhaustible pockets of the Australian taxpayer have replaced such a rarefied court atmosphere with the economic rationalist nostrum of "productive judicial time". I expect it's the concern of

Justice LDS Waddy RFD

every judge to balance the time necessarily taken to ensure that justice is done to the parties appearing in the court with the ancient reminder, even from Magna Carta, that justice delayed is itself justice denied, which applies most pointedly nowadays to the those in the lists who cannot get their cases heard or determined expeditiously .

Although it's very often overlooked, I am persuaded that being Australian has as one of its essential elements and has had since 1788, when convict Kable successfully sued the Master of the convict transport that brought him here, a fundamental adherence to the rule of law equally applicable to all 'without fear or favour, affection or ill will'. It is referred to in the Oath of Allegiance I happily took again earlier today on the volume of the Sacred Law, in the form of the schedule to the Constitution which referred to the Queen of Australia's 'heirs and successors according to law'. That law is now, of course the law of a sovereign. independent Australia.

Well, Acting Chief Justice, you have been very patient, as have all here. I thank those at the bar table for their extremely generous comments and the extreme generosity they have shown in spending their time coming to this lovely city for this occasion. But it is time for me to take my godson's advice and 'Get on with it'.

I conclude with reference to the one power you all have over me, for judges are - as Bracton wrote in the 15th Century concerning the constitutional position of the Monarch – judges also are under 'God and the Law'. My former rector - of St Augustine's, Mr Cameron - was kind enough to write to me and compliment me on my preferment. In a generous note he concluded: 'At St Augustine's we pray for judges and magistrates, probably not as often as we pray for politicians. Your appointment will spur us on to do so more frequently'.

May I invite all so inclined to include me and all who work with or come before this court in their prayers, that justice and mercy, love and kindness may temper the lives and work of all judges, officers and employees of the Family Court of Australia, and that all litigants may here obtain justice with compassion, 'without fear or favour, affection or ill will".

Swearing in of His Honour Judge K O'Connor

On 10 August Kevin P O'Connor was sworn in as a judge of the NSW District Court by the Chief Judge, Justice Blanch. He was welcomed to the bench by the NSW Attorney General the Hon Jeff Shaw QC MLC and Mr Mark Richardson, Chief Executive Officer of the NSW Law Society. At the bar table was Justice Alwynne Rowlands formerly of the County Court of Victoria and now of the Family Court. Mr Shaw separately announced that Judge O'Connor had been appointed to a three year term as the inaugural President of the just established NSW Administrative Decisions Tribunal.

'His journey to the Bench in Australia's oldest jurisdiction has not been conventional - but what is conventional? In an era of national law firms, reciprocity of admission and uniform professional conduct rules, state borders are now of less significance in legal practice.'

In his remarks the Attorney said that Judge O'Connor comes to the Bench 'following a distinguished career, first in academia, then in the area of law reform, at the Victorian Bar, and more latterly in senior offices within the Commonwealth and New South Wales public sectors'.

Born in 1946 in London of Irish stock, Kevin Patrick O'Connor arrived in Australia at the age of five. His family settled in the western suburbs where he was educated in the catholic school system. He attended Melbourne University Law School and subsequently, on a Fulbright Scholarship, the University of Illinois at Urbana-Champaign. In the mid 1970s he returned to lecture in contract at the Melbourne Law School. Among his colleagues there at the time were the now Sackville and Weinberg J Js, R R S Tracey, Marcia Neave, and Cheryl Saunders.

In 1976 he was coaxed to Sydney to join the newly established Australian Law Reform Commission. Under the energetic chairmanship of Kirby J he joined an illustrious band of law reformers that included John Cain, F G Brennan QC, G J Evans, Murray Wilcox QC, J J Spigelman, J H Karkar, Bryan Keon-Cohen, and Jocelynne Scutt. As principal law reform officer he led the team that was responsible for the research and discussion papers for a number of important early reports of the ALRC including *Complaints Against Police,* and *Privacy.*

In 1980 he returned to Melbourne, joined the Bar and developed a general practice with a focus on administrative law. He left the Bar in 1983 to take up the position of Director of Policy and Research in the Victorian Law Department. In this role he was the intellectual force behind the team that drove the extensive law reform agenda of the early years of the Cain government under successive Attorneys General John Cain, Jim Kennan QC, and Andrew McCutcheon. Significant legislation that Judge O'Connor was involved with included freedom of information, regulation of in vitro fertilisation, establishment of the Victorian AAT, and early initiatives to reform police powers and the criminal law. In addition to directing the legislative programme he was Secretary of the Standing Committee of Attorneys General for five years. Over that period this institution too made a deal of progress on a number of uniform law projects. In his spare time his Honour was active in civil liberties. For a time he was secretary of the Victorian Council for Civil Liberties as it was then known, and also produced its weekly radio program.

In 1988, after being promoted to the position of Deputy Secretary of the Law Department, Judge O'Connor was appointed to the position of Australia's first Privacy Commissioner. With that appointment came an ex-officio position on the Commonwealth Human Rights and Equal Opportunity Commission and relocation to Sydney with his wife, Bernardette, and three school age children.

As Privacy Commissioner his first task was to guide the implementation in the federal bureaucracy of the information privacy principles that emanated from his old stamping ground, the ALRC. He also worked behind the scenes with departments and agencies to ensure that the Australian Card substitute, the tax file number system, met the high privacy standards that he brought from his civil liberties background. He was also responsible for the controversial but ultimately smooth extension of the *Privacy Act* to private sector credit reference providers. At the time that his appointment expired in 1996 there was bipartisan agreement to extend the *Privacy Act* to the entire private sector. While this was later abandoned, the fact that the Commissioner had been able to facilitate a climate of acceptance of such an extension is testament to his expertise and respect in the area. Under Judge O'Connor the office of Privacy Commissioner also produced a number of leading edge discussion papers on community attitudes to privacy issues, medical records, genetic testing, and data matching. The Privacy Commissioner also acquired an international reputation, with Australia regarded as having one of the most advanced privacy protection regimes in the western world. He addressed and convened a number of conferences on privacy issues. After his term as Privacy Commissioner he was retained as a consultant on privacy by the Hong Kong government. As a member of HREOC Judge O'Connor presided over a number of hearings of discrimination cases, represented Australia at the UN Commission on Human Rights, and acted as executive Commissioner on a number of occasions.

In 1997 Judge O'Connor was appointed as Chairman of the NSW Commercial Tribunal, the State's peak credit and home building tribunal. He is also honorary Chairperson of the Public Interest Advocacy Centre.

Judge O'Connor's first challenge is to preside over the bringing together of a number of merits review tribunals and formerly court based appeal rights. His journey to the Bench in Australia's oldest jurisdiction has not been conventional - but what is conventional? In an era of national law firms, reciprocity of admission and uniform professional conduct rules, state borders are now of less significance in legal practice. Similarly, professional careers often now include stints in academia, the bureaucracy, and law reform or other agencies of government. There is now no typical career in the law just as there is now no conventional route to judicial appointment. As he remarked at his welcome, 'perhaps this appointment represents a small milestone in the journey in seeing ourselves as lawyers belonging to a national legal profession rather than a series of State Bars.'

'Since I have been on this Court its workload has increased immensely, cases have become larger and more complex; no two cases are even remotely the same. Innovative procedures are constantly being tried.'

In any appointment to public office it is the professional and personal qualities and values that are important. In his career to date Judge O'Connor has displayed intellectual rigour, integrity, impartiality and a sense of fairness. He is admirably equipped for the challenges ahead. New South Wales' gain is Victoria's loss.

The New South Wales Bar congratulates him on his appointment and wishes him well in his judicial career.

Retirement of the Honourable Justice ML Foster

Barker QC: Fearlessness in a judge can be a bit of a worry, but your Honour had the reputation of being in fact exceedingly careful in your judgments, and to quote others, you sweated over every judgment, you agonised about getting it right.

