

Inaugural Sir Maurice Byers Lecture

Strength and perils: the Bar at the turn of the century

By The Hon. Sir Gerard Brennan AC KBE. Delivered at the New South Wales Bar Association, 30 November 2000.

Maurice Byers was one of the towering figures of the Bar. His distinguished career included a remarkable decade as solicitor-general for the Commonwealth. When he died, leaders of the profession, as well as the media, paid eloquent tributes to his record of advocacy. He was described as ‘the finest lawyer never to have been appointed to the High Court’.¹ Though there were good grounds for expecting on more than one occasion that an appointment was imminent, ‘strategically located smaller minds’, Gareth Evens said ‘. . . made its attainment impossible’.² The High Court was his milieu. He knew its members well – indeed, he had led several of us at the Bar. He knew its cast of mind and, I suspect, its internal dynamics. His enjoyment of advocacy there evoked a corresponding judicial response. His forensic triumphs were notable. May I repeat the estimate I made from the bench on an earlier occasion: ‘His participation in the work of this Court was perhaps no less on that side of the Bar table than it would have been on this’.³

His professional eminence and success do not explain why the Bar Association of New South Wales commissioned his portrait to hang in these rooms and created an annual lecture to be delivered in his honour. Professional eminence and success are not alone sufficient to produce, or are even conducive to the production of, the fond response of colleagues. That response reflects a peer group’s appreciation of a mind and manner and disposition which commanded affection as well as a profound respect. Tom Hughes identified these qualities in an obituary⁴ in which he



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said that Maurice was –

...the quintessential barrister... possess[ing] a combination of admirable and lovable qualities seldom found together in one individual and, unlike many others in his profession, his intellectual interests extended well beyond the law... He had the gift of urbane charm; he was suave without being slippery. He was of a kindly disposition and had a gently mischievous sense of humour. He had the blessing of a happy marriage and a close-knit family.... He was endowed with a deep, but not unquestioning, religious faith which he practised throughout his life.

Byers came to the Bar in 1944, without the professional or familial connections that might have eased his entrance to this most competitive of professions. Sir Anthony Mason has told us that Byers ‘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 was available to appear for anybody who had need of his services. It would seem that his clients of that time were not the large corporations. His talents were sharpened on the intricacies of the *Fisheries and Oyster Farms Act*⁵ and on the law which the authorities believed to be inimical to the sale of liquor at the Black Tulip Restaurant⁶. He took silk in 1960, before the risks of that step were minimised by the abolition of the two counsel and two-thirds rule. As with many of the towering figures of the Bar, the quest for financial security was suppressed in favour of the passion for advocacy. That was a symptom of the rugged individualism which is characteristic of the Bar’s leaders. Chief Justice Gleeson has noted⁷ that ‘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.’

Rugged individualism is essential to the barrister’s assumption of personal responsibility for the advice given or the course of advocacy pursued. David Bennett, sometime Byers’ junior and now his successor as Solicitor-General, tells of the occasion when he suggested to his leader that they should take instructions on some question of policy that would be affected by the litigation. Byers’ reply was: ‘I don’t take instructions – I give them’. His constitutional arguments in the High Court were developed according to his view of the Constitution, whether or not that view was preferred by the Government of the day. Gareth Evans MP, then attorney-general for the Commonwealth, speaking at a testimonial dinner on Byers’ retirement from the office of solicitor-general, acknowledged that Maurice, in his role as Second Law officer of the Commonwealth had ‘displayed outstanding qualities of objectivity and courage’. The attorney no doubt had in mind Byers’ appearance before the Senate Committee into the Loans Affair. There he displayed a great deal of courage in refusing to disclose the secret counsels of the Crown – but, as Simos QC (as he then was) observed at the Bench and Bar Dinner in honour of Byers in 1994⁸ ‘such courage is characteristic of our guest of honour’.

Of course, objectivity and courage are esteemed in a barrister because they are conducive to the giving of advice that is correct and to advocacy that is relevant, cogent and persuasive. What the Bar offers to its clients – both solicitor and lay clients - is a high level of expertise in the provision of advisory and advocacy services. That calls for a complex of capacities in the practising barrister: knowledge of the law, a facility for research, analytical skill, tremendous commitment and energy and a familiarity with the courts before which the barrister appears and with modes of judicial thinking. Byers exhibited these capacities to an outstanding degree. Simos knew him to have a phenomenal and detailed memory of decided cases and to have been a prodigious worker⁹. Justice Gummow remembers that his submissions were ‘preceded by reflection and speculation’ and were calculated to draw the Court into the heart of the matter. Alan Robertson speaks of his intellectual curiosity which led him to look radically at each problem and to re-examine the fundamentals. And he remembers Maurice seeking to enlist the support of a waitress in a French restaurant in Canberra for the proposition that French was the language of reason – a proposition which elicited only a look of profound consternation.

He was an agreeable and entertaining companion whose conversation ranged over music and philosophy and a notion of the cosmic God. Byers’ curial

arguments, delivered with a ‘mellifluous voice’ and ‘courtly gestures’¹⁰, were always directed to ‘the critical grey area of the case’¹¹ As Sir Harry Gibbs noted, Byers identified ‘the point or points on which the decision will rest and advance[d] clearly and strongly, but without undue repetition, the arguments directed to those points, keeping to the main road and not wandering off into side tracks and blind alleys, however attractive they may seem from a distance.’¹² Byers’ own opinion was ‘the isolation of the matter [for decision] is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy’.¹³ Of course, as Gareth Evans remarked: ‘The counterpoint to brevity, that which sets it off... is style and that’s a quality that Maurice has in abundance.’ Sir Anthony Mason remembers a style of his advocacy which Byers described to a junior counsel: ‘Put the ball into the scrum and let the politics of the court take over.’ Sir Anthony¹⁴ comments that ‘he apparently omitted to tell the junior that in feeding the scrum he put the ball into the second row’. Although Byers was a consummate practitioner of the arts of advocacy, the practice of these arts was only a means to his end. Chief Justice Gleeson remembers him as ‘a man who hungered, and thirsted, after justice’.¹⁵ It was a concatenation of capacities and personal qualities that endeared Maurice to the Bar and earned him the plethora of accolades that accompanied him in life and on

his death – capacities and qualities that commanded the affectionate respect of his clients, who to use Gareth Evans’ words, ‘valued enormously the wisdom, experience, integrity and objectivity of Maurice Byers’.¹⁶

Not every barrister can exhibit the style and affability of Byers, not every barrister will be as easily available for his or her fellows as Byers was for other barristers who sought his advice. Not every barrister will be blessed with the same acuity of mind or will burn with the same passion for the constitutional truths which he was briefed to advance. But there are some capacities and qualities which are characteristic of the Bar and which maintain public confidence in the institution. They are objectivity and competence in legal advice, skill and effectiveness in legal advocacy, fearless independence and a commitment to justice according to law. These are the strengths on which the Bar’s institutional reputation depends. They are sustained by the structure of the justice system and by the Bar’s rules and practices.

The public administration of justice by the courts ensures that advocacy is open to critical evaluation and the validity of legal advice is publicly tested. The fearlessness and independence of the barrister - qualities that stand high in public estimation as Mortimer’s Rumpole demonstrates - can be assessed by court and client and, significantly, by peer-group. So

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can the barrister's commitment to justice according to law. Publicity and individual responsibility produce the competition which stimulates a high level of professional service.

The strengths of the Bar are buttressed by its rules and practices. Partnerships have not been acceptable at the Bar, so that each barrister must take individual responsibility for his or her advice and advocacy. The conventional view has been that solicitors facilitate the objectivity of the barrister by providing a *cordon sanitaire* which keeps the barrister at a certain distance from the lay client. A brief is not accepted if the advice or advocacy for which the barrister is retained would be compromised by personal or commercial relationships or by knowledge acquired elsewhere. The confidentiality and commitment which are offered by a barrister to a client are secured by more than a Chinese wall¹⁷.

Touting for work has been frowned upon and the barrister's remuneration has been confined to payment for specific work done on the solicitor's instructions. In the jurisdictions where an independent Bar has been established, whether by law or in practice, the remuneration of the practising barrister has never been a wage paid by a solicitors' firm or a proportion of the firm's profits¹⁸. The piecemeal nature of the solicitor-barrister relationship relieves the barrister from an ongoing concern about the lay client's non-legal objectives. The barrister's attention is focussed on the application of the law, not on the consequences of the law's application. Hence the duty in advocacy is to assist the court to a conclusion that is legally correct, even to the disadvantage of the client. The duty in advising is to be legally objective, not to furnish an opinion which gladdens the client's heart. And when a person who offers a reasonable fee, seeks the barrister's services in an area in which the barrister ordinarily practises, the barrister must accept the brief even though he or she would not wish to do so. That is the cab-rank rule which secures both the reasonable availability of the Bar's services and the independence of its individual members.

These are not merely the rules and practices of an exclusive club. They are calculated to ensure that the barrister is able to perform, efficiently and with objectivity, the function of assisting in the administration of justice according to law. The lofty words of Lord Eldon¹⁹ are worth repeating, if only to restate the reason why the Bar exists:

He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question.

The sentiment was echoed when Byers responded to his toast at the Bench and Bar Dinner in 1994:

When we appear before the courts we are engaged in the administration of justice and thus owe to the courts in this ministerial undertaking a duty which prevails over our duty to our client. The practice of the law is thus radically and essentially different from the practice of

other professions or callings. We participate and they do not in the administration of justice to the same extent as the judge, though our function differs.²⁰

A separate and independent Bar provides not only an organised structure in which individuals can conveniently and efficiently carry on their practices. The primary purpose of an organised Bar is to ensure the existence of a college of advisers and advocates who act in the belief that their chief function is to assist in the administration of justice according to the law. Without that collegial ethos, the individual barrister is hard put to characterise himself or herself as a professional. And were that character to be forsaken, the objectivity of advice and the efficacy of advocacy would be lost, to the disadvantage of client and community alike.

The rules and practices of the Bar that buttress its professional objectives are still the respected modes of professional behaviour and have great attractive force for those who, for whatever reason (or for no good reason at all) seek to practise in this most competitive, uncertain and sometimes cruel profession. But now, facing the reality of a rapidly changing society, is the Bar able to – indeed, does it wish to – retain the character it has had and about which it has boasted in the past?

As the worth of a barrister's services has come to be appreciated by the commercial community, the work of the Bar has changed from what it was in the days when Byers commenced practice. The private litigant is represented by a barrister in the criminal court and often in the Family Court and in other jurisdictions in which legal aid is available, but private litigants do not now constitute the same proportion of a barrister's lay clientele as in earlier times. In the lesser cases of earlier times – the fencing disputes, the minor statutory offences, the applications for testator's family maintenance in small estates, the run of the mill accident cases – the barrister built up a large constituency of goodwill. The services of the Bar have been increasingly devoted to service of the corporate and government sectors. The soaring cost of litigation has removed a large part of the public constituency of the Bar. Perhaps it has also given the Bar the image of an institution of and for the affluent. That is an image cultivated by the media as they focus on the fees of the most distinguished or fashionable leaders. Regrettably, the *pro bono* work of the barrister, especially the *pro bono* work of the leaders, receives little publicity and lacks the recognition it deserves. I fear that the Bar has lost some of the public support it once enjoyed and, however illogically, that could reduce the high conceit which the Bar holds of its professional standing and could lead some barristers to suspect that (to adapt Chief Justice Gleeson's phrase) 'it would serve the public better if [the Bar] were a business.'

The strength, indeed the very viability, of an independent Bar depends primarily on its internal ethos. If its members are conscious that they are participants in the high social function of doing justice according to law, the community of the Bar is bonded by a common sense of public service and by mutual

respect among its members. Of course the noble aspiration of justice for all is never fully achieved but, if the aspiration be forsaken, the professional character of the barrister's work would be lost. It would then be a business, the chief purpose of which would be the efficient delivery of advisory and advocacy services to the economic advantage of the practitioner. Then public service would be subordinated to self interest, except to the extent that the rendering of some public service would be deemed to enhance the goodwill of the business. Pro bono work would cease to be a professional obligation and a necessary element of practice. The limitation on fees, imposed by the reasonableness requirement of the cab-rank rule, would cease to apply. Indeed, the cab-rank rule would lose its obligatory force. Nor would there be an incentive to assist the court on issues of either law or fact if the assistance might prejudice the barrister's business connections. The courts would question their faith in the integrity of a barrister's submissions, to the detriment of the administration of justice.

The differences between a profession and a business may not always be obvious to the superficial observer; nevertheless, the distinction is substantial. True, a rough measure of a barrister's progress in the profession is the volume and importance of the briefs delivered and his or her ability to command a higher fee. Those would be the criteria of success in a business also. In a profession, however, they are the consequence not only of technical competence but also of the judicial and peer group's appreciation of the barrister's adherence to the ethical standards of the Bar. Again, competent and efficient service of a client's interests is or should be the outcome of a barrister's work, whether the barrister is conducting a business or a profession, but in a profession that service is only a particular instance of, and is qualified by, a wider public service that ensures the due application of the law to all aspects of a free and ordered society. And the professional barrister provides that service from time to time to those who, being unable to afford representation, would or might suffer significant injustice if representation is denied them. The expansion of the independent Bar in every State and Territory indicates not only the economic viability of a barrister's practice but the attractive force of the Bar's professional standards and the collegiality of Bar membership.

However, the development of new technology may force some contraction of Bar numbers and could require further consideration of the Bar's rules and practices. The implications of technological development are, I venture to think, greater than the Bar or other sections of the legal profession presently appreciate.

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When Lord Woolf conducted his inquiry into Access to Justice, he had as an Information Technology Adviser Professor R E Susskind, legal scholar, editor of the *International Journal of Law and Information Technology* and author of several texts including *The Future of Law*. In that book, the author points out that, with the advent of print, the quantity of legal materials was increased and was capable of widespread dissemination. In that milieu, the doctrine of precedent developed. With the advent of massive data bases, the available bodies of law have become more complex and the specificity and detail of the mass of material often renders the law impenetrable. Current technology has been devoted to data processing giving access to this mass, which needs then to be sifted and analysed by experienced legal practitioners. There is much work to be done by the practising lawyer, but

developing technology is directed not only to data processing; it is directed also to knowledge processing so that the user is able to pinpoint *all but only* the material relevant to the solution of a problem. When that technology is combined with the public's ability to seek information by operating a television set interactively, there is likely to be a significant alteration in what might be termed the advisory market.

Susskind foresees massive investment, perhaps by legal publishers, in the development of legal information products and services which will provide solutions to many legal problems. Lawyers will be employed as legal engineers, engaged because of their analytical skills and specialist knowledge, in the creation of

programmes from which advice can be obtained. The programmes will be cost effective, for the advice will not be sought by, and given to, a single client but will be devised for and sold to many. The legal engineer will be called on to think in more general terms than the adviser to a particular client but the programmes will be sufficiently detailed to resolve specific legal issues. If simple-to-operate but technically complex and legally sophisticated information services become the most familiar way in which the public obtains legal advice, situations which presently lead to litigation may be prevented from arising or may be solved without litigation. Court lists may well contract. One can foresee that much advisory work of the simpler kind will no longer require the services of the Bar.

However, technology cannot cope with the infinite variety of human situations which might call for a legal solution. Susskind points out that computers deal only with natural language which may be ambiguous and in which unspoken implications may reside. Priorities between possible solutions may have to be determined and there will always be lacunae which can be filled

only by displaying what Susskind describes as ‘the creativity, individuality, intuition, and common sense that we expect of judges acting in their official role.’ As moral and ethical judgments will always have to be made about the circumstances of individuals or the interests of society more generally, judges of ‘integrity, knowledge and experience acting as impartial arbiters’ will always be needed. And if they be needed, the objective barrister of integrity, knowledge and experience will be needed to participate helpfully in the judicial function. There may be a change in the number of barristers needed and in the skills they will require to perform their function. New legal questions may arise from the use of technology. For example, if information services utilise knowledge processing technology, will the general use of a programme over a period give it some force as an authority? What will be the effect on the doctrine of precedent and the manner in which previous authorities are cited to and considered by a court?

The court lists of the future, from which the simpler cases will probably have disappeared, will contain a greater proportion of cases the solution of which is legally problematic. If these be cases which are too sophisticated for the legal information service to solve, they will be cases calling for familiarity with the underlying principles of the relevant law, precise analysis and a sensitivity to the values which can inform the development of new legal principle. The courts' need for the Bar's assistance will certainly be no less than it is today. Whatever may be the cost-effectiveness of new technology in the delivery of legal services, I cannot conceive of a transformation which would eliminate the demand for the functions presently discharged by the independent Bar.

But will those functions continue to be discharged by an independent Bar or will they be an aspect of the functions of large firms or corporations? Will the comparatively meagre resources of the individual barrister withstand the competitive pressures of firms or corporations that can offer the lay client a range of interlocking services including, but not limited to, legal advice and advocacy? That question must cross the mind of many in the legal profession who read the recently-issued discussion paper published by the Law Council of Australia entitled *Multi-Disciplinary Practices: Legal Professional Privilege and Conflict of Interest*²¹. The Law Council's paper observes:

The perceived dichotomy between business and the professions is regarded by many as being outdated, and the legal profession is recognising that ethical and

commercial issues can and must be dealt with simultaneously.

As commercial transactions become increasingly complex, the need to establish multidisciplinary teams is growing. Clients are increasingly demanding more integrated professional services to meet their financial and legal needs. Big firms (and governments) are streamlining their staffing down to ‘core business’ functions and outsourcing entire programs.

The movement towards Multi Disciplinary Practices, or MDPs, is widespread and, many would say, commercially irresistible. The Report of the American Bar Association's Commission on Multi Disciplinary Practices reached this conclusion:

The forces of change are bearing down on society and the legal profession with an unprecedented intensity. They include: continued client interest in more efficient and less costly legal services; client dissatisfaction with the delays and outcomes in the legal system as they affect both



Left to right: The President of the Bar Association, Ruth McColl S.C., with Lady Patricia Byers and Sir Gerard Brennan

dispute resolution and transactions; advances in technology and telecommunications; globalization; new competition through services such as computerized self-help legal software, legal advice sites on the Internet, and the wide-reaching, stepped-up activities of banks, investment companies, and financial planners providing products that embody a significant amount of legal engineering; and the strategy of Big Five professional services firms and their smaller-size counterparts that has resulted in thousands of lawyers providing services to the public while denying their accountability to the lawyer regulatory system.

One of the ‘Big Five’, Price Waterhouse Coopers, is said to have 1600 lawyers employed in 42 different countries²². Anderson Legal and Pricewaterhouse Coopers Legal are now the third and fourth biggest legal firms worldwide.²³ England and Canada are moving in the direction of multi-disciplinary practices and, as you know, New South Wales is perhaps leading the movement with the enactment of the *Legal Profession Amendment (Incorporation of Practices) Act 2000*.

If this is the general movement of the legal profession in common law countries, can an independent Bar reasonably anticipate a long term future? The individual barrister is poorly resourced in comparison with the large solicitors' firms of today;

the poverty of those resources will be far more dramatic in comparison with those of the large multi-disciplinary partnerships of tomorrow. The large legal firms of today offer expert advice and, if the members of the Bar were to join the firms, would offer advocacy at the highest level of expertise. The one-stop shop for clients must have great attraction, particularly if the shop is a department store rather than a small boutique. And, for the overworked barrister, the prospect of a partnership and shared responsibility might have both financial and life-style advantages. Those advantages would be the greater if the reasoning in *Gianarelli v Wraith*²⁴ were to yield to the reasoning of the House of Lords in *Arthur J.S.Hall & Co v Simons (A.P.)*²⁵. As you know, their Lordships held that a barrister is liable in damages for in court negligence, whether in criminal or in civil proceedings. A minority of the House would not have withdrawn the immunity in relation to criminal cases, but the majority thought that so long as a conviction stood, an action by the convicted person would usually be an abuse of process. I would not presume to speculate on whether the High Court would reconsider *Gianarelli v Wraith*, but I would draw attention to the speeches in *Arthur J.S.Hall & Co v Simons* in which their Lordships estimate the effect of that judgment on some of the fundamental rules and practices of the Bar.

Although Lord Steyn regarded it as 'essential that nothing should be done which might undermine the overriding duty of an advocate to the court', he thought that in the world of today 'there are substantial grounds for questioning whether immunity is needed to ensure that barristers will respect their duty to the court.' Lord Hoffman did not think that a loss of immunity would tempt barristers to ignore their duty to the court. After all, he said, most are 'honest, conscientious people...[who] wish to enjoy a good reputation among [their] peers and the judiciary' and '[i]t cannot possibly be negligent to act in accordance with one's duty to the court.' These were the leading majority judgments and others of their Lordships agreed with the general approach. Lord Steyn accepted that the cab-rank rule is a valuable professional rule '[b]ut its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great and he is free to raise the fee within limits.' Lord Hoffman dismisses the argument that the imposition of liability for a barrister's in court negligence would affect the operation of the cab-rank rule by saying that the argument is 'incapable of empirical verification' and, in any event, 'vexatious actions are an occupational hazard of professional men and... we are improving our ways of dealing with them.'

Of course, if the Bar did not subject the duty to the client to an overriding duty to the court and if the cab-rank rule were abandoned, the argument against barristers' immunity would be extremely powerful, but their Lordships do not contemplate that the Bar's standards in those respects will be affected. The confidence which their Lordships place in the ability of

barristers to adhere to traditional ethical standards – standards which are essential to the maintenance of the rule of law and the administration of justice – even though the traditional safeguard of immunity be withdrawn is a tribute to the English Bar.

Their Lordship's confidence in the Bar's ability to adhere to its traditional obligations despite the loss of immunity is exceeded by the Law Council's confidence in the ability of lawyers generally to adhere to their traditional obligations while practising in partnership with other professions. The Law Council proposes Model Rules which state:

1. A lawyer practising within an MDP, whether as a partner, director, employee or in any other capacity, shall ensure that any legal services provided by the lawyer are delivered in accordance with his or her obligations under the applicable legal practice legislation and professional conduct rules.
2. No commercial or other dealing relating to the sharing of profits shall diminish in any respect the ethical and professional responsibilities of a lawyer.

The Issues Paper contains three 'principles [which] enshrine the Law Council policy', the first two of which are:

- a) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities;
- b) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities; that regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards'

Of course, ethical obligations and professional responsibilities can be maintained by an individual lawyer in any environment, just as religious convictions can be maintained by an individual even in a hostile environment. The Colosseum was witness to thousands who did so, though the number of those who survived the lions was small indeed. The structures of a profession may differ from the structures of a business precisely in order to facilitate the maintenance of ethical and professional responsibilities. And that seems to be acknowledged by the third of the Law Council's principles.

- c) that individual lawyers should be free to choose the manner and style in which they wish to practice law, including the right to choose to practice at an independent Bar, which requires practice as a sole practitioner and adherence to the cab-rank rule, recognising the importance of the sole practice rule in the administration of justice.

In other words, the unique structure of the independent Bar can be preserved and its preservation will continue to assist in the administration of justice.

The objectivity of an independent barrister's advice or advocacy will not be influenced by the commercial or other aspects of a client's interests which might be the overall concern of a multi-disciplinary partnership. Nor will the barrister be influenced by the commercial interests of such a partnership. There will be no risk of a barrister acting for conflicting interests or breaching the confidentiality of any client's communication. The barrister will accept individual responsibility because he or she will be free of relevant commitments to anybody other than court and client.

The Law Council's recognition of the survival of an independent Bar is to be welcomed for another reason. Although the work of the independent Bar is symbiotically related to the work of the courts, the barrister is independent of the judge. Ill-temper or petulance, arrogance or ignorance or self-indulgence on the part of a judge will be met by calm, courteous but unyielding insistence by the barrister that such judicial conduct be rectified. And the stalwart protection of a client's legal interests even in unpopular causes against unprofessional demands by a client, overreaching by an opponent or even unacceptable conduct by a judge will strengthen in a barrister that courage which equips him or her to assume in due course the responsibilities of an independent and impartial judge. The maintenance of an independent Bar will be essential to ensure a training ground for at least a majority of an independent and fearless judiciary.

I suggest that the functions of an independent Bar will be more significant in the future than in the past. If multi-disciplinary partnerships become the norm and an increasing proportion of lawyers are engaged in those firms and as legal engineers, the need for an independent Bar will be the greater. Its numbers may be fewer than today, its work more complex and sophisticated. Yet it will be a more important participant in the work of the courts and in the administration of justice according to law. Its capacity to perform those functions depends on the maintenance of its own standards, on the strengthening of its collegial ethos and fidelity to its rules and practices. If the independent Bar, forgetful of Lord Eldon's definition of its purpose, were to think that its strength could be measured solely in commercial terms, its privileges would rightly be short-lived and its very existence would be in jeopardy. This was the view of Maurice Byers who, responding as Guest of Honour at the 1994 Bench and Bar Dinner said this:

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

Indeed, the Bar is right to honour his memory.