Foster J: I should say that when I was sworn in as a Justice of the Supreme Court in 1981 by Sir Lawrence Street, my first Chief Justice, two speeches sufficed to mark my arrival in the judiciary. Today I find that no less than four speeches are required to signal my departure. If there is some hidden message in that, I don't think I'll dig for it.

I thank you, Mr Burmester, Dr Hughes, Mr Barker and Mr Heinrich for so collectively, comprehensively, conclusively and compassionately dispatching me into the outside world.

I am of course grateful for your more than flattering remarks. I'm happy to accord to them the willing suspension of disbelief for the moment. That moment will stretch out until midnight when the Constitution will strike me down. Indeed the last decision I shall make as a judge is whether to stay up until that hour in order to experience at first hand the abrupt withdrawal from my being of the judicial power of the Commonwealth or whether I shall retire to bed at a more appropriate hour and simply wake up tomorrow with a nagging sense of loss.

I have not been disappointed by the challenges of this Court. It has not been all easy. I can remember my concern when I first confronted the arcane intricacy of the Commonwealth Anti- Dumping legislation and the bewildering maze of the Taxation Acts. However, no challenges are insurmountable. I have enjoyed the work at first instance and on appeal and hope that I have made at least a meagre contribution to the success of this Court.

Since I have been on this Court its workload has increased immensely, cases have become larger and more complex; no two cases are even remotely the same. Innovative procedures are constantly being tried. The challenges of judicial life in the Federal Court, in my view, will continue to attract to this bench top legal talent from the profession and from academia and perhaps, Chief Justice, from other courts.

I confess that I have no real wish to leave this happy, growing and progressive Court. I should have liked a little more time, but it cannot be. But I have no cause to complain, I have had a rich and varied judicial life, full of interest. My wife and I have attended many judicial conferences, made social contacts with the judges from other states and have made many new friends. Moreover, I voted yes in that referendum in the '70s. I then accepted the proposition that when a judge achieves three score years and ten he is necessarily in a state of severe intellectual decline and should take his pension and, as was said, go off into his dotage. It is just that when you reach constitutional senility, and it happens with such alarming speed, that things do look rather different.

Retirement of the Honourable Mr Justice JJ Cahill

Shaw QC MLC: Justice John Cahill has lived a life of public service, in the best sense of these words. The functioning of a just and fair society depends on the work of thousands of public servants, who make it happen. John Cahill has served the people and the State of New South Wales with distinction and has well and truly earned the deep respect of the industrial and wider community in this State.

Retirement of the Honourable Justice BJK Cohen

Tobias QC: At your swearing in ceremony on 21 November 1983 as a judge of this court the then Attorney General, the Honourable Paul Landa, referred to your period as Master in which he said that you had displayed judicial qualities of fairness, impartiality, courtesy and kindness, qualities that would well equip you

for the additional appointment you were then undertaking. He also referred to the fine personal qualities of good humour, integrity and kindliness that you would bring to that office.

That was repeated by your very good friend and then Senior Vice President of the Law Society of New South Wales, Fred Herron, who when referring to your Honour's grandfather, John Jacob Cohen, who served with distinction as a judge of the District Court of this state for some ten years, referred to the tribute paid to him upon his retirement with respect of his fair mindedness, ability, integrity, common sense and loyalty. Mr Herron also referred to your period as Master in that context in which he said you displayed, 'a measure of kindness, courtesy and never ending patience which I doubt will ever be equalled and I am certain will never be surpassed'. How prophetic those words were because your Honour has lived up to them throughout the fifteen years that you have been a judge of this Court.

'You have never adopted any form of aggression nor have you bullied those who have appeared before you. On the contrary, you have been even tempered, interminably patient and over-kind.'

Your Honour has carried those qualities on to the Bench in your present role. You have never adopted any form of aggression nor have you bullied those who have appeared before you. On the contrary, you have been even tempered, interminably patient and over-kind to some of the efforts that you have no doubt experienced from some members of the Bar. Notwithstanding that, you have indeed applied delicately the scalpel to the arguments presented before you with the skill, experience and principled approach that your Honour would have learned from your Honour's mentor, the late Mr Justice Roper, to whom your Honour was Associate and whose skills as an equity lawyer you have brought to your time as a judge of the Equity Division of this Court.

Cohen J: You have pointed out the things that were said about me and said to me fifteen years ago. Your mention of the swans I seem to remember came from something Lord Pearce had said but I think repeated by McGarry J, who said that when going on the Bench one sees the judge sitting in a manner that seems to be like a swan gliding across the mirrored surface of the lake but he said the judge, like the swan, is paddling madly underneath and I have certainly had to do a lot of paddling.

One of the other things Justice McGarry said, which has had an effect on me, if you could bear a moment of seriousness, was that the most important person in court in any case is the one who is going to lose. As a result and as you don't know at the beginning who this is, it means everybody has to get a fair go. I tried to do that, I hope I have succeeded.

Swearing in of the Honourable Justice Paddy Bergin

Bergin J: Chief Justice, your Honours, Mr Barker, Ms Hole, members of the legal profession, ladies and gentlemen. Thank you Mr Barker and thank you Ms Hole. I am deeply grateful for the generous remarks that have been made.

It is most gratifying to be reminded of the interesting and important aspects of my life and career. One aspect to which reference has not been made directly is my abiding interest in the exercise of power and how it affects others.

This was first awakened in my formative years in my family environment, although at that time it wasn't so much identified as an interest but rather as a frustration, being the youngest of three children.

However, that interest flourished in my time in high school at the Sacre Coeur convent in Kincoppal. The Sacre Coeur nuns wore habits, or robes, which were quite unique and it seemed to me that their presence enhanced the nuns' authority. It was not just the individual with whom one was dealing with but an institution which commanded, and might I say received, respect.

But luckily for me it was also an institution which accommodated the ever so gentle questioning of authority when fairness seemed wanting. On the rare occasions when this occurred I always felt the nuns had this extra edge caused in no little part by the presence of their robes. Although the significance of their robes was understood they did at times cause some little curiosity. I suppose if the Sacre Coeur nuns were to see me today their curiosity may also be excited by my robes. But I have no doubt that they would understand their significance.

Mention has been made of my years as a teacher. It is interesting to reflect that those years included events that would touch upon my later life at the Bar. To this day I can vividly recall a young student on a hot summer afternoon take off his shirt to expose welts deep in his young back. When the government department was contacted to assist in the matter the school was informed that really little could be done because one had to catch the perpetrator in the act and that was a matter for another department. But for the innovative initiative of the head of that school in finding a way through the quagmire of red tape that abuse might have continued.

It is enormously satisfying to know that nearly 30 years later I was part of a process which I have no doubt was pivotal to the establishment of a more accountable and specialised system for the detection and

more importantly the prevention of abuse of children in this state. It seems to me that the community will remain indebted to Justice Wood for his remarkable achievements in this area.

Reference has also been made to my years as an Associate. I felt I was extremely privileged to be appointed as Associate to Judge Peter Ayton Leslie and later with Judge Desmond Ward QC during the period I completed my degree. That opportunity to observe the administration of justice from such a privileged position in such a diverse jurisdiction was a wonderful introduction to the law. The consolidation of that at Stephen Jaques & Stephen in working with Ross Griffith Wagland and Gerald Ingrim Raftesath prepared me well for the Bar. To all of those people I extend my gratitude.

It was to my delight that in practice as a solicitor and at the Bar I found once again that the ever so gentle questioning of the exercise of power was accommodated when fairness seemed wanting.

That interest was further enhanced in the mid-1980s by a visit to this country by Sir Robert Megarry who addressed the legal profession in Sydney. The profession had posed a question for His Lordship, 'Whither Equity?'. His Lordship disclosed to the audience that he felt a little shy addressing them because Mr R P Meagher QC, as he then was, with his immense learning on the subject, would be speaking when His Lordship concluded. Luckily for me I don't have to face that prospect - at least today.

His Lordship observed that equity seemed to go through periods of quiescence and periods of vigour. He concluded that at that time it was travelling through a period of vigour. His Lordship then fascinated the audience telling them about the *Anton Piller* order and the then very much in vogue *Mareva* injunction and delivered his answer to the question posed that there was still much life left in equity.

However, R P Meagher QC then unleashed a concerted and cerebral attack on the life left in equity to which his Lordship referred. He analysed the then recent decisions on constructive trusts and concluded that equity in England was in a state of chaos and headed for doom. He expressed further anxiety about the intolerable state of the confusion that had developed in the area of equitable damages.

And so in contrast to His Lordship's optimism his Honour's prognosis was that equity was in urgent need of resuscitation by the injection of a very large dose of precedent and principle.

My perception about the gentleness with which one could question the exercise of power was reassessed slightly when I observed his Honour call for the removal of Lord Denning's influence and a very much more drastic measure for dealing with Lord Diplock.

There was, however, one aspect of his Honour's analysis which was not lost on his audience. It was a statement about feminine logic. That statement was perceived by some as somewhat derogatory. This was not to be the only time that his Honour's statements on this topic were to be so perceived. But on analysis and with the application of a little feminine logic, that perception can not be justified. One need only observe the gender of the judges in England, and the Law Lords of whose logic his Honour was so critical in reaching his conclusion of doom, to understand that on balance his Honour's public musings about feminine logic have been but well disguised pleas for the appointment of a woman to Equity.

I am indeed honoured and delighted to be that woman and to be appointed to Equity when it is so clearly in a period of vigour.

This is a wonderful ceremony made more so by the presence of my family, my friends and colleagues. It is, of course, not possible to thank you individually but I would like to say that the trust of my instructing solicitors in placing their briefs in my hands over the years has been enormously gratifying. It is that trust upon which a career at the Bar depends. For that I thank you.

Also in this regard I am most grateful to T F Bathurst QC whose delicate tolerance of feminine logic was quite masterful.

The friendship and support of a number of people in this room has assisted me in the development in the attributes necessary for a successful career at the Bar and the assumption of this high office. To each of you I extend my gratitude.

I would like to make some personal comments and perhaps have a vision into my privacy. It is about my family. I am very happy to say publicly that I am so proud of the Bergin family. Mary, my sister, Denis my brother, and I had the extreme good fortune to be brought up in an environment of intellectual honesty which nurtured each of us in our lives and career paths. My mother, Olga, who died in 1976, was quite a spectacular individual with the capacity to combine directness and gentleness with perfect feminine poise. My father Denis, who died in 1994, was unique. His

Justice Bergin

Irish ways are very much missed today. However, I am comfortable in the knowledge that Olga and Denis would be happy with what is happening here today. My sister Mary's concerted and dedicated medical work with the leukaemic children of this state is an example to us all. There are no adequate words to express my gratitude for the great friendship and wisdom of my brother Denis. I look forward to the continuation of that friendship and my involvement very much in the lives of the next generation of Bergins, each of whom is a credit to their parents.

Before I depart I would like to say something about the profession I have grown to love. My life as a solicitor and as a member of the Bar has been fascinating and exciting. The denouement of my career at the Bar has of course been exhilarating with my recent appointment as a Senior Counsel for this State.

During my time at the Bar I examined and lectured the new barristers in ethics and during that period it was very reassuring to observe the enthusiasm with which they assumed their ethical obligations as new members of the Bar.

The history of the Bar demonstrates its resilience to attacks upon its integrity. I have no doubt that the Bar is an institution strong enough to repel any further attempts to diminish it as a profession. The continued success of the Bar in this regard is not only in the best interest of the Bar but of the judiciary and the community.

The wrench of leaving such a great institution is tempered by the knowledge of the greatness of the institution of which I am now part. However, I am acutely aware that the function of the Bar and the legal profession generally is essential to the efficient performance of my judicial function.

Cognisant of the sentiments of Oliver Wendell Holmes, of which the Chief Justice reminded us at his swearing in, that the law is not a place for poets or artists but for thinkers, your indulgence is sought today for my reference to the words which William Blake penned almost 200 years ago but which seem apt:

> Joy and woe are woven fine, a clothing for the soul divine, and under every grief and pine runs a thread of silken twine.
> It is right, it should be so, that we are meant for joy and woe, and when this we rightly know safely through the world we go.

Swearing in of the Honourable Justice Virginia Bell

Bell J: Chief Justice, your Honours, Mr Barker, Ms Hole, members of the profession, ladies and gentleman. Thank you Chief Justice for your words of welcome.

I am conscious that it is only a little over three weeks ago that at the swearing in of Justice Bergin you expressed your pleasure that her appointment, among other things, helped to redress the gender imbalance of the Court. Redressing that concern might now be thought to have acquired something of the velocity of the very fast train. I am pleased to be a part of that process. When I was first in practice as a solicitor doing a great deal of my own appearance work, there were no women judges on the District or the Supreme Court. That had the capacity to make women advocates feel somewhat exotic, even if they weren't rumoured to be go-go dancers.

'The effect of a woman presiding over a court in those days would for those steeped in the language of modern literary criticism probably be described as subversive.'

I still recall walking into number 6 court at Darlinghurst on a morning in the early 1980s to find the short matters list being called over by her Honour Judge Mathews, as she then was. The effect of a woman presiding over a court in those days would for those steeped in the language of modern literary criticism probably be described as subversive. Happily, that is no longer so and we now have a number of women on the District Court and on this Court.

I would like to take the opportunity to say how important figures such as Justice Mathews, Justice Gaudron, Justice O'Connor, to name some of the long-standing women judges in this state, have been, not just because they have served as role models, although that is important, but particularly for their personal qualities of unfailing warmth and support to women members of the profession. I have been a beneficiary of it and I am grateful and I thank them for it and I would like to say in more recent times for very much the same reasons I thank Justice Simpson.

I am mindful that the women judges of whom I speak are all very distinguished lawyers and I can't help but notice that the thing most consistently said of me is that I am likely to recognise a joke if someone tells it. I have started to think it is a pity that that is a quality rather peripheral to the business of judging. I bear in mind that the Chief Justice of Australia when Chief Justice of this state said words to the effect that if a judge is burdened by a sense of humour, it would be rather a good thing if he or she did not demonstrate that fact from the bench.

As to my other attributes, they were rather strikingly drawn together in a letter I received from a friend who is a Crown Prosecutor who recalled our days together at Sydney University in 1971 in Professor Pieden's commercial law class. Professor Pieden was then

trialing a form of enforced class participation which in the heady atmosphere of university campuses in the early 1970s was quite a high risk teaching approach. A number of the fellow members of our class dealt with that challenge by sitting in their assigned seats but using pseudonyms. The Crown Prosecutor recalled that I did not resort to an assumed name. In a tone that he still remembers as loud and resonant, I replied to every question asked of me, 'I don't know'. The Crown Prosecutor cited that as an instance of my forthright honesty, an important quality in a judge, but I realise that there might be a view that it is a rather singular way for one's confrères to sum up a university career, so when I bear that in mind, together with the Chief Justice's caution as to the matter of humour on the bench, it commends to me a view that I might make a quiet style of judge and I could take comfort in the fact that that is a judicial attribute I have always found most endearing in the judges before whom I have appeared.

I would like to thank you, Ms Hole, for your very kind words and you, Mr Barker, for your very - I was going to say kindish - but indeed I would characterise them as kind words. My career as both a barrister and a solicitor has been a very satisfying one. I have had the great pleasure of working with and forming friendships with lawyers who are people of great goodwill and who have seen the practice of law as a useful means of seeking to make a contribution to a just society.