- Ruthning (a firm)* (1991) Qd R 558 and *Bolkiah v KPMG* (1999) 2 AC 222 with *Australian Commercial Research and Development Limited v Hampson* (1991) 1 Qd R 508;
- 18 Cf the position of 'in house' counsel discussed in *Law Society of the Australian Capital Territory v Lardner and Andrews* [1998] ACTSC 24.
- 19 Reported as a note in *Ex parte Elsee* (1830) Mont. 69,70n at72.
- 20 *Bar News* Spring/summer 1994 p.23
- 21 Hereafter LCA/MDP
- 22 Appendix to Report, section C(1).
- 23 LCA/MDP p 10 quoting *Business Review Weekly* 18 February 2000 p 76
- 24 (1988) 165 CLR 543
- 25 (2000) UKHL 38; (2000) 3 WLR 543.

1 *The Age*, 27 January 1999

2 Speech at the Attorney-General's dinner in honour of Byers 8 February 1984

3 (1988) 193 CLR vi

4 *The Australian*, 26 January 1999

5 Jacqueline Gleeson *NSW Bar News* Spring/Summer 1994 p 19

6 McHugh QC (as he then was) at the Attorney-General's Dinner in honour of Byers 8 February 1984

7 *73 Australian Law Journal* 380, 382.

8 *NSW Bar News* Spring/Summer 1994 p 18

9 *Ibid.*

10 Gummow J 73 ALJ 382

11 Sir Anthony Mason 73 ALJ 382

12 Attorney-General's Dinner in honour of Byers 8 February 1984, p17.

13 10 *UNSW Law Journal* 179, 180

14 *Encounters with the Australian Constitution* p 195.

15 73 ALJ 382

16 Attorney-General's Dinner in honour of Byers 8 February 1984, p 7.

17 Compare *Fruehauf Finance Corporation Pty Ltd v Feez*

The Hon. R J Ellicott QC: 50 years at the Bar

A speech delivered by The Hon. Justice R V Gyles AO at a dinner to celebrate Ellicott QC's 50 years at the Bar, Westin Sydney, 17 November 2000

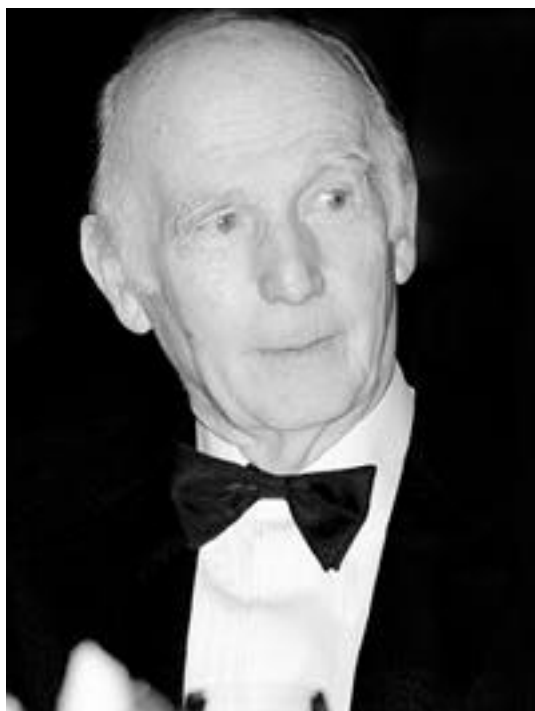
You can take the boy out of the bush, but not the bush out of the boy.

Bob Ellicott was born and raised in Moree, the son of a shearer turned wool classer. Rural interests have been one abiding theme of his life. Since his days as a junior barrister, he has owned rural properties (not always with Colleen's full approval). When in comparative penury whilst in public service, he persuaded Trevor Morling to subsidise his interest by entering into partnership.

That long-term friendship had begun when each attended Fort Street High School, along with other future barristers. Bob, down from Moree, boarded on a verandah at Summer Hill during school term. I am reliably informed that he still regularly takes his family for views of that location. Morling was one year behind Ellicott. In an arrangement which tells us something of the shrewd, if not frugal, approach of each of them, Morling paid Ellicott £1 per annum for the bailment of his discarded textbooks each year.

His rural background has contributed to his independence of mind and determination to succeed against the odds.

Another abiding theme of Ellicott's life has been a social conscience reflected in his public and community service. This has included his activities with the Baulkham Hills Methodist Church whilst residing in the Hills District, and his association with the Reverend Ted Noffs and the Wayside Chapel



The Hon. RJ Ellicott QC

when he moved to Elizabeth Bay. He is presently Chairman of Life Education Australia, which does much good work with drug education programmes for Australian school students.

He spent 14 years in public life as solicitor-general, a Member of the House of Representatives, in various ministerial portfolios, and as a Federal Court judge.

He had, and has, a genuine fascination for public affairs. He resigned from the Bench in part because he retained this interest and did not wish to shut himself out of participation in public issues and public debate in the way he did not think proper for a serving judge. Whether

his services have subsequently been adequately availed of is, perhaps, questionable.

It will be recalled that he had earlier resigned his office as attorney-general, for which he was ideally fitted and which he much enjoyed, on an issue of principle as to the exercise of the discretions of that office.

I know that, in addition to service as attorney-general, he obtained much satisfaction from the other portfolios that he held. He was involved in developing constitutional arrangements for some of the External Territories, in the establishment of the Institute for Sport, and in devising the scheme for encouragement of Australian films amongst many other activities. His service to sport has continued, with his involvement in arbitration in connection with the Olympic movement.

Of course, in his public life he has been no stranger to controversy. He was involved in 'the

Dismissal'. One of the myths which have grown up about that event was that there was a conspiracy between Ellicott, his cousin, Sir Garfield Barwick, and The Hon. Sir John Kerr. It seems to me that, in addition to the integrity of those concerned, there are at least two good reasons for doubting this theory. The first is that Ellicott was telling everybody who would listen, whether in public or private, his opinion as to what the governor general would be bound to do in certain eventualities. Indeed, one of his opinions was, as I recollect, made public. There were letters to the newspapers arguing his views one way or the other. Nobody was in doubt as to Ellicott's view. The second reason is that whilst Sir Garfield Barwick was a cousin of Ellicott's, and they were no doubt on cordial terms, they were not close. I am reliably informed (not by Bob) that when the young Ellicott first came to the Bar and sought to see the great man, he was told that he was too busy. I can recall being briefed with Ellicott, when he was solicitor-general for the Commonwealth, to intervene in the High Court in a case involving complicated issues concerning the constitutional treatment of Commonwealth places. We worked the case up from all angles for several days. We lasted approximately 30 seconds in the High Court until dispatched at the hands of Sir Garfield Barwick. It was at about that time that a very valuable piece of High Court transcript became available. A verbatim transcript was taken from the tapes and normally revised before publication. On this occasion the following appeared in the transcript, which somehow was released. What follows is not a lapse from taste, it is the contents of the transcript. The transcript recorded Barwick CJ (who sat next to Sir Douglas Menzies) as follows: 'Doug, watch me piss this bloke off'. The transcript was recalled, but some copies were not returned.

It is not for me to comment upon speculation which has occurred at various time as to whether Ellicott was not offered the chief justiceship of the High Court in breach of an understanding with the prime minister, or whether he rejected an offer for an ordinary seat in the High Court. I do say that he would have served in either office with distinction.

Another abiding theme of Bob's life has been his

family. Colleen, his wife of 50 years, is here tonight. He is, of course, proud of all of his children, and one of them, Michael, has his own well-established practice at the Bar. I am informed that some of the habits of his shearer/wool classer grandfather have skipped a generation, including an interest in horse racing. The farm and a place at Mission Beach have been family escapes from the pressures of practise over the years.

I now turn to Bob's career in the law. It can be described as stellar and can only be sketched in outline tonight.

He attained First Class Honours in Law at Sydney University (together with an Arts degree), served articles of clerkship with Henry Davis York, and was a researcher with Minter Simpson. He was an associate to Sugerman J, then of the Land & Valuation Court, later president of the New South Wales Court of Appeal.

I first met him in 1964, when I took a chair in the corner of the chambers of MJ Clarke on 10 Selborne. In about 1962 that floor had come from Denman Chambers, where Bob had, for some time in his early days, shared chambers with Alroy Cohen. Alroy could properly be described as old, eccentric and rich. He treated chambers as a comfortable place in which to open dividend cheques and to have naps (with blankets), from which he was awakened by alarm clocks and cups of tea made by the redoubtable Dorothy Slater. I do not know that Alroy Cohen did what Trevor Ziems is reputed to have done, and offered his hand in marriage to Dorothy.

The leader of 10 Selborne Chambers then was Nigel Bowen QC, one of the doyens of the equity and commercial Bar, and a mentor of Bob's. He did much work with him, he followed him

into politics and as attorney-general, and had the pleasure of appointing him as the first chief judge of the newly established Federal Court.

My meeting with Bob in 1964 was most propitious for me. He was, by then, a leading junior in his field, including intellectual property, tax and general equity and commercial work, including some work in the Land & Valuation Court. He agreed to accept me as a reader, and that commenced a relationship which has lasted to today, to my great



The Hon. Justice R V Gyles AO

'Whether against
him or as a judge
(and as his junior),
you know to fasten
your seat belt when
Ellicott fixes his blue
eyes on the judge.'

advantage professionally and personally. I appeared with him on many occasions, I appeared before him when he was a judge, I was against him in a number of memorable cases. In a remarkable irony, he has appeared before me sitting both as a single judge and as a member of the Full Court. I might say there have been mixed results in all capacities. We have been together in places as disparate as the Gove Peninsula in the Northern Territory and the fleshpots of Mayfair in the United Kingdom. He has been a good companion and a wise and loyal friend to me.

He took silk in the middle of my reading period. Callaway, at the time, was unkind enough to say that it was to avoid the responsibility of looking after me. Mind you, Callaway said the same thing when I disappeared to become Master in Equity for six months during the tenure of Francis Douglas as a reader with me.

It is interesting to recall the other silk appointed from the private bar that year. In order of seniority they were: EA Lusher – feared defendant’s counsel (McHugh J still trembles at his name), Royal Commissioner, Supreme Court judge; DG McGregor – president of this Association and Federal Court judge; KJ Holland – one of the great all-rounders of his day (who I must also say was good to me) and a Supreme Court judge; and last, but by no means least, GJ Samuels – another president of this Association, a Supreme Court judge and now Governor of this State. A strong group, particularly when it is recalled that others in Bob’s field such as AF Mason, LW Street and RW Fox took silk at much the same time.

Shortly after taking silk, Bob disappeared into the Rheem case. He then became solicitor-general from 1969. In that capacity, he appeared in many important cases, including the proceedings in the International Court in relation to French nuclear tests. He served as attorney-general of the Commonwealth between 1975 and 1977, and amongst many important activities was instrumental in having the Parliament pass the administrative law reforms and establish the Federal Court. I was reminded of the former only a few days ago, when reading a recent article by Sir Anthony Mason, who stressed that getting those reforms through depended in large measure upon the efforts of Ellicott as attorney-general.

As a judge, Bob participated in establishing the reputation and jurisprudence of what was then a small, but talented, Federal Court.

It is impossible to list the important cases, both at first instance and on appeal, in which he has led since his return to the Bar, together with the significant work in which he has participated as an arbitrator. He surely must be neck and neck with his chamber companion, TEF Hughes QC, in this respect.

I finish these remarks by referring to Ellicott the advocate. I do so advisedly. Although his knowledge of many areas of the law is without peer (I do not include the rules of evidence in that comment), his real skill is advocacy in the broad sense. He has a great instinct for the point of a case, and then sets about shaping it to his vision – in preparation, in court, in interlocutory proceedings and at the final hearing. He then sets about selling his vision. Whether against him or as a judge (and as his junior), you know to fasten your seat belt when Ellicott fixes his blue eyes on the judge and his tone of voice suggests both the Methodist lay preacher and the honest tiller of the soil.

I have noticed no waning in his capacity. The only change is that it is now even harder than it was to induce him to resume his seat if he thinks he is losing – whether a point or a case. As somebody tonight here has said to me, the most difficult thing to extract from Ellicott are the words: ‘I close my case’.

I also notice no diminution in his motivation. My conclusion is that in addition to his normal practice, he is determined to do all the good cases that he missed out on during his 14 years of public service.