I did start work at Redfern Legal Centre almost at the time of its inception. It was then the only community legal centre in New South Wales. In the more than 20 years since that time the community legal centre movement has proliferated. There are generalised centres like Redfern throughout the state and also a number of specialist community legal centres catering for diverse needs, from those with intellectual disability to welfare recipients, those living in aged care accommodation and so forth. Historically the community legal centre movement owes a great deal to the remarkable talent and idealism of a group of academics who were then attached to the Faculty of Law at the University of New South Wales in the mid and late 1970s. Notable amongst them is John Basten of Queen's Counsel, who has been an inspiration to a generation of public interest lawyers and who has been a marvellous friend and source of counsel to me and I thank him.

When I look back to the beginning of my career, one of the most important events that I recollect is the publication of Mr Justice Nagel's report into the state of prisons in New South Wales. I was an adherent of prison reform. I attended many sessions of that Commission and I saw the report as a very powerful document that brought about far-reaching social change in the administration of prisons.

Years later it was an immense delight to have the opportunity to work as one of the counsel assisting Justice Wood in his Royal Commission into Police in New South Wales. It would have been possible for that Commission to investigate what I might describe as corruption simpliciter.

Justice Bell

Mr Justice Wood explored additionally what he described as process corruption, the systematic placing of evidence that is false in some particular before courts. In the course of that Commission's work and by his report, Justice Wood has succeeded in achieving far-reaching change and in preserving the integrity of the criminal law. It was a very great privilege to work with him.

The practice of criminal law, which has been very much my background, is one in which one can't help but be confronted by a great deal of sadness and awareness of one sort of deprivation that some people are subject to in their lives. I, like I think many people who are here today, have had the great benefit of growing up in a happy family, in my case, a conspicuously happy family. It gives me enormous pleasure to see both my parents and my brother Chris here today and to be able to say publicly what they well know, which is that I could not imagine having more loving or better parents. Criminal practice has made me very, very conscious that is a real form of privilege.

Perhaps finally I should just make this observation. Mr Justice Sully has on occasions found it necessary to take me to task for a certain want of depth in my classical allusions in advocacy. I felt I couldn't continue to let him down in my new role, so I took the time to determine what, if any, classical associations there may be about today and I discovered that 25 March marks the ancient Roman Festival of Hilaria. I am mindful that there is a latent ambiguity in that, but I propose viewing it as a favourable portent.

I would like to thank you all for taking time from your I know busy schedules to be present on this occasion. Thank you.

Laurence Charles Gruzman QC

Memorial Service
St James Church
19 March 1999

Tribute by CJ Stevens QC

FROM HIS ADMISSION to the New South Wales Bar on 9 February 1949 to his retirement on 3 March 1997 Laurence Gruzman embodied the essentials of counsel, namely to adhere to the cab rank principle, accepting briefs when available which are within the barristers capacity, skill and experience whereby he practised without fear or favour, showing a fearless determination, even at times to his own detriment. Long before he was appointed a Queen's Counsel on 1 December 1966, he had attained an eminence in the law to which many can merely aspire.

Four very large and very thick scrap books of newspaper reports which Zoe has collected over the years give an indication of the range and depth of his practice but equally they are reminders of his flamboyance and notoriety.

Laurie had a tenacity by which he was able to turn situations around. One of the earliest legal memories of Anton and Adrian is of a case in the 1950s when Laurie overcame police evidence of his client having said 'I done it'. It was only Laurie who could convince the court that those words were being offered in a rhetorical manner or a quizzical manner and in no way constituted an admission. Laurie's client was acquitted.

One characteristic of Laurie to which we can all relate is that steely glint in the eye and the little shrug of the shoulder as if he was making himself perfectly comfortable before embarking upon a process of demolition of the witness before him or preparing a riposte to a judicial thrust. The judgments in so many of Laurie's cases contain findings that the principal against whom Laurie appeared would have his evidence accepted only where it contained admissions or coincided with that of other reliable witnesses, testament to the effectiveness of Laurie's cross-examination.

Laurie was an excellent strategist and lateral thinker. His first question in cross-examination of Alexander Armstrong: 'Are you an honest man?'. He would be conscious of the weaknesses in his cases but look to attain the appropriate objective, frequently forcing his opponents to call a witness they otherwise would have preferred not to. Then, showing the meticulous attention to detail and recall of apparently innocuous facts Laurie would be able to destroy a witness's credibility. In the Barton and Armstrong saga a pencil note of a car registration number, one piece of paper in the thousands, was decisive in destroying the credibility of one witness. He showed that same meticulous approach years later when he was pursuing the Coles Myer relationship with Solomon Lew, knowing that one false or inaccurate step would bring down upon him the battery of lawyers Coles Myer and Lew had retained. That same tenacity of Laurie which would override a judge who wanted him to dissuade him or force him to sit down was recognised by the Australian Shareholders' Association when they gave him a silver medal in 1993 for his services to shareholder rights.

Laurie on occasions achieved the apparently unachievable. Associated with that, he would express his satisfaction both as a reminder to himself of what can be achieved and also as it were a proclamation to others to beware of taking him on. Having been one of the defendants in the ex officio indictments associated with the Barton proceedings which were ultimately quashed in the High Court, when Laurie subsequently obtained his entitlement for a significant cost order, that cheque was photocopied, framed and remained on the wall of his chambers for many years. Similarly, when defending one of the principals of Mineral Securities Limited his research disclosed a fatal flaw in the prosecution case. He was able to persuade the Senior Counsel who were representing the other directors to entrust to him completely the issues of accounting and audit and ask no questions on that subject whatsoever, obviously no easy task in itself. Laurie then prepared a summary of what he proposed doing, and made it available to the other silks but in envelopes sealed with

wax only to be opened after the event. Laurie was able to obtain a verdict by direction from Mr Justice Taylor at the close of the prosecution case on the very ground he anticipated. So often, Laurie was conscious of that need for secrecy and security and he had that penchant for flair.

Laurie was disarmingly charming. No matter how vigorous the legal battle, he did not carry it beyond the court. He surprised one of the juniors for the Commonwealth at the end of the Amann Aviation litigation when he and Zoe hosted a dinner at their home for the counsel and solicitors on both sides of the litigation, but that practice was usual. In the same way, when he had been involved in difficult settlement negotiations with attorneys in New York who were acting on behalf of Andy Gibb and the dealings were characterised by veiled death threats and a need for cloak and dagger security, when a settlement was arranged all of the parties were able to adjourn to Florida for the formal signing of the documentation and to take advantage of some additional jurisdictional benefit.

Laurie attained a mastery in any of the areas of the law to which he turned his attentions. His four appearances before the Privy Council involved markedly different legal issues; *Barton* v *Armstrong* raising issues of equity; *SimsMetal Limited* v *Mikhael* relating to negligence; *Brins* v *Off-Shore Oil* involving corporations law and the other showing his embodiment of the best traditions of the Bar. Laurence Gruzman was a returned serviceman who had served in the Middle East in the Second World War. That was no bar to his defence of a conscientious objector in his fourth appearance in the Privy Council.

Laurie's clients came from extraordinarily diverse fields. Many are present today. Some manifest the ultimate compliment to counsel, namely they had been parties directly or indirectly on the other side in litigation and subsequently sought Laurie's services as their advocate, for example the musician Sid Vicious and the wife of Alexander Barton, when she had her matrimonial proceedings. Although Laurie was apolitical at all times, he was one of the advisers to Prime Minister Malcolm Fraser in relation to the 1975 constitutional crisis and was extensively interviewed on the ABC television, not shrinking from the controversy but hoping to assist public understanding.

Laurie sought to share his love and learning of the law with others. He contributed articles to the *Australian Law Journal* on some observations on procedures in foreign countries (1975) 49 *ALJ* 577 and in (1991) 65 *ALJ* 646 liability of search and rescue authorities for negligence of which article the editor considered it to be a major contribution to the legal literature on the liability of public bodies for negligence. In July 1993 the *Herald* published his succinct contribution to the *Mabo* legislation, reminding us of the right to claim title to land after 20 years of hostile possession being available to all Australians, aborigine or not.