The following is an edited version of the speech delivered by Ellicott QC.

The Hon. RJ Ellicott QC

Chief Justice, your Honours, colleagues, you have done me proud. May I thank all of you for coming tonight, I know that I am amongst friends, and that goes from the Chief Justice, the former chief justice, right through to the most junior person here. I feel at home. I want to thank you for doing this. I was somewhat shy of having it because I thought somebody like Roger might be the person who would speak. I suppose he hasn’t been as difficult as I thought he might have been. He has kept back a few secrets about the fleshpots of Soho and he hasn’t made up any stories about our trip to Darwin.

‘Although his knowledge of many areas of the law is without peer (I do not include the rules of evidence in that comment), his real skill is advocacy in the broad sense.’

Denman Chambers

When thinking about tonight, I thought of the people who were in Denman Chambers, when I first went to the Bar. One particular person came to mind. Clive Teece KC was a grey headed man, who usually wore a light coloured suit with a red rose in his buttonhole, a monocle, and a pork-pie hat. I used to think what a very old, old man that is, as he walked along the street and went to deliver the course in legal ethics. I asked if Philip Selth could get some information about him, because I thought I might like to talk about him. I decided I won't, because when I looked up the biography, I discovered that when I first observed him he was the same age as I am now! Never mind - he went on to live until he was 88 and he was the first president of the New South Wales Bar Association and, I think, the first president of the Law Council of Australia.

I originally found a resting place in Denman Chambers, at a small table in Nigel Bowen's room. On the floor at that time was Ken Pawley, who shared chambers with Gough Whitlam and became a senior judge of the Family Court. Alongside him was Trevor Ziems who, as you probably know, was the barrister found guilty of manslaughter before Adrian Curlewis and went to gaol for 12 months. Trevor, whom I visited in gaol, felt that he had been badly done by, and I think he was. You will read a judgement by one of the great judges of the High Court, Sir Wilfred Fullagar and another by Sir Frank Kitto, which exonerated him. There was no doubt that Trevor came to the rescue of a woman in a hotel in Newcastle, was bashed by a seaman, and left with blood streaming from his face. He staggered out of the hotel - he had been drinking, got into a car, drove along the street and ran down somebody and killed him. However, when he came back from gaol he won the lottery and he survived. The most fortunate thing that happened was that Dorothy Slater didn't accept his proposal of marriage, because I can assure you Dotty, who is still alive (she is about 86 and lives at Potts Point), would have put him in his place! She was a match for any male clerk in Phillip Street, both in terms of language and in terms of her capacity to get you a brief.

Then there was Bill Perignon, who became a Judge of the Industrial Court, Nigel Bowen and, dare I mention his name, Freddie Myers. Freddie Myers did terrorise us somewhat at the junior Bar. All of us learned a lot. I think he made us better counsel in a way, but he did make us tremor. One day I was stupid enough to accept on the run a brief in front of Myers. It was about interpreting an order he had made. In the way that Gyles described, I said, 'Maybe Your Honour



meant this, or perhaps Your Honour meant that?' I tried to get some response from the Judge, but he suddenly said: 'I'm not here to be cross-examined by you.' Whereupon the great friendship was destroyed, because I said, 'We wouldn't be here at all, Your Honour, if Your Honour had made Your Honour's order clear in the first place'. That started a beautiful relationship, I can assure you, and it didn't end there.

The best person in handling Freddie Myers was Michael Helsham. 'Yes Your Honour; Of course Your Honour; 'Oh don't you worry about that Your Honour; Yes, I'll fix it up today Your Honour.' That was the Victorian style. Nigel and I first noticed it in a famous patent case, HPM Industries, which we couldn't possibly win. We were against Douglas Menzies and Keith Aitken. It was all about a hole in a plate that covers a switch and we were trying to show that it was patentable. Needless to say, we lost the case. But all the time it was 'Yes Your Honour; No, Your Honour; Of course, Your Honour'. That was where we learned the Victorian style!

Bob Smith, who wrote the book on the Stamp Duties Act, was in Denman Chambers and, of course, there was Alroy Cohen. Alroy was a wonderful man. Apart from my parents, I have only been left something in a will by one person, and that was Alroy Cohen, who left me £20. I tell those on my floor who borrow my full bottomed wig, that it was Elroy's wig, which he left me in his will.

One of the truly great people I have been associated with is Nigel Bowen. The person who is your master can be important in your life. I am grateful to Roger that he thinks I've been important in his life. My life would have been entirely different, if it had not been for Nigel Bowen. He was one of the great all-rounders, but he was also one of the great lawyers of the last [twentieth] century. He would have graced the High Court. He was a magnificent first chief justice of the Federal Court. Most of you have experienced him and you know that what I am saying is true. As a friend, as a man, he was a person of immense honesty. He was immensely trustworthy. He was a person who seemed unmoved, yet he was capable of great emotion. Nevertheless, he seemed always to be unruffled. He was a person who, if you were his friend, would stick by you. He was loyal. There is something about Nigel Bowen that was unique and, looking back, I think people will see him in a light of greater magnificence than perhaps we see him, even now.

We had lots of cases together. I think the strangest one we had was appearing for the madam of a house up in Brisbane. She had been assessed to £12,000 extra income from her brothel and our task was to appear in

Brisbane in front of the Taxation Board of Review and cross-examine each of the prostitutes. We had to ask them all sorts of personal details: about how many times and the like! If you can imagine Nigel and this Methodist local preacher asking these questions for four or five days before the Taxation Board of Review - well you might smile a rye smile.

I think our greatest treasure as barristers is the independence of the Bar and the sense of independence that it gives us. Apart from its role in the rule of law, it enables us to go away and do something else and come back. I don't know whether all of you appreciate that. But if you are a successful barrister, you can go away and do something else and come back. It's a remarkable gift that all of us have. All you have to do is to have the courage and the will to do it. That is one of the most important things that I have discovered in my life. It also enables you, I have found, to confront the demagogue and damn his treacherous flattery. That is part of the independence that we have. This is a remarkable profession. It must be the only profession that still has that sense of independence. It is not only important to the rule of law, it is important to us as people.

Barwick

I decided to be a barrister at the age of eight. There is a story in our family of a boy who, with his seemingly interminable conversation, constantly interrupted a couple who were canoodling on a gas box on the verandah of a terrace in Paddo. He only gave up when the male got up and gave him what was then called 'a boy-proof watch'. The boy was named Garfield Barwick and the couple happened to be my parents.

I was born in Moree and the bush has meant a lot to me and I guess the bush is still in the boy. They were fairly pioneering days. The success of my cousin, the young barrister Barwick, was interminably repeated in the home. It was the challenge that suddenly caused me to say to myself 'that's what I'm going to be'.

I first went to the Privy Council in 1958. For all my days at the Bar, I didn't appear very much with Barwick. On this occasion, I thought I would stretch the cousinly relationship a bit. I had eight hundred pounds in order to pay our costs getting to the United Kingdom. Bill Cole, from Moree, was my instructing solicitor. He said, 'The client can only afford eight hundred pounds'. So I said to Garfield, 'Look, you

take three hundred and I'll take five hundred and then I can take Colleen'. He said, 'Oh, all right' and off we went to the Privy Council on five hundred pounds!

Barwick was the greatest advocate I saw. He was simple, straightforward, emotive where necessary and able to charm judges. In fact, some of the judges used to say, 'Don't give an ex-tempore judgement, because you need to get off the bench to see things in the clear light of day'. I think that is how Barwick was - immensely convincing. I saw him in all courts, right up to the Privy Council.

There were other great advocates. Douglas Menzies was one of them. He was better than Keith Aitken, I thought, and much closer to Barwick. Lord Roskill, whom I had a lot to do with in the Bass Strait arbitration, said that in more recent years Murray Gleeson and Tom Hughes were two of the best counsel he had ever seen. That, I thought, was a magnificent tribute to the Australian Bar, apart from being a tribute to those two people. We have a lot to be proud of in our Bar.



McHugh J and Hughes QC

Passage to politics

During the War, as a teenager, I was constantly listening to the radio and hearing people like Churchill and Curtin. They were strong, emotional orators and delivered well-presented speeches. They moved me a great deal, and for some reason I made up my mind - some day I was going to be a politician.

I started my political career at university. For all those who belonged to the Liberal Party, please close your ears! I agreed to be the treasurer of the University Labor Club! It only lasted about three months, because I was a member of the Student Christian Movement, and when I went to conferences at the Labor Club I felt there was a great divide between their rationalisation of philosophy and my view of the Christian faith. I realised that probably I didn't fit, and probably they did too. So shortly after that I ceased to be the treasurer of the Labor Club. But never mind. That has happened to others. May I say that it stamped me in a way where I would be in politics. I was never on the 'right wing' of anything. I was on the 'left wing' of the Liberal Party, if there is such a thing. I tried to be a true liberal, if I could.

The nuclear test case

During the Nuclear Test Case, in which I appeared, a lot of things happened. The preparation of it started late in 1972, when the Labor Government came to

power. There was a book published by Professor Sternglass, which suggested that by the year 1988 thousands of children would be killed by atmospheric nuclear testing, if it went on. There was, on the other hand, a United Nations Committee that put out a report, which said there will be 'four or five who will be killed by 1988'. In preparing the case, I decided to go for the lower number, because I thought the World Court would be more likely to listen. If we relied on the higher numbers suggested by Sternglass, and we tried to scare them, they wouldn't listen.

During the early period of Lionel Murphy's ministry, he brought to Canberra Professor Harry Messel to be on his staff as his nuclear adviser. He also brought in Leslie from our Bar and Colin Howard to advise him on constitutional law. That created somewhat of a divide between the solicitor-general and the attorney-general! I didn't quite see what my role was. Very quickly, Professor Harry became his de facto secretary and, so far as I could observe, had little time to advise on nuclear testing.

In order to take France to the World Court we had to generate a dispute with them about the testing. In April 1973, Lionel Murphy and I went to Paris to do just that. On Good Friday 1973, Murphy was talking to the French foreign minister and having the final discussions that generated the dispute. At that stage, while I was standing outside the room, Harry Messel came up to me and said, 'Lionel says that Stevens has to go'. Stevens was our man on the United Nations committee, which said four people were going to be killed by 1998. We had quite a loud discussion, in the course of which I said: 'If Stevens goes, I go! Harry, today is Good Friday and you are trying to crucify another man'.

After that loud discussion ended, we went back to our embassy and Murphy called me in. He said to me, 'If you want to resign as solicitor-general, you resign in front of me'.

I replied, 'Well Murph I'm not resigning, so don't have any wishful thinking. I was just indicating I would hand over the brief'.

When Murphy and I left Paris, there was clearly a dispute with France. I retained the brief and the case was heard in May 1973, at The Hague. That's when he took off his wig and the rest of us kept ours on. I said to him, 'Murph, I'm not going to take mine off. If you want to take your wig off, you take it off in front of the

High Court, do it there, but don't do it here and embarrass this court, which expects you to wear your traditional dress.' When the case ended the counsel sat down, like you may do now after appearing in the High Court, and asked, 'how have we gone?' You may reply, 'we won five to two' or 'three to four', or 'I think that fellow McHugh, he might go either way, we can't say.' Well, we did that with the World Court and we decided that we ought to succeed by nine to six. I was fairly close to Whitlam in those days and he called me round to the Lodge after I returned and said, 'How did you go?' I said, 'We think we will win by nine to six'.

Shortly after, Gough went down to Melbourne to the Victorian Law Society. Somebody asked 'How's the case going?' He said 'I think we are going to win by nine to six.' Unfortunately, it got out into the press and, of course, at that point all hell broke loose. An inquiry was undertaken in the Court. The French judge said that Barwick, the ad hoc judge, had leaked it. When the decision came out, we did in fact win by eight to seven. It was slightly different, but we had won.

Can I just take you forward to April 2000? It was our 50th wedding anniversary party. An old friend, who is a builder, was there and he had been to Eucumbene with me in 1974, where we had a cottage. I don't know how it happened, but apparently, at that time a telegram I had received, but not opened, had fallen on the ground and he had picked it up but he had never given it to me. He gave it to me in April 2000 and this is what it said:

Mr R.J. Ellicott, Redhill ACT. I express my personal appreciation to you and to all who participated in the preparation and presentation of this great case to the International Court of Justice. I am especially grateful to you for your advice and assistance to me. The result of the case completely justifies the initiative taken by the Australian Government and is a fitting reward to your efforts.

Thank you.

Senator Lionel Murphy, QC, Attorney General of Australia.

That is a piece of paper of which I can be proud, but it is also a happy ending to a part of a relationship which I can assure you was, from time to time, not very happy.

At one stage we were walking across the lawn outside Parliament House in Canberra. He said, 'Come and see me in my office'. We were coming from a meeting with Whitlam. At that meeting there was a decision made that I should go to London,

*'If Whitlam became
messianic, as I believe he
did, then he became
messianic. If the events of
his dismissal have affected
the rest of his life in a way
that I think is somewhat
tragic, then it has robbed us
of a person and a capacity
that was immense. I regret
that it has had that effect.'*

because the State premiers were going there to try and lobby against the Government getting a Bill through the British Parliament to stop appeals to the Privy Council. A decision was made that I should go back. I had been in England for three months and I didn't want to go back, but that was the decision.

Murphy called me in and said: 'Next time you want to offer to go overseas, you speak to me first. Anyhow, they tell me you have been leaking things to the Liberal Party.' Now, I of course denied that, because it wasn't true. That was the lowest point in our relationship, and it was at that moment that I decided it was time that I ceased to be solicitor-general. I stayed for the purposes of doing the memorial for the case and after that I went off into politics.

The Dismissal

Can I talk a little bit about law and politics? It's a funny game. I won't say much about 1975. I will only say this: I was in the thick of it and I have to bear the burden or the joy, or however you look at it, of my involvement. I don't have any regrets, I may say. I did what I did, Fraser did what he did and Whitlam did what he did. It was essentially a battle between two political forces and Kerr was caught in the middle. You can read about it, you can discuss it. All I ask you to do is put yourself in Kerr's place, and ask yourself what you would have done.

People had to make judgements about others. I had to make a judgement about Gough Whitlam, somebody I had had a close relationship with. In 1964 Whitlam said to me, when we were talking about Labor politics, 'You don't want to go into politics - concentrate on the High Court'. We discussed these things. In 1975 I was observing somebody I had known for a long time. I had to make a judgement about how he was acting, and if I made a bad judgment I made it. If Fraser misjudged whether they were exemplary circumstances, he misjudged it. If Whitlam misjudged the power of the Senate, he misjudged it. If Whitlam became messianic, as I believe he did, then he became messianic. If the events of his dismissal have affected the rest of his life in a way that I think is somewhat tragic, then it has robbed us of a person and a capacity that was immense. I regret that it has had that effect. I regret it, but don't blame John Kerr, that is all I say.

John Kerr is entitled to be judged by his own

achievements. You can read his book, and what he says he did. He was the president of this Bar Council, he was responsible for LawAsia, he was the one who was behind the Administrative Law Reforms. He was the Kerr Committee in effect. I was on it, Tony Mason was on it, Harry Whitmore was on it too. At the end of the day judge him on the whole score, and please try and put yourself where he was because I don't believe that justice has been done to him. He was a barrister, he was a lawyer and he was a judge as well and may be I have to say, he was also a friend.



Walker S.C., Gyles J, Barker QC

Lawyers in politics

You have to take your moment in politics if you are a lawyer. One day a colleague said, 'Oh we have to do something about Jim Staples, he is being a nuisance, John Moore can't get on with him, he is refusing to do this and he is doing that'. I thought, Jim Staples is a great champion of human rights, and on my agenda I had a proposal for a human rights commission. So I said, 'Malcolm why

don't we send Jim on a trip for a couple of years to study human rights, and we'll set up a Human Rights Commission?' They grabbed it and sent Jim off to study human rights. You will find that there was introduced into Parliament in May 1977 a Human Rights Commission Bill, which is basically equivalent to the one that is now in force. You have to take your moment in politics.

When we were discussing the 1977 referendum, to make sure that you couldn't appoint senators the way that Field had been appointed, Anthony and Fraser said to me, 'I wonder if there is anything else'. It was another moment, because in the Judiciary Act Committee, and at a recent constitutional convention, we had recommended that judges should be appointed to the age of 70. That is how that provision became part of that referendum, and that is why judges are now only appointed in the Commonwealth area to the age of 70. You have to take your moment. If you are a lawyer in politics, that's sometimes how things will happen, because politicians aren't thinking about law reform. That is often the last thing that they think about.

The most enjoyable thing I did in politics was setting up the Institute of Sport. I discovered what I should do when I went on a ministerial visit to China. I

thought I was pretty good at table tennis and they took me out to an institute where they trained teachers. I found they were in residence, learning skills in sport and also being trained as physical education teachers. I said to the old man in charge, who was then about 73, 'I'll give you a game of table tennis'. Needless to say, he beat me 21:2. This gave me the idea of the Institute of Sport. I was minister to the Australian Capital Territory and I was minister for sport, so I could actually make it happen on a rather modest budget by setting it up in Canberra. I could put empty residences to work at the Canberra College and the Australian National University, by putting the athletes in there. We could build another stadium - an indoor stadium. We were able to put it together because I had the two ministries. I could take the land because I was the one who 'owned' the land. All the land was vested in the minister. That is how the Institute of Sport got going.

When they were building the new Parliament House, I became responsible for getting that through the Government. Before the 1980 election, a union boss in Canberra threatened to go on strike, I said to him: 'For heaven's sake, what are you doing? Get the top off Capital Hill first and then go on strike'. I knew that once that happened, the new and permanent Parliament House would be built, because no politician would leave the top of Capital Hill shaven off. That is exactly what happened.

Politics is malleable. Not in a way that is wrong or dishonest, but it is a very, very interesting area of life and it opens up creativity!

The Sankey Case

Thank you very much for the night, I will treasure it very much. I thank my wife, for 50 years of being my wife, but also for being a barrister's wife. Not easy, I think. We are working all day and all night and all weekends. It is a reason for having a break now and again - a big break. It is not good for family life and if you can knock up 50 years you are doing pretty good and I am very grateful to my wife for those 50 years. Plus, I am looking forward to a lot more. Thank you very much, thank you Madam President, and thanks to the Bar Association. Thank you for standing by me in 1977, when I resigned in relation to the taking over of the Sankey case. That wasn't easy. Yet, it wasn't quite as you put it.

It happened a different way. It happened because the prime minister was trying to get my officers, Frank

Mahoney, the deputy secretary and the secretary of my department, Clarrie Harders, to give an opinion against me. Maurice Byers had already given an opinion against me. Fraser had gone to him behind my back and found out what his advice was going to be and then said to me: 'Why don't you consult the solicitor-general?' I said: 'I didn't consult the solicitor-general for this reason - he was a witness to the events of 13 December 1974' and I told him that when I became attorney-general I wouldn't embarrass him by involving him. Needless to say it didn't impress me that this had happened. I then went overseas having said to Fraser, 'Well, we'll forget it and just let the case go on'.

When I came back I was greeted by Clarrie Harders at the airport and he said 'Fraser has been trying to get me and Frank Mahoney to give an opinion against you'. At that moment I started to realise that I couldn't stay as attorney-general because the prime minister was trying to undermine me. Those aspects of my resignation are not widely known, but that is why I resigned. I couldn't allow a prime minister to do that sort of thing.

One thing I did not learn until recently was that during September 1977, the attorney-general who succeeded me sought the advice of Professor Edwards, who was a leading authority in the common law world on the role of attorneys-general. Apparently his advice basically supported my stance, namely that I should not step in and terminate Sankey proceedings without having access to all the

evidence. That advice was given about three or four weeks after I had resigned. I was never told that. I found that out when reading Clarrie Harders personal memoirs a few months ago. But that is why I resigned. And that's why I was grateful at the time that the Bar stood behind me. I still believe that the attorney-general's role is the most significant in government. I see it being frittered away. And as it is frittered away, so the independence of the law and the rule of law are frittered away. That is something we can't afford. Thanks for standing by me then. I appreciate tonight very much.

'I still believe that the attorney-general's role is the most significant in government. I see it being frittered away. And as it is frittered away, so the independence of the law and the rule of law are frittered away. That is something we can't afford.'

20 years at the Land & Environment Court

Ceremonial sitting to celebrate the 20th anniversary of the Land and Environment Court, – Friday, 1 September 2000

Address by Bob Debus MP, Attorney General, Minister for the Environment, Minister for Emergency Services, Minister for Corrective Services and Minister Assisting the Premier on the Arts, 1 September 2000

It was twenty years ago today that the Land and Environment Court came into existence by virtue of the *Land and Environment Court Act 1979*. The creation of the Court was part of a number of major reforms introduced by the Wran Labor government in 1979 and 1980. These reforms completely changed the face of environmental planning decision making in NSW. Prior to the reforms it is generally agreed that there was an inadequate planning framework. The previous system had failed to demarcate the respective responsibilities of State and local governments; it had failed to provide a uniform and rationalised code for development control; it had failed to integrate land use planning with environmental assessment and protection; and it had failed to give members of the public any meaningful opportunity to participate in planning decision-making.

At the time of the reforms, the Government's key objects for the new system were to satisfy the current and future needs of the State in respect of planned development and economic growth, whilst enhancing the social environment. This balance was to be achieved by the proper management, development and conservation of the State's natural and human-made resources.

The new system shared responsibility for



The Hon. Bob Debus MP

environmental planning between the State and local governments and greatly increased the opportunity for community involvement.

The centrepiece of this new regime is, of course, the Land and Environment Court, a specialised superior court of record with comprehensive jurisdiction in matters affecting the value and development of land and the enforcement of planning and related laws.

The superior status granted to the Court reflected the community's growing awareness of the importance of planning and the environment.

At the time of its creation, the Land and Environment Court was unique in Australia. The idea of bringing together in one body the best attributes of a traditional court and of a lay tribunal, functioning with the benefits of procedural reform and as few legal technicalities as possible, was a novel one in 1980.

The Land and Environment Court took on this pioneering role with great skill, making the Court a model for environmental protection both interstate and internationally.

Planning and development decisions are often hotly contested in the community, which can make the Court's position a very difficult one. Yet, since its inception, the Court has consistently managed to assess matters objectively and independently, deciding each case according to the law and evidence presented.

Any organisation that plays such an important role within the community will often be criticised.

In the case of the Land and Environment Court, many of these criticisms are ill-informed and misconceived. However, as it is unlikely that any system will ever be perfect, some fine tuning will always be necessary.

In this regard, I note that the Chief Judge has made a number of positive reforms in recent times, including procedures for consultation with court users and major stakeholders, the adoption of time standards and the promotion of alternative dispute resolution.

In addition to the internal reforms, the previous attorney general set up an independent Working

- finally the Working Party will consider whether greater reliance can be placed on alternative dispute resolution mechanisms in resolving disputes.

During the course of the review the Working Party will be assisted by a reference group made up of a number of experts in environmental and planning law. These experts are drawn from a cross section of organisations with an interest in the Court. These include organisations such as the Property Council of NSW, the Environmental Defender's Office, the Environment and Planning Law Association, Royal Australian Planning Institute, Total Environment Centre, the Urban Development



Back row, left to right: Judges Sheahan, Talbot, Bignold, Lloyd, Cowdroy. Middle row: The Chief Justice of NSW, The Hon. JJ Spigelman AC, The Hon. Pearlman AM, Chief Judge of the Land & Environment Court, Jerold Cripps. Front row: Commissioners Nott, Watts, Bly, and Roseth.

Party to look at how the Land and Environment Court reviews decisions in relation to development applications. The Working Party is chaired by Mr Jerrold Cripps, a former chief judge of the Land and Environment Court, and includes representative from the Department of Local Government, the Department of Urban Affairs and Planning, the Local Government and Shires Association, the Attorney General's Department and the Land and Environment Court.

The terms of reference for the Working Party include:

- consideration of the manner in which decisions of local councils in relation to development applications should be reviewed;
- the constitution of the Land and Environment Court, and the matters to which it should have regard in reviewing decisions;
- ways in which to streamline the processing of development applications, and ways in which to reduce the number of appeals to the Court; and

Institute and Justice Paul Stein of the Supreme Court.

There has been an overwhelming public response to the Working Party's call for submissions, with more than 200 submissions received to date.

This demonstrates the importance that the community places on environmental and planning law and the continuing importance and relevance of the Court today. I look forward to receiving the report of the Working Party in due course.

In conclusion, I am optimistic that these ongoing reforms will continue to ensure that NSW remains at the forefront of environmental and planning law reform and that the Land and Environment Court will continue to be as effective and important in twenty years time as it is today.

Ruth McColl S.C.

President of the New South Wales Bar Association

It is my privilege to speak today on behalf of the barristers of New South Wales in offering our congratulations to this Court on attaining its 20th anniversary.