Laurence Gruzman was not merely an outstanding and successful lawyer and staunch advocate of the Bar, but was a kind and generous friend, a devoted husband, father and grandfather. He will ever occupy a unique place in the hearts of all those who knew him and has left his indelible mark upon the legal profession of this country.

Honourable Alan Victor Maxwell QC

Memorial Service
St Mark's Church
18 June 1997

Tribute by His Excellency the Honourable Gordon Samuels QC, Governor of New South Wales

IT IS AN HONOUR to speak in celebration of the life of my dear friend, Victor Maxwell. I had the privilege of speaking at his father's Memorial Service; and over the years I, and my wife, have spent many joyous occasions with the Maxwell family, since friendship encompasses both joy and sorrow. Today, we mourn the passing of someone dear to all of us. But we are comforted by the example of a brave life, well spent in service to his community, of a loving husband, father and grandfather, and of a true and loyal friend.

Alan Victor Maxwell was born on 1 July 1922, the son of the late Justice Victor Maxwell and the former Margaret Lawless.

He was at school at Shore where he became Senior Prefect and Cadet Lieutenant. He demonstrated considerable athletic ability and held the Australian junior records for 120 and 220 yard hurdles.

In 1941 he enlisted in the Army and subsequently served in the AIF in Western Australia, Cape York, Bougainville and New Britain from 1941 until 1945. In 1944 he was promoted to Major, one of the youngest officers in the Army to have achieved this rank.

After Japan's defeat and capitulation, he served as President of the War Crimes Tribunal in Rabaul and New Britain. In the course of that duty, he was obliged to impose the death penalty upon a Japanese officer convicted of war crimes. This was an event which made a deep emotional impression on him - it was something which he said later 'always lived with me'.

In 1946 he was discharged from the AIF and enrolled

in the Law School of Sydney University. He duly graduated and on 25 October 1949 was admitted to the Bar. In 1950, he married Mora.

I met him first in 1952, when I came to the Bar myself. At that time Victor shared a room with another junior in Forbes Chambers, now demolished, which was known as 'The Diggers' Dug-Out', for obvious reasons. I had a corner in the room next door. As a result of the byzantine manoeuvring by which one acquired accommodation in the building, Victor's fellow occupant moved into another room and Victor kindly invited me to go in and share with him.

'Well, if a nice fellow like that Mr Maxwell thinks he's guilty, he must be'.

We were together in this small room at the very top of a steep flight of stairs (which we painted from time to time to conceal the worst excrescence's of age and dilapidation) for more than two years, as I recall. He was beginning to put together a practice - I had yet to start. He was one of the most agreeable and best tempered people I have ever met. Neither during that period, working at very close quarters as we were, or at any time thereafter for that matter, can I recall his showing irritability or impatience or losing his temper, except once or twice in the face of considerable provocation. Nor can I ever remember him saying a mean thing about anyone. Our temperaments were, I think, different in many ways, but we got on very well from the start; and so began a close and, for me, deeply rewarding friendship which lasted until his death.

Victor had a most generous spirit and deep kindness. I was a comparative stranger in Sydney, and I knew few people in the law. Victor introduced me to many of his friends, including some who were his attorneys - a remarkably selfless act for a young barrister.

At Easter in 1954 Victor, another barrister and I went away together to Nambucca Heads where we spent an hilarious few days. I was still a bachelor and was, of course, blamed by the wives for having induced their husbands to participate in this ill disciplined adventure. Mora forgave me, however, and I became one of their most constant visitors and shared their joy as their children were born.

In 1955 I met my wife and, of course, almost immediately introduced her to Victor and Mora seeking, I suppose, affirmation. I recall a very wet picnic somewhere along the northern beaches (after rendezvous at the 'blinking lights') at which Jackie stoically held an umbrella over the barbecue fire, and immediately satisfied with honours all the tests which Victor could devise for an appropriate spouse. Later, one Sunday night I was visiting the Maxwells and declared my intention to seek Jackie's father's consent to our engagement. I proposed to do this in the traditional way by letter. But Victor would have none of that, and decreed that I should at once ring my putative father-in-law in Perth, and seek instant permission to make my addresses to his daughter. This I did, I am happy to say with success, and obtained parental approval. I insisted on paying for the phone call. Victor agreed that I might, provided that I paid by cheque, thus enabling him to add an endorsement recording the occasion and the purpose of the payment. I often wonder what happened to the cheque. I can't recall whether it was ever presented.

Victor was one of my attendants at my wedding - we have a splendid photo of him in full verbal flight at the reception.

After my marriage, we remained close. We had regular car washing parties at the weekends at the house of Mora's father where there was a convenient hose and hard standing, and Victor and I were, from time to time, pressed into service as unskilled garden labourers.

I remember many occasions shared in gaiety and friendship with Victor and Mora, and with their children, upon whom I was thought by Mora to have an unfortunately stimulating effect always; 'revving them up'. There was the great rugby match between the barristers and the solicitors in which Victor and I performed with little distinction after a late dinner party the night before, I think with the Ackerys.

As the years went by, Victor established himself firmly as a leading junior on the common law side. He was a very good advocate - always well prepared and lucid, with the ability to isolate the real issues in a case and to pursue them. Everything he did was illuminated by his even temperament, his manifest fairness and what can best be described as his obvious decency. Early in his career he was prosecuting for a week at Darlinghurst, as the custom then was, and achieved a very high rate of convictions in cases which had not seemed to be good runners for the Crown. One reason may have been this. After the jury had returned their verdict in a somewhat doubtful prosecution, one of them was asked how they had arrived at their decision. His answer was: 'Well, if a nice fellow like that Mr Maxwell thinks he's guilty, he must be'.

Victor became the retained junior counsel for Australian Iron and Steel in the common law lists at Wollongong, dealing with industrial accident cases, and later with coal mines litigation. Of course, with Victor, a little honest hilarity was never far away, and from time to time he enlivened the proceedings at Wollongong by secretly introducing dubious photographs of young ladies into the photographic

exhibits of dangerous machines and continuous miners.

We were briefed by some of the same attorneys, but we were only once opposed. Perhaps it was thought that we would not fight each other vigorously enough. That inference may have been strengthened by the fact that that one case we settled, although not from lack of appetite for battle.

In April 1974 Victor was appointed to the Bench, and turned out to be an excellent judge. He brought to the Bench the qualities of clarity of mind and scrupulous fairness, which he had demonstrated as counsel. In addition, he demonstrated in judicial office an exceptional professional patience and self-discipline, qualities which were tested but never overcome in the years before his retirement when he continued to do his job despite the increasing pain and discomfort of his encroaching illness. He was a modest judge. Any preoccupation with self-esteem was totally absent from his character. He was dedicated to the judicial role and not to himself. He was popular with the Bar because he was firm with counsel but always courteous. He was regarded as a human judge; and it was this quality which made him very effective with juries. I am sure, indeed I know, that they admired and respected the qualities of personality which he demonstrated, his kindness, and his consideration for their role in the administration of justice.

He tried a number of lengthy and difficult cases. At one time, it was thought that he was specially selected for the hard criminal trials. I don't think that this is wholly true - but it is not wholly false either. He was absolutely dependable - someone upon whose professional dedication the court could place the most complete reliance.

He tried the Croatian conspiracy trial which lasted for a year, and which subjected Victor and Mora to constant police surveillance over the whole of that period.

It was an extremely uncomfortable time for them both. They put up with it with great patience - the experience furnished Victor with some very good stories about falling over police officers in the middle of the night. But this, and the trial itself, proved a great strain. He handled it all with considerable skill and success. I presided in the Court of Criminal Appeal when an appeal was brought by the convicted accused, and dismissed. I therefore had to read the whole of Victor's summing up with great care. It was a most impressive piece of work.