The conception of the Land and Environment Court is well known. It was the product of a review by the then Labor Government in the 1970s of existing legislation relating to town and country planning and environment assessment.

That review had revealed a number of deficiencies, all of which caused unnecessary delays and costs in the development process.

In the words of the minister for planning and environment, Mr. Paul Landa: ‘the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute-resolving techniques and it will utilise non-legal experts as technical and conciliation assessors.’

This point was developed by Mr Justice Cripps, as he then was, in a paper delivered in 1982 when he pointed out that:

It is the intention of the legislature that the Court combine the characteristics of the superior Courts and the expert administrative tribunals in a manner designed to permit the discharge of its business by judges and assessors. The new Court exercises a more comprehensive jurisdiction in relation to planning and environmental matters than has hitherto been vested in any one appellate body.

Public Participation

One of the most significant aspects of the new scheme was the emphasis it gave to public participation in the development of environmental plans and enforcement of the legislation.

The new legislation was intended to confer equal opportunity on all members of the community to participate in decision-making concerning the contents of environmental studies, the aims and objectives and contents of

draft planning instruments and many other matters.

As Justice Stein, formerly of this Court has said, the public involvement in the Court’s work reflected the increasing recognition in the 1970s that the content of Environmental Law, while it may involve many private disputes, in its substance and content is indubitably that of Public Law. The decisions of this Court have implications, not only for the immediate parties, but also for the broader community and the environment itself.

In recognition of this fact, a significant part of the new scheme enabled objectors to applications for designated development to appeal to the new Court against the grant of development consent. Furthermore, any member of the public was given legal standing to bring proceedings in the Court to enforce compliance with the new planning laws and to remedy any breaches of those laws.

Significantly, s123 of the *Environmental Planning and Assessment Act* (1979) (NSW) gave ‘any person the right to bring proceedings in this Court for an order to remedy or restrain a breach of the Act, whether or not any right of that person had been infringed by or as a consequence of that breach.’ This provision, as chief justice Street was later to emphasise (*Hannan v. Elcom*), recognised that the task of the court was to administer social justice in a manner that travelled beyond administering justice *inter partes*.

From the outset, the Court made it clear that it would not read down the broad standing provisions nor, would it set up barriers which would limit the intention of public participation in the process. Early in the piece, arguments that the ‘any person’ provision still required the applicant to prove a ‘relevant interest’ in the subject matter of the proceedings were sternly rejected.

These provisions have been a notable success. Contrary to the doomsayers who foresaw that such provisions would open the floodgates of litigation, the number of cases brought on the basis of such provisions has not been sufficient



McColl S.C., President of the New South Wales Bar Association

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justice *inter partes*.’

as one former judge of this Court has observed, to ‘wet a pair of wellies’

The success of the operation of such provisions in this Court has led to the adoption of similar open standing provisions in Queensland, Victoria, South Australia and Tasmania.

The intention of public involvement has been enhanced by decisions such as *Oshlack* in which the High Court upheld a decision of Justice Stein that a party legitimately claiming to represent the public interest may not be ordered to pay the costs of the successful party.

Involvement of the Bar Association

The Bar Association can proudly claim a role in the new Court. It established a small committee to prepare submissions to be made to the then minister for planning and environment, Mr. Paul Landa, concerning the terms of the proposed package of legislation. The committee included the then Mr Murray Wilcox QC who, at that stage, had been active in environmental and planning cases for some years. The Bar Association’s submission clearly made a substantial impact as is evident from Hansard of the day when the bills were read for the second time in the Upper House.

As a result of the Bar Association’s submission, provisions which would have meant that appeals would be way of stated case, were amended to ensure that they were by way of normal appeal on questions of law. Secondly, the Bar Association’s submission that appeals against demolition orders under s317B of the then *Local Government Act* [1919] which were then vested in the District Court, should be vested in the new Land and Environment Court, was also adopted.

The Bar was also concerned that the Bills did not provide for mandatory public participation for State planning policies in contrast to the extensive requirements for public participation in the preparation of regional and local plans. Amendments were made to ensure such consultation.

The Bar Association also criticised the proposal that the Land and Environment Court was be separate from the Supreme Court of New South Wales. We were concerned that true rationalisation demanded that the various functions which had previously been exercised by a variety of courts and tribunals should be vested in the Supreme Court. One of the reasons for that submission was an opinion expressed by the then chief justice, Sir Laurence Street concerning the increased costs of an entirely new court structure and the danger that the ‘fragmentation inherent in [specialist tribunals] weakened the

whole fabric of what ought to be regarded as an integrated and all embracing system of regular courts’. We were also concerned about the risks attendant on a court of limited jurisdiction not being able to provide all relief arising from the same factual matrix.

This last criticism proved to have force. In *National Parks and Wildlife Service and Another v Stables Perisher Pty. Ltd* (1990) 20 NSWLR 573 the Court of Appeal made it clear that this Court had no pendant or accrued jurisdiction of a like nature of that enjoyed by the Federal Court.

The Act was amended in 1993 by the addition of s16 (1A), which purports to grant that pendant jurisdiction. Whether or not it has truly had that effect is something which is yet to be worked out.

This year a Working Party has been convened to review the State’s planning laws and the role of this Court in development applications. As the present Attorney General’s predecessor, the Hon. Jeff Shaw QC MLC made clear he believed ‘the Land and Environment Court objectively and independently decides matters before it according to law and the evidence. Some criticisms of the Court have been ill-informed and misconceived. However some reform may be appropriate.’

It would hardly be surprising if an innovative and youthful court such as this was not the subject of criticism however founded, particularly having regard to the way its jurisdiction touches so closely upon public matters as I have already indicated. The Bar has already made a submission to the Working Party, once again prepared by a small committee of dedicated Land and Environment practitioners.

We are confident any review will only lead to a strengthened jurisdiction which will continue to serve the people of NSW in the sterling manner it has done so for the last 20 years.

We wish the Court many happy returns.

Opening of Maurice Byers Chambers

An address by The Hon. Sir Anthony Mason AC KBE, 4 August 2000 on the opening of new chambers at Level 60 MLC Centre.

Only two months ago I attended the opening of a set of chambers in Hong Kong. There, as in mainland China, great deference is extended to the feng shui man. A feng shui man is invariably consulted in China as to the siting of a building and its internal arrangements, particularly the location of windows, with a view to fending off unfavourable vibes and spirits. In the case of the Hong Kong chambers, the feng shui man had advised that the architect's location of a window be altered or at least blocked out. He predicted that, if it were not altered, counsels' fees would be spirited through the window into the hands of competitors below.

Whether he was referring to another set of chambers below, or to the solicitors who are claiming equal rights of advocacy in Hong Kong with members of the Bar, was not clear. Such was the authority and influence of the feng shui man that his advice was taken.

It would be too much to expect that those who have set up these chambers to have consulted the local equivalent of a *feng shui* man. But they have done the next best thing by naming the chambers after Sir Maurice Byers. The magic of his name should ward off evil spirits and other satanic emanations like solicitors-general for the State of Victoria, for whom Sir Maurice had a healthy and undisguised contempt.

It is very appropriate that a set of chambers be named after a distinguished member of the Bar, rather than a judge and it is all the more appropriate when that member of the Bar commanded the deep affection and great respect which was always accorded to Maurice Byers.



The Hon. Sir Anthony Mason AC KBE

Maurice's qualities were legion. On this occasion, I shall endeavour to capture some of them in the hope that those who inhabit these chambers in the years to come will exhibit similar qualities.

Maurice began his career as a smart point-taker, briefed by astute but not leading solicitors, on behalf of clients who, if not shady, did not always appear to advantage in full sunlight. In those days, he was given, indeed compelled, to argue technical, sometimes specious points, but he managed to do so in a manner that conveyed that he was engaged in a virtuous enterprise that attracted the goodwill, rather than the asperity, of the judge.

Whenever I argued such a point, I excited a tidal wave of judicial scorn.

Maurice ended his career as a Queen's Counsel who appeared for government and large corporations. He was then, more often than not, called upon to present constructive rather than destructive arguments. Constructive argument is a greater test of ability than destructive argument. Some of Australia's outstanding counsel were noted for their destructive ability. They were not quite so impressive when it came to constructive ability.

That was not so of Maurice. He was a counsel for all seasons, able to handle a wide range of cases and a miscellany of judges of varying dispositions and competence. And, like Sir Garfield Barwick, he never forgot those who supported him in his early days.

Maurice was at all times generous in the advice and assistance that he gave to other members of the Bar. One of the Bar's finest traditions is that each and every

member is ready to assist others, to pass on the fruits of his or her experience to others. Maurice was an exemplar of this tradition. More than once I was a beneficiary of his generosity in this respect. In the first case in which I appeared in the High Court as solicitor-general after my appointment, he appeared with me. In fact he had been briefed to lead me. The reversal of roles made no difference whatsoever to him except that he gave me invaluable support and advice for which I always remained indebted to him.

He had an abiding sense of justice. He was of course a great servant and respecter of the law. But he believed that the law was moving in the wrong direction if it failed to take account of the justice of the case. His sharp criticism of the High Court's decision in *Kruger's Case*, the case concerning the stolen children, which he described as 'an extraordinary, indeed a shocking decision', conveys some sense of the purpose of law as he saw it and how it is to be applied. If you have not read what he wrote, you should do so. It was published in volume 8 of the *Public Law Review* at page 224.

Maurice epitomised the conversational style of advocacy. He invited the court to engage in a dialogue about the issues in the case. This style has its advantages and disadvantages. It does not make for eloquence and Maurice's arguments were intricate rather than clear. There is some truth in what Justice McHugh once said of him, namely that his great strength as an advocate was that you never quite knew what his argument was. So if you were his opponent, it was difficult to devise an effective reply.

Maurice was not without artifice. He knew that all judges are vain, some more so than others, and that sometimes it is good advocacy to let the judge think that he has discovered the answer himself. At other times, Maurice would appreciate that clarification of argument might spell the end of his client's case. Not that he would resort to obfuscation but a measure of complexity would not go amiss and it would give the judge something to work out. After all, that is what the judge was paid to do.

I do not suggest that Maurice failed in his duty to the court but he strongly believed in his duty to the client. There is a tension between the two and they cannot be reconciled quite as easily or as glibly as the House of Lords sought to do in their recent decision on the advocate's immunity from negligence.

Maurice was extremely literate and a lovable and lively companion, all being qualities we like to see in a barrister. So with his spirit hovering over the inmates of these chambers, I am sure that the members will enjoy themselves. Hopefully they will also enjoy

success and prosperity.

I conclude with two stories about the Law Lords. There is a strange convention that Law Lords include in their title the name of a place with which they are closely associated. So if I were raised to the peerage I might call myself Lord Mason of Mosman, just as in the 1970s Lord Justice Salmon, when elevated to the peerage, chose to call himself Lord Salmon of Sandwich. The alternative is to omit the place name. In that event I would call myself *The* Lord Mason. When Lord Justice Jenkins was elevated to the peerage in the 1960s, he elected to call himself Lord Jenkins of No. 9 Elmsley Gardens or similar address), that being an undistinguished apartment in an obscure suburb of London where he lived. He was prevailed upon to abandon this egalitarian enterprise.

When I first sat with Sir Robin Cooke, the President of the New Zealand Court of Appeal, in the Supreme Court of Fiji, he signed the Court judgments as Robin Cooke. After his elevation to the House of Lords, his signature took the form of 'Cooke of Thorndon', 'Thorndon', being a small suburb in Wellington, New Zealand. When I asked Sir Gerard Brennan whether I should sign a judgment as 'Mason of Mosman', Sir Gerard advised against that course. 'People will think you are a small suburban store or a second hand car dealer' he said.

In passing, I should mention that many years ago when the High Court were sitting in Perth the management of the Sheraton Hotel, labouring under the mistaken belief that I was Lord Mason, put my wife and myself into a luxurious suite and treated us in regal style. Unfortunately Lionel Murphy, who was on the Court at the time, informed the hotel that I was masquerading as a peer with the result that we were relegated to

being commoners - but we still retained the suite.

Viscount Dunedin was a Scottish judge who became a member of the House of Lords and the Privy Council in the first quarter of this century. According to legend, he is chiefly remembered for not only sleeping but also snoring during the course of argument. As one Lord Chancellor is reputed to have said, it was thought discourteous to awaken him. That extreme course was resorted to only when his snoring became so loud that it awakened other Law Lords from their slumber.

I shall conclude lest by speaking instead of snoring I send you into a slumber. I now declare these chambers open.



Sir Anthony Mason and Lady Patricia Byers

'he believed that the law was moving in the wrong direction if it failed to take account of the justice of the case'

APPOINTMENTS

Richard Conti QC

On 15 August Richard Conti QC was appointed as a judge of the Federal Court. He was admitted as a solicitor in 1960 and became a partner in the firm of Arthur Pritchard & Co. until 1967. He was admitted to the Bar in July 1967 and joined the eleventh floor of Wentworth Chambers, where he remained until his appointment to the Bench. He took silk in November 1977.

Since the outset of his practice, he took on an enormous workload, which spanned a broad spectrum including tax, trade practices, all matters commercial, intellectual property, corporations law, administrative. His diverse practice took him to the Privy Council and all courts in Australia.

He was seen by many as the archetypal barrister, with a profound knowledge of the law, great cross-examining skills, an acute sense of tactics, absolute integrity and unfailing courtesy. He was respected for the great support given to the junior Bar. He mentored a large number of barristers, taking them on board soon after they came to the Bar, encouraging, supporting and promoting their careers. He sought to impart to them an approach to the law from first principles, by advising them in one of many 'Contiisms': 'Don't try to learn all the law. Just know where to look for it.' He also tried to instill in them a fundamental credo which has stood him in such good stead in remaining on favourable terms with his opponents: 'Barristers are briefed to fight their client's cause, not to fight each other.'

He was one of the Bar Association appointments to the Legal Profession Disciplinary Tribunal and sat on the Board of Counsels Chambers from 1997 until the day before his appointment.

Stephen Norrish QC

On 3 October 2000, Stephen Norrish QC was appointed as a judge of the New South Wales District Court. He was admitted as a solicitor in 1974 and worked for two Aboriginal legal services, until coming to the Bar in 1980 as a public defender. He was deputy senior public defender in 1987, when he took silk. In 1988 he became senior counsel assisting the Royal Commission into Aboriginal Deaths in Custody and also conducted a report for the International Commission of Jurists in 1990 on the impact of the criminal justice system upon Aborigines in north-west New South Wales.

He returned to the Bar in 1990 and rapidly became a leading criminal silk, although he only appeared for the defence.

His contribution to the work of the New South Wales Bar Association included being a member of the Bar's Aboriginal Education Committee in 1992, the Criminal Law Sub-Committees in 1993 and chairing the Bar's Legal Aid Committee in 1998, together with long service on a Professional Conduct Committee.

Roderick Howie QC

On 11 October 2000, Roderick Howie QC was appointed as a judge of the Supreme Court of New South Wales. His Honour was admitted as a solicitor in 1974 and went to Hickson, Lakeman & Holcombe. Between 1976 and 1980 he worked in the Public Solicitors Office, before coming to the Bar as a Public Defender in June 1980. In November 1986 he took silk.

Between 1984 and 1987 he was Director of the Criminal Law Review Division, in the NSW Attorney General's Department. During 1987 to 1992 he occupied the post of Deputy Director of Public Prosecutions and in May 1993 he became Crown Advocate, serving in that capacity until 1995. It was during this time that he began his long and dedicated involvement in the drafting of the Model Criminal Code as Chairman of the Model Criminal Code Officers Committee (MCCOC). His Chairmanship has witnessed the completion of the bulk of the Code, which has received widespread recognition in the US, Canada and the United Kingdom.

On 15 May 1996 Howie QC was appointed as a District Court Judge and served as an Acting Judge of the Supreme Court of New South Wales from September to December of 1997.

Michael Finnane QC

On 20 October 2000 Michael Finnane QC was appointed as a judge of the New South Wales District Court. His Honour was admitted to the Bar in February 1969 and took silk in October 1982.

His Honour had a diverse practice. As a silk, he was counsel assisting in many important inquiries such as the Ananda Marga and Kalazich inquiries. He was counsel for the Police Service in the Royal Commission into the NSW Police Service, and he was senior counsel for the Department of Transport in the Special Commission of Inquiry into the Glenbrook rail accident.

He gave his time to many worthy causes. He was involved in the advancement of the Aboriginal community. He provided much assistance to the Bar Association Readers Course and to advocacy training programs in and outside Australia. He was an experienced Army legal officer, retiring with the rank of colonel in 1998 and at that time also holding the appointment of a judge advocate and Defence Force magistrate.

He was an acting judge of the District Court on two occasions, of the Supreme Court on one occasion, and was a member of the Legal Services Division of the Administrative Decisions Tribunal.

APPOINTMENTS

2000 senior counsel appointments



Back row, left to right: Michael Bozic, Robert Goot, Geoffrey Petty, Graeme Little, Justin Gleeson, Peter Berman, Stephen Odgers, Stephen Rushton, Harry Dixon, Jonathan Simpkins, David Hammerschlag. Front row, left to right: Stuart Donaldson, Peter Zahra, John Dailly, Francesco Corsaro, Stephen Epstein, Robin Margo. Absent: Stephen Gageler and Roderick Cordara

On 26 October the President of the New South Wales Bar Association, Ruth McColl S.C., announced the appointment of 19 senior counsel.

The successful applicants for 2000, in order of seniority, are: Geoffrey Petty, John Dailly, Michael Bozic, Robert Goot AM, Stephen Epstein, Graeme

Little, Jonathan Simpkins, Robin Margo, Francesco Corsaro, Stephen Rushton, Stuart Donaldson, Peter Berman, Peter Zahra, Stephen Odgers, Justin Gleeson, Stephen Gageler, David Hammerschlag, Harry Dixon, Roderick Cordara.

Peter Michael Seery 6 February 1933 – 22 October 2000 *By His Honour Judge Peter Dent QC*

Peter Michael Seery was admitted to the New South Wales Bar on 1 July 1967, in fulfilment of a burning ambition to be a barrister. He carried to its ranks great personal qualifications of honesty, integrity and deep compassion for his fellow man.

He was tutored by Ernie Knoblanche QC and by him trained to be a barrister's barrister. He eschewed the fast turnover approach of many of his contemporaries and insisted upon mastering his client's case at the first opportunity and pursuing that case wisely and vigorously, to secure for every client the best result that could be achieved in the circumstances.

Seery avoided specialisation because of his personal belief that counsel should be able to acquit themselves competently in every jurisdiction and with that talent he was of enormous assistance, in particular, to country solicitors and clients on the circuits where he appeared. Once Seery accepted a brief it was rapidly put in order and thereafter it stayed in order until finally disposed of.



Peter Seery

Peter suffered more than his fair share of life's adversities and bore them manfully. When others brought their problems to him, and many did, he counselled them with wisdom and kindness.

Irish-Australian to the core, he was gifted with a splendid sense of humour and a laugh that could be heard blocks away.

He served with distinction as an acting judge of the District Court of New South Wales and as an arbitrator. He retired from active practice in 2000, to be sadly taken

from this life too swiftly thereafter, to the great sorrow of his widow Moira and their children, who's comfort and welfare had been Peter's first priority throughout his life.

Should I in future encounter a child frightened by the sounds of thunder, I will explain that 'It's nothing to worry about, it's only Peter Seery laughing in heaven'. His colleagues in Wentworth, University and Henry Parkes Chambers will understand that well.

FEATURES

The Barristers' Benevolent Association

By a member of Bar Council

Every year there are barristers who encounter personal misfortune or require some form of assistance in order to overcome a problem. At least once a year a barrister or a member of their family suffers a catastrophe.

Sudden deaths, serious illness, accident, refusal of indemnity by an insurer, mental illness, cancers, suicides, HIV/AIDS, alcoholism, families of deceased members who have some need and serious financial misfortune are all problems which have been addressed by the Barristers' Benevolent Association over the last few years.

In each case, the barrister, former barrister or family member has been provided with assistance. The Association can respond to calls for assistance without formality and without delays. There are no formal applications, forms, waiting periods, means tests or other predetermined administrative requirements.

There have been times when assistance has been provided on the same day as information about a problem became known.

The assistance given is generally financial, but it is not limited to money. Arrangements have been made for legal assistance, for independent psychiatric assessment, for negotiating housing, negotiating with banks, preparing financial position statements, or dealing with other aspects of members' financial problems and intervening with creditors where that becomes necessary.

Every aspect of the operation of the Benevolent Association, from the donations made to the Association, notification that a member is in difficulty, or assessing and providing assistance, is an expression of the collegiate nature of the life of a group of independent individuals collectively operating as the Bar.

The Association is generously supported by the Bar and its former members, is active, efficiently run and extremely effective in the assistance it provides.

Background of the Association

The Association was started in about 1936. Because of the state of the records of the early decades of the Bar, it is difficult to precisely identify the circumstances that brought it into existence. The copy of the last printed version of the Rules and Regulations is dated 1939 and refers to amendments of 1938. The Hon. Secretary noted on the document was A B Kerrigan and the Treasurer was A E Rainbow.

The Object of the Association 'is to afford assistance in necessitous and deserving cases' to members and former members of the Bar, their family and other dependents. At the moment, the language of the Objects speak of wives, widows and others determined to be dependents of barristers, but following last year's renovation of the Memorandum and Articles of the Bar Association, a similar renovation is under way with the Barristers' Benevolent Association.

The Committee of Management of the Association consists of the members of the Bar Council. By convention, the President of the Bar Council is the chair of meetings of the Benevolent Association. By decision of the Committee of Management, the five office holders of the Bar Council (President, Senior and Junior Vice-Presidents, Treasurer and Secretary) have delegated to them a power to provide assistance in cases of emergency, should a need arise between scheduled meetings. Situations of that type often arise.

Financial reports of the Association are audited every year, but the funds of the Association are professionally managed. A review of management strategies was conducted last year by the Executive Director and his staff, and as a result a change of investment manager occurred to ensure a lower cost to the Association and a better administrative response to the requirements of the Committee of Management.

Although there have at times been heavy demands on the funds of the Barristers' Benevolent Association, it has steadily grown as a result of the generosity of donors to the Association on the one hand, and successful investment on the other. Contributions from members and former members totalled almost \$60,000 in the year ended 30 June 2000. The fund presently stands at about \$1.9 million. Its accounts are published in the annual report of the Bar Association.

Because the Association is a charitable trust, donations are tax deductible.

Provision of assistance

Information that a member is in difficulty can come from any source. The most common source of information is from barristers who are aware that a floor member is in difficulty. Very often clerks will make contact, but sometimes family members will make an approach, either direct to a member of the Bar Council or Executive Director or through a floor member or clerk. Sometimes, but much less frequently,

the barrister will make a direct approach. Often understandable but unnecessary embarrassment will make members reluctant to seek assistance. Numerous barristers and their families have had assistance of one kind or another from the Benevolent Association.

A telephone call or a letter to the Executive Director or to any member of the Bar Council is all that is needed to start the process and it is treated with the utmost confidentiality. Usually, some member of the Council or the Executive Director makes enquiries on behalf of the Committee of Management to whatever sources are both necessary and authorised by the person seeking assistance. Because the Committee of Management has the duties of a trustee, proper enquiries are made, but privacy, confidentiality and promptness have always been the hallmarks of the Association's activities.

Naturally the first person contacted, where possible, is the one needing assistance. That may be the barrister, a surviving partner, or the children of a barrister or former barrister who is ill or has died.

A first report by the member or Executive Director to the Committee of Management is often oral but, where necessary, documents evidencing the problem are provided or a written report is prepared.

The Fund will provide interest free loans but is reluctant to be treated as a bank or a source of bridging or short term finance. Wherever there is a real need and the Benevolent Association can provide useful help, it will be provided.

Generally, effective assistance can be provided and the Fund is large enough to meet the more urgent problems that can arise. There are some widows of members who have been provided with regular assistance over a prolonged period. Most financial assistance, however, is provided in the form of a lump sum loan or grant rather than ongoing payments.

Assistance has been provided to meet living expenses, funeral expenses and moving costs. Money has been lent to obtain transcript to defend private proceedings and to give assistance to a child of a deceased member who was then able to complete some studies. Money has been advanced to meet debts before the sale of chambers or some other asset and money has been provided for ordinary expenses when a spouse or child has died.

Barristers Hockey Match – New South Wales v Victoria

By Andrew Scotting

The NSW Bar has a long tradition of playing hockey, having fielded a regular team since the late 1950s for the Gordon club and keenly contesting the annual Barristers v Solicitors game. The team has contained many eminent silks and judges, both past and present. Unfortunately, eminence in the law has not always been reflected in skill on the hockey field, but the team has secured a number of premierships and appearances in finals, particularly in recent years.