There were other cases too, such as the Anita Cobby trial and the trial of Kalajzich. In these and in others, Victor demonstrated a very high standard of judicial skill and the most equable temperament. When he tried the Cobby case, and Kalajzich, he was not well, and his performance was remarkable for someone who had to cope with an increasing physical infirmity as well as the challenges of the work.

And so there commenced the last long years of suffering and frustration; a succession of operations, hospital and chronic and deteriorating ill-health. All of this he bore with the most exemplary courage and patience. I visited him in various places as often as I could, and it was rare to hear him complain or rail at the cruel hand which fate had dealt him. Once or twice, when things had got very bad, he fell into an understandable depression from which, however, he was able to extricate himself. He felt keenly the humiliation of being dependent on others - as he was more and more. At Lulworth House, where he was splendidly cared for by the staff, in particular by Matron Armson and Sister Vanderfield, he managed at first to maintain his accustomed humour and was very amusing about the frailties of the other patients. Even when he had become convinced that he would never leave, he kept his courage and maintained until near the end a determined effort at cheerfulness and hope. I brought him legal gossip and stories of that kind. We amused one another by the fact that his difficulty with speech and my deafness did not make us ideal conversationalists.

'Victor Maxwell was a righteous man indeed...'

During all this time Victor was sustained beyond measure by the constant loving and devoted support of Mora. From her as well these years have taken a toll. Edwina, as the daughter in residence, as it were, was wonderfully supportive too. Victor was always aware of the spiritual presence, one might say, of his children and grandchildren, even when their physical presence could not be regularly managed. He was a great one for family photographs, as we all know - and from these he derived great comfort. He appreciated, too, those friends who visited him and who arranged outings for him for as long as this was possible.

I will miss him very much, as I am sure all his friends will. He has been very much a part of the lives of Jackie and me and of our girls. To Mora, young Victor, Edwina, Louise and their children, to Ailsa and Margaret, and all the family, I extend loving sympathy on behalf of us all.

There is a passage in Psalm 37 which appears in many forms of Jewish service and in the *Book of Common Prayer* too, I think:- 'I have been young and now I am old, yet never have I seen a righteous man forsaken or his seed begging bread'. Victor Maxwell was a righteous man indeed; and he will never be forsaken while his memory remains bright in the hearts of all of us.

Some Thoughts on Courtesy

by Rick Burbidge QC

IT IS THOUGHT by many senior barristers that standards of courtesy within the Bar have fallen over the years. As one gets older the distant past tends to take on a glow which it lacked at the time, but I think that there is a measure of truth in the perception. This is to be expected where the Bar has grown from several hundred, all housed in much the same area and knowing each other by name, to now approaching two thousand and widely dispersed. Believing that part of the strength of the Bar as an institution derives from the courtesies traditionally afforded one another, I set out some of the matters which I have experienced personally, in the hope that, where failure to observe those courtesies stems from ignorance of their existence, they will be remedied. Perhaps others will add to the list.

Behavior in court

- Where a number of counsel are in court it is customary for junior barristers to yield their seat at the bar table to any barrister senior to them. Generally speaking, the centre of the table is occupied by the most senior barrister present.
- In mention matters, one should yield precedence to more senior members. It is sufficient to look around as one rises, yielding with good grace to an obviously more senior barrister.
- On ceremonial occasions, it is not good enough to arrive early, secure a place which you think roughly appropriate, and then sit stony-faced whilst senior late comers are left to find a position further back in the court, if they can. If senior practitioners turn up in numbers which you had not anticipated, then your gamble is lost, and you should make your position available. The fact that an even more junior barrister refuses to leave does not relieve one of the responsibility, though it is to be hoped that peer disapproval will dislodge the more junior barrister.
- It is inappropriate to offer any personal observation about one's opponent in court. Should some matter of offence arise, it is best dealt with by direct discussion outside the court, or in extreme cases, by letter to the Bar Council.
- It is discourteous to 'sledge' ones opponent, whether by interjection, snorts or facial and bodily movements. Nor is it wise: judges are not going to be impressed by such behaviour, and are certainly not going to permit it to influence the result. If your opponent wants to 'sledge', ignore it, or pause thoughtfully until he/she is finished.
- Authorities should be brought to the attention of the court and any counsel affected. Last minute additions should be signalled by facsimile or telephone. Obscure authorities and those discovered in the morning should be made available both to the court and opposing counsel by the provision of photocopies.

'It is discourteous to 'sledge' one's opponent, whether by interjection, snorts or facial and bodily movements. Nor is it wise: judges are not going to be impressed by such behaviour, and are certainly not going to permit it to influence the result.'

Formal occasions

Where there is a guest of honour and at functions where placecards are provided, it is customary to remain standing until the guest of honour is seated. On any occasion where the departure of the guest of honour is announced (eg. the Governor or Governor-General), it is customary to rise.

The lifts

It is a courtesy to permit senior barristers to enter and leave lifts first, where this is practicable. The situation is here complicated by the question of whether gentlemen still give way to ladies, as once they did. Such a view may now be regarded as old fashioned, and perhaps by some offensive. Perhaps we should operate according to our own instincts.

It creates a very poor impression for counsel to be heard discussing their cases in the lifts. Apart from the obvious possibility that remarks will be reported to those interested, the public must wonder whether their confidences are being similarly exposed in another lift.

Telephone

It is good manners to be on the line when telephoning a senior barrister whether making or receiving the call, and it is obviously rude to allow any person to remain waiting to take a call which you have initiated.

Courtesy to solicitors

It is within my memory that young barristers were on occasion rude, condescending and disdainful to their instructing solicitors, and solicitors with whom they came in contact. This conduct I suppose arose from a perception that the Bar is in some way superior to what was then termed the lower branch of the profession. This attitude when displayed rankled with solicitors, and I have no doubt played no small part in the enthusiasm with which many solicitors embraced the concept of a fused profession in 1993-4.

It would be well for all members of the Bar to remember that solicitor's formal qualifications are no different from those of barristers, that solicitors choose to be solicitors, that there are many fine legal minds within their ranks, and that their skills, though different, are no less demanding than our own. Whilst the Bar has in recent years confronted these facts with a consequent improvement in its behaviour, it is a warning still worth sounding.

CIRCUIT FOOD

Like MacArthur... I Shall Return.

By John Coombs QC

IN A MISSION TO SEE *Shakespeare in Love** at the Cremorne Hayden, the party of the second part and I sampled Cannibals for the first time, but not for the last.

The decor is bright and although there is a lot of glass and a shiny floor, it is reasonably quiet, and the chairs are very comfortable for elegant modern.

We had no reservation and were limited by the session time. No problem. We sat at the top of the stairs on the high level side and were immediately offered drinks and menus, and a request for bread was dealt with by delivery with the drinks. The first plus, pane toscano, baked on the premises, crunchy and full of bread flavour.

We ordered, and within a few minutes a complimentary appetiser was brought - a demi tasse of quail consomme with fresh thyme, just gamey enough for the thyme to shine, and quite delicious.

We shared a duck and coconut chicken laksa, which was spicy and hot but not too much chilli, with meat, a few greens and very thin noodles swimming about. A satisfying 'soup'.

Next we shared Guinness braised ox pie with mushy peas and spicy onion jam. Very English and very home-cooked with irregular fork-tine marks neatly around the edge and an elevated centre. Chunky, flavoursome beef in thick gravy was the centre and the pie sat on a bed of mashed mushy peas (correctly sweet) and in a shallow pool of onion jam-flavoured gravy.

The whole thing was very rich and satisfying. The chef (Helen Walton) has eschewed the Californian anti-salt fetish and both dishes needed neither salt nor pepper, just something nice to wash them down with. Yarra Valley Pinot Noir seemed right for both courses, as long as some beer was handy.

Like MacArthur ... I shall return.

**Great movie!*

CANNIBALS RESTAURANT

Shop 3

283 Military Road

Cremorne NSW 2090

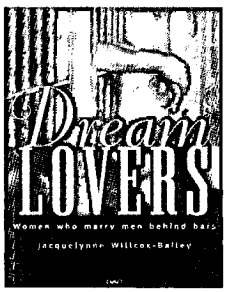
Tel: 9953 4100

Dinner: Monday to Saturday

Lunch: Tuesday to Friday

Credit Cards: All major credit cards accepted.

Book Reviews



Dream Lovers: *Women Who Marry Men Behind Bars,*
By Jacquelynne Willcox-Bailey,
Wakefield Press,
Kent Town, SA 1997
$14.95

AS THE GREAT PHILOSOPHER Kant remarked, no straight thing can ever be carved from the crooked timber of humanity. This is an understatement. You'd think, for example, that educated middle class women would steer clear of drug addicted violent criminals, but this is far from being always the case. No notorious serial killer is without his female admirers, and many receive proposals of marriage.

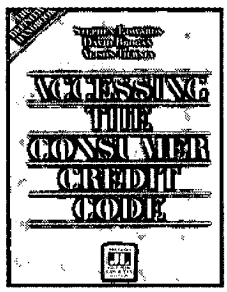
In this fascinating book, the author interviews middle class women who fall in love with prisoners: not the minor felons who predominate in any prison system, but murderers and the like. She also interviews the objects of their affections, and in fact gets to know them better than their lovers. She allows the interviews to speak for themselves.

Commentary, indeed, would be redundant. I thought I knew all about Man's capacity for self-deception, but some of the protagonists of this book left me agape. The most startling story is that of two evangelical Christian sisters, one of whom is brutally murdered by her loved one three days after his release, and the other is very nearly murdered by hers - he having been imprisoned for the murder of his first wife. Having waded in her sister's blood and her own, she still thinks it has all been a positive experience, which has drawn her and her attempted murderer closer together, emotionally if not physically.

What possesses women to behave in this fashion? For the prisoners, the advantages are clear: for the women themselves, less so. Perhaps they relish the role of saviour; they take pride in being non-judgmental, that is to say perverse and contrary in their judgements. At the heart of it all is grandiosity, a desire to be both different and important.

This is a short book, with no claims to 'scientific' status, but it repays careful reading by all those who are interested in the subject of human folly.

Reviewed by Dr Theodore Dalrymple



Accessing the Credit Code
By Stephen Edwards,
David Brogan and Alison Tierney, FT Law and Tax
Melbourne Vic 1996
$58.50

ALL PRACTITIONERS WILL have to be wary of the new Consumer Credit Code. It has every prospect of affecting many more areas of work than the previous legislation.

When it started on 1 November 1996, the new Code (part of a uniform national scheme) replaced the *Credit Act 1994*. The old legislation was really a matter of concern only for providers of non-business credit of under $20,000.00. The new scheme has no financial limit. It affects credit for non-commercial purposes ('personal', 'domestic', 'household' or 'residential strata') and covers mortgages, consumer leases, guarantees and credit related insurance.

The jurisdiction covering the Code will remain primarily the New South Wales Commercial Tribunal, but it is only a matter of time before that Tribunal is swallowed by the proposed New South Wales Administrative Decisions Tribunal.

The new Act, and the Code to which it is annexed, make many changes. Credit is specifically defined (a debt created and then deferred), licensing is abolished, interest rates regulation is largely abolished and unjust contracts provisions are inserted. In particular, there is an over commitment provision. It provides relief where 'a credit provider knew ... or could have ascertained by reasonable enquiry of the debtor ...' that a debtor could not repay or repay without hardship.

Most people would need some help with the Code and this book certainly provides it. Its authors are well known in the field. They include one of our own, Sydney barrister David Brogan, well known in the Commercial Tribunal, in seminars on the subject and as a writer.

The book follows the Code but is far more than an annotated Act. The layout commences with the section of the Code, sets out relevant transitional considerations, provides an explanatory note and detailed comment, then deals with special issues arising from the section. Finally, 'relevant regulations' are

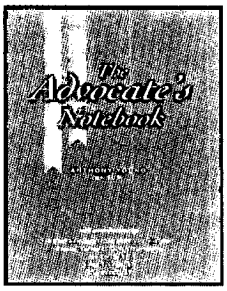
referred to, a table of 'related provisions' is set out and a heading called 'Practical Hints' is provided.

The tables of related provisions are particularly helpful and should save a great deal of research time. The practical hints, however, are especially useful. These bullet pointed sections must have used the considerable and varied experience of the authors under the prior legislation to show how the section is likely to operate and how its operation fits in with the scheme of the Act.

The book is well balanced with both credit provider and credit consumer in mind. It is written in a direct fashion and presents as a true handbook which is surprisingly readable. The layout is very good and contributes to the high level of accessibility to the material.

This is an excellent book. Given the scope of the Code, it is worth examining the book to ensure some awareness of the impact on residential mortgages, personal loans and non-business leases. The new Code could be quite pervasive. Softback 483 pages.

Reviewed by Jeremy Gormly



The Advocate's Notebook
By Anthony Young
Prospect Publishing,
Sydney NSW 1997
pb. $55.00.

A CAREER AS AN AUSTRALIAN advocate is rather like being a committed traveller: where one goes, when, with whom, by what route, how and why, all being the result of some initiative, the blessings of experience, and good dollops of luck.

Formal legal education is the prerequisite to the passport to set out to practice, a passport which until very recently was clearly stamped valid here and here, but not anywhere else. We can be grateful that the national mutual recognition legislation has removed a few barriers, reduced the necessity for visas to go from one Aussie court to another.

However, there is another potent barrier to travel, even within the territory always covered by the passport to practice: without a guidebook about the customs peculiar to each judicial and tribunal domain the risk of embarrassment, gaffes, seeming ineptitude and incompetence is high. As Ian Barker QC neatly puts it, ' a practice book of helpful hints for the guileless lawyer in a strange land' would help.

Anthony Young's notebook is a useful start to Barker's project. For those new to advocacy, and without the benefit of the quality of guide or mentor that comes from good legal family connections or a broom cupboard space in the 'best chambers', it is much better to have this book than to be without it. From A to Z (well almost, Adjournment to Waiver actually) it is a useful collection of principles, citations, and timely reminders to ward off harm. At the very least it will arm the novice against early ulcers and frighten away some of the spirits of despair which come to rejoice in the early hours as Dr Hindsight ruthlessly delights to revisit the avoidable mistakes of yesterday.

The publishing of this *Advocate's Notebook* in 1997 is both an achievement and a challenge. There is nothing new about compiling such a notebook: there is a charming novelty and generosity in deciding to publish it. As Anthony Young so disarmly admits, 'it seems ... a notebook would be of value to other practitioners; more importantly, since I have retired, it cannot be used against me'. Sharing widely the wisdom born of experience is always an achievement in our competitive profession.

Hence the challenge lies in persuading a group, say just a dozen advocates of reasonable experience and seniority to produce the Advocates' Guidebook - the Michelin, the Fodor, the Lonely Planet of the litigation traveller. All that's needed to make a useful start is to take a day at a barrister's national conference, pool the experiences from some thousands of trials, distil the essential learning, chew over what's essential and what isn't to stay out of trouble, savour some witty anecdotes, and then set out to describe the journey from conference to prehearing, from prehearing to trial, to judgment, to appeal - not forgetting, of course, the all important spice of costs.

The notebook gives the profession some sketches, and very useful ones, from which to plan and produce the whole map. The notebook is alphabetical, so 'resulting trusts' and 'secondary evidence of contents of written documents' are side by side. The guidebook will approach topics from an advocate's strategic, planned perspective. It will use a computer generated index to provide alphabetical entry, but its flow will match the litigator's travel needs. Necessarily the notebook reflects the opportunities afforded to one traveller; the guidebook will reflect the experiences of many.

A really good advocates' guidebook, a comprehensive, up to date, easily used, star rating guidebook would go further than answering the instant dilemma: it would prevent the very events which lead to the despair; it would help the new advocate to make informed choices, to better plan the trip, and better to complete it. And, of course, like all good guidebooks it would invite comment from users so that successive editions could be improved.

With a little bit of luck the challenge that Anthony Young has given to the Bar will be quickly accepted. Meantime buy his notebook, scribble your own painful learning all over it, and wait for the Guidebook committee to call for suggestions.

Reviewed by Hugh Selby

Lady Bradman Cup

By Andrew Bell

On Saturday 17 April 1999, for the ninth consecutive year, the Eleventh Floor Wentworth/ Selborne padded up to the collective might of Edmund Barton Chambers at Bradman Oval, Bowral. The fixture is named in honour of the late Lady Bradman who, by invitation, was present at the ground on the occasion of the first match and presented the trophy which bears her name to the winning captain.

Andrew Bell and Ian Pike

Edmund Barton Chambers warmed up in the customary manner with stretching exercises and a gentle jog. The Eleventh Floor warmed up at the salubrious coffee shop associated with the Bradman Museum.

Under Thos Hodgson's leadership, Edmund Barton amassed a more than respectable total of 176 from 40 overs. Notable performances included those of Hodgson himself (26), David Alexander (30 retired) (notwithstanding his call for a runner and who made that supreme athlete Arjuna Ranatunga, look credible) and the gloveless Bill Lloyd (30) whose swashbuckling knock confined Griffiths' second spell to six balls.

In the field, tyro Malcolm Holmes collected two wickets after a typically inauspicious start.

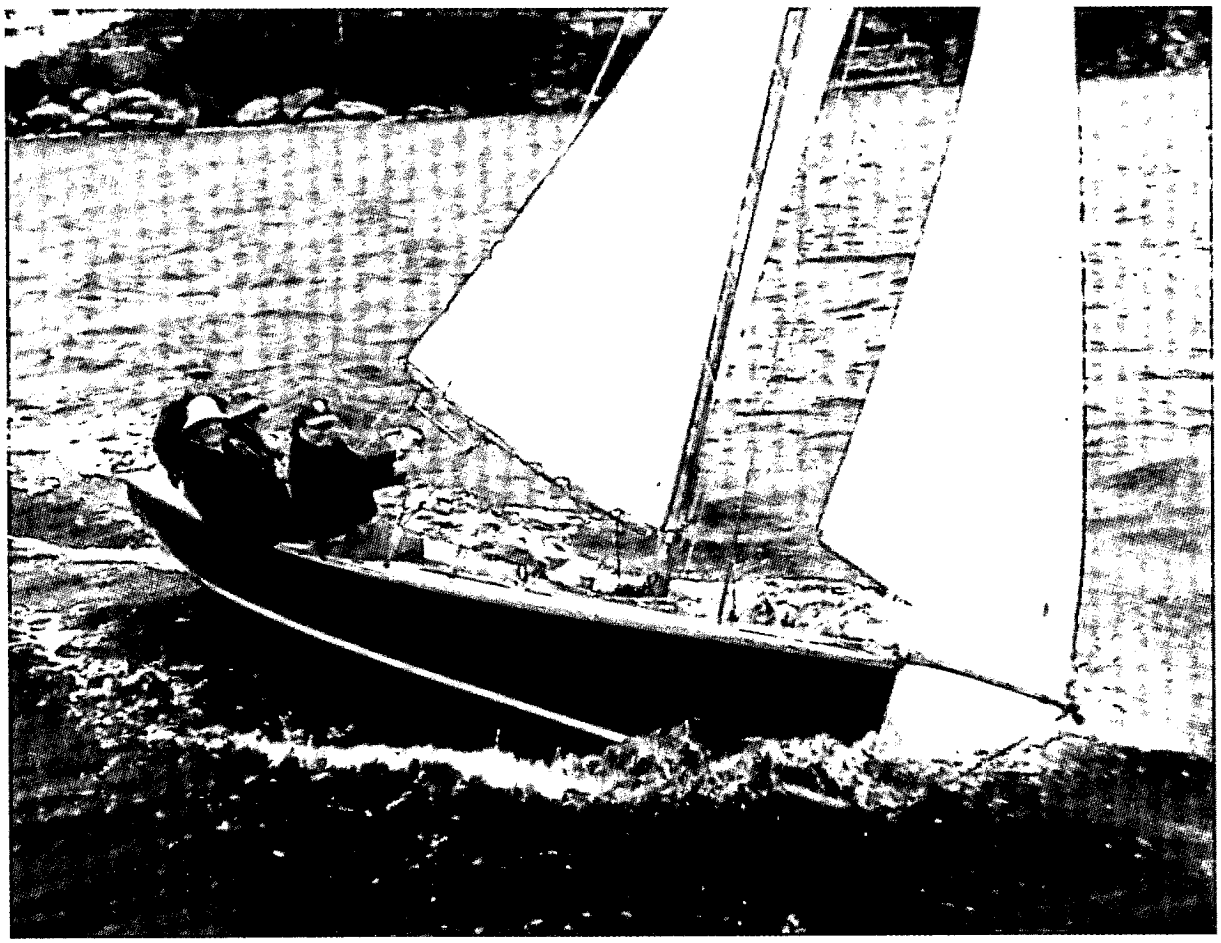
Ian Pike got part of his body to one of the two sitters which came his way. With the exception of the unhappy Pike, all members of the Eleventh Floor team bowled at least three overs including tandem father and son combinations featuring John and Nye Griffiths, Ian and Andrew Harrison, and Stephen and Daniel Climpson.

In reply to Edmund Barton's total, the Eleventh Floor comfortably reached 9 for 142 with John Atkin capturing three wickets for eighteen runs. At this time Greenwood decided to take an early shower. That disgraceful lack of faith in the prospect of a tenth wicket partnership will justly haunt him for the rest of his life. McInerney, returning to the crease after earlier retiring for 30, proceeded to contribute 36 runs in a partnership of the same total to win the match for the Eleventh Floor. He was a worthy winner of the man of the match award, a copy of the book *Bowled Warnie* presented by the author, Roland Perry, complete with peroxide sachet and nicotine patch.

The Eleventh Floor resources were depleted by the absence of one Poulos who, in the week before the match, had indicated that he could not play. He also indicated that he was unavailable. The latter observation was not understood as mere superfluity.

15th Great Bar Boat Race

By Des Kennedy



His Honour Judge RH Solomon wins his class yet again

THE 15TH GREAT BAR BOAT RACE was sailed on Sydney Harbour on Monday, 21 December 1998 in a 10-15 knot south-easterly breeze. There was a fleet of 45 dedicated skippers and crew who all sailed hard for the many trophies on offer.

The outstanding performance of the day was Solomon J in *Yeromais V* who took the Division 1 prize, the Chalfont Cup for competition amongst the judges and silks and the Wooden Boat Cup.

The major trophy of the day, the Law Book Company Sailing Trophy, was won by *Lunch On Sunday* which was skippered by D Miller. It also won Division 2. Division 3 was won by *Farrocious* which was skipped by Mike Williams who together with Gary Walsh of 43/Edmund Barton Chambers won the Jack Hartigan Shield for competition amongst the floors.

Foxtel (of Stan Zemaniak fame) took Division 4 and was skippered by Gary Walsh.

Freya, skippered by H Cox, won the Compo Cup.

One of the most prized trophies for the day, the Gruff Crawford Memorial Panache Trophy, was won by John Ringrose in *Trecento*. The crew and boat were beautifully turned out for the day. All in all another great day's sailing for the Bench & Bar and a very enjoyable day.