The team's spirit is renowned, some may say notorious. It is embodied in the members such as our founder The Hon. Justice CLD 'Shagger' Meares and the patron of our team spirit trophy, 'Bunter' Johnson.

On 14 October 2000, the NSW Barristers hockey team travelled to Melbourne to take on the Victorian Bar. Fresh from the annual Solicitors game on 7 October 2000, played in 35°C heat, we were confident, but wary of an opponent that we had not faced since 1989.

We were met by wet, Arctic conditions but the rain cleared for the game itself. Players were left to warm up and mentally prepare for the game in their own way. Worthy of note, Bellanto QC, Ireland QC and Callaghan S.C. enjoyed a bottle of red at a Lygon Street restaurant. On the way to the game, concerns were raised that the Victorians may require urine tests from our players. It was thought that Bellanto QC and Ireland QC would probably return a positive result, but that Callaghan S.C. may not be able to provide a sample.

NSW reached an early lead, as the best-dressed team, resplendent in blue with the Waratah over their hearts. Sadly, it did not take long for the Victorians to establish that they had the younger, fitter players, especially when they failed to field a silk at any time during the game. In response, Larkin and Mallon were our fittest players, who did everything in their power to be everywhere. Mallon, named as on-field captain for the day, was inspirational in command and in attack. Moen was superb in defence and was acknowledged by the Victorians as a force to be reckoned with.

Katzmann S.C., playing in goal, was called on to make a number of quality saves and was certainly equal to the task. A



Left to right: Giagios, Pritchard, Scotting, Mallon, Ireland QC, Moen, Bellanto QC, Callaghan S.C., Larkin, Katzmann S.C., McManamey, Robertson (ring-in), Warburton



Our Silks, left to right: Callaghan S.C., Ireland QC, Bellanto QC, Katzmann S.C.



Mallon laying down the law at half-time warm up.

brilliant save in the early part of the game caused her a nasty injury but she felt no pain as the ball was deflected wide. I understand that the injury now causes considerable disability and someone really should pay for that.

Unfortunately, the Victorians were too strong on the day and we were well beaten, 6-2. Ours was a similar fate to the 1989 team.

A great night in hockey history was celebrated at a dinner hosted by the Victorians, where we managed to exact sweet revenge on the bar tab.

Sunday was spent in recovery, and in transit back to Sydney. On St Kilda Beach, the 2001 Match Committee (Ireland QC, Callaghan S.C., Katzmann S.C. and Scotting) pondered, over a dose of anti-inflammatories and an excellent Sauvignon Blanc, the need for the recruitment of younger, fitter players.

Thanks to our Victorian hosts and in particular to Phillip Burchardt for organising the local content of the game.

Sterling struggle for Shaw Shield

By Paul R Glissan - Captain, Bench and Bar Chess Team

In the advent of the new millennium and the centenary of federation, a sterling struggle for the Terrey Shaw Memorial Shield took place on 17 November 2000 at the Law Society's Lounge and Dining Room. The Shield is the prize for the winner of the annual Bench and Bar v Solicitors chess match, in memory of the late esteemed Terrey Shaw (formerly of Culwulla Chambers), who died in 1997.

The Shield has been a resident of the trophy cabinet in the Bar Common Room since the inception of the match in 1993. This year, however, the task of maintaining its residency there was made herculean by the simultaneous absence from the Bench and Bar team of many of its strongest players. The Hon. Justice J S Purdy of the Family Court of Australia (multiple former Australian Chess Champion) was on circuit in Queensland. Tim Reilly (Observer of the Australian Chess Team at the recent International Chess Olympiad in Istanbul) was still overseas. Ben Ingram had a professional commitment. Steven Rares S.C. was celebrating Ellicott QC's magnificent half century at the Bar. Michael Hall was recuperating from his final submissions on behalf of John Marsden. Bullfry QC, having had too many doubles, was attempting to take advantage of the cab-rank rule at the taxi rank opposite the Law Courts.

On the other hand, the Solicitors were strengthened by the recent return from London of their former Captain Malcolm Stephens (one of Australia's strongest players), who drew with Shaw in his last game, on board one, in the Bar Common Room in 1996. Indeed, so strong were the Solicitors this year that their current Captain, the aptly named Adrian Chek (who has defeated Australia's second strongest player, Grand Master Darryl Johansen), was playing on board three.

This year's match was played on 13 boards, arranged in order of descending strength according to current ratings or recent performance, with a limit of one hour per player to complete the game. A thrilling struggle ensued.

Bob Colquhoun (former Australian Chess Federation President) got the Bench and Bar off to a good start with a win on board seven. The Solicitors then drew ahead with wins on boards 12 and 13. The Bench and Bar then won on boards six, eight, nine, 10 and 11, but lost on boards two and four. In the opinion of Director of Play, Morris Needleman, Ken Pryde, with the white pieces on board one, 'never quite equalised' against Stephens, and eventually lost his first game against the Solicitors in the history of the match, in a classic pawn ending. With minutes remaining on his clock, Malcolm Broun QC judiciously agreed to a draw on board five, resulting in an unlosable lead of 6½ - 5½ in favour of the Bench and Bar, but with one game remaining, on board three.

Could the Bench and Bar win? Horst Bleicher had been recruited from retirement from practice at the Bar to play on board three. With two or three minutes remaining on his and Chek's clocks, his position looked equal, if not slightly superior. Everybody clustered around to watch the unfolding drama. Not realising the score, Chek (as he revealed later) mulled over the possibility of offering a draw, which would have resulted in a win for the Bench and Bar by 7 - 6. But he played on. Then a truly 'Hickory Dickory' thing happened. Without



Glissan and Chek with the Shaw Shield.

human intervention, Chek's clock suddenly retreated 20 minutes. Nobody saw it happen. Nobody can explain how it happened. Nobody has ever seen it happen before. Bleicher pointed out that Chek's flag appeared to have fallen. Because of the clock malfunction, the Director of Play stopped the game, removed the erratic clock, replaced it with another (after resetting it to the times displayed on the original clock before its malfunction) and restarted the game.

The atmosphere was now akin to that during the bowling of the last ball of the last over in the famous tied test against the West Indies, 40 years ago. Everybody was rivetted by the rapid progress of the pieces, as the remaining seconds ticked away. Then chess's equivalent to a cricket run-out happened - Bleicher's flag fell. Chek had won on time, and the match was tied 6½ - 6½! Silver cups were presented to both Chek and Bleicher for their sterling game. Copious quantities of red were consumed to restore everybody's nervous equilibrium.

The consensus is that this was the best match yet played. Unlike the Bledisloe Cup, the Shield will spend six months with the Solicitors and six months back in the trophy cabinet in the Bar Common Room.

In this Olympic year, it is appropriate to recall that Terrey Shaw represented Australia in no less than nine consecutive International Chess Olympiads, from 1968 to 1984, and won the gold medal for the best percentage score on board six in Yugoslavia in 1972. He was an International Chess Master, and was an authoritative, entertaining and widely read Chess Writer for the Sydney Morning Herald and The Bulletin magazine for many years.

In the 1993 *Bar News* Shaw, with characteristic modesty, wrote: 'The handsome perpetual shield ... is now on display in the common room trophy cabinet. Have a look at it quickly, as we may not be able to hang onto it next year.'

In true gladiatorial spirit, the Bench and Bar have not yet relinquished their grip on the Shield, which is pictured in the hands of both Team Captains in the Bar Common Room following this year's match.

Congratulations are due to the Solicitors for sharing the Shield this year.

Edmund Barton: 'The one man for the job'

By Geoffrey Bolton AO
Allen & Unwin, 2000

Sir Edmund Barton's entry in the index to Crisp's *Parliamentary Government of the Commonwealth of Australia*¹ reads '1849-1920; (A, B, D, F, G, H, J, K)'. The letters A-K are used as a shorthand description of the principal offices attained, and mean in this case that Barton was a member of both New South Wales and Commonwealth Parliaments, a New South Wales minister, a Commonwealth cabinet member and prime minister, a justice of the High Court, and a member of the first and second national federal conventions of 1891 and 1897-8.

No other person in that index of distinguished Australians achieved so many offices. Even then, Barton's importance is understated. Barton was no ordinary delegate to the 1891 convention, but a member (with Griffith and Kingston) of the informal but enormously influential working party on the Lucinda in 1891, which first drafted the document which became the Australian Constitution. He played a key role at both conventions in securing the acceptance of the crucial compromise that became s53, qualifying the Senate's power to deal with money bills.² Without this, the entire federation movement could easily have foundered through lack of agreement between large and small colonies. As a New South Wales politician, he was the attorney general who introduced legislation for universal male suffrage and single member seats, and the acting premier during the Broken Hill miners strike in 1892 who refused the employers' demands to send in military forces. While the federation movement was becalmed in the mid 1890s, he spent much time cultivating and encouraging what would now be called 'grass-roots' organisations supportive of federation. He was the most popular of all the elected delegates to the second federal convention of 1897-8, and was elected its leader as well as chair of its Constitutional Committee and convener of its Drafting Committee. And his role (in part clandestine) between 1897 and 1900 in obtaining a Constitution which was acceptable, both to the Australian colonies and the Colonial Office, was vital. More than any other single individual, Barton caused the Australian colonies to federate.

Yet it seems that in large measure Barton's considerable intellectual gifts (he was dux of his school and obtained a First in Classics and a special prize from Sydney University) were squandered. He became known as an indolent epicure, a man who preferred to spend long hours in the Athenaeum Club rather than in Parliament or his chambers or with his family. His career at the Bar was not a great success. His nickname 'Tosspot Toby' stuck, and his physique, too, approached that of Sir Toby Belch from an early age.

Barton's story is described sympathetically and enthusiastically by Emeritus Professor Bolton, whose clear

prose shows an obvious familiarity with most of the available primary materials, but without the constrictions of complete scholarly apparatus. There are points of interest and insight on most pages.

Strangely, no mention is made of Martha Rutledge's slim monograph on Barton,³ which discloses the irony that the man who, more than any other, was responsible for the drafting of the Commonwealth Constitution, failed in his application as a young barrister in 1874 to become parliamentary draftsman in New South Wales.⁴

Inevitably, Bolton focuses on the political aspects of his subject's career. A legal biographer might have given more prominence to Barton's experiences with the Privy Council, which culminated, of course, in his successful brokering of the compromise in 1900 with the Colonial Office whereby the High Court was the final court of appeal in relation to *inter se* appeals, but the Privy Council's position was otherwise preserved. As a barrister, Barton never appeared in the Privy Council, although much later he sat on some commercial appeals.⁵ However, as a litigant, Barton himself brought appeals to the Privy Council twice. His first encounter occurred during his four year tenure as speaker of the Legislative Assembly (the only years during which his attendance in the chamber was other than desultory), when he had suspended the notorious journalist Adolphus Taylor for a week for disruptive behaviour. After a second suspension (for re-entering the chamber before the first suspension had expired), Taylor commenced proceedings for assault against Barton, and demurred to Barton's defence on the basis that the Standing Orders pursuant to which he had acted (which adopted those in force from time to time at Westminster) were invalid and moreover that the chamber's only inherent power was to suspend for a single sitting. The Supreme Court of New South Wales agreed and Barton's appeal (on behalf of the chamber) to the Privy Council was dismissed.⁶ There is not a trace of bitterness in his reasons when the same issue came before him as a justice of the High Court (in this case, the member's disorderliness lay in the failure to uncover his head and make obeisance to the chair when leaving the chamber).⁷ The powers of the New South Wales chambers have not to this day been entirely defined, although the facts on which such issues are now presented are of more moment than a century ago.⁸

Bolton's account of the above is short and non-legal (which is no criticism). He also provides a sympathetic and probably over-generous portrayal of Barton's other appeal to the Privy Council. Barton's father had speculated in land and, by 1874, had mortgaged the entirety of his holdings to the Bank of New South Wales, which took possession. In December 1884, the Full Court of the Supreme Court of New South Wales held that the bank lacked a power of foreclosing. Immediately thereafter, Barton commenced proceedings on behalf of his father's estate seeking to redeem the old mortgage and regain lands which, by this time, had dramatically increased in value on account of Sydney's growth, relying on the Full Court decision. His success at first instance was short-lived: the Privy Council,

not unpredictably, allowed an appeal from the original decision,⁹ after which the bank's success on appeal against Barton, and Barton's failure on subsequent appeal to the Privy Council,¹⁰ were equally certain. Bolton describes the episode as ill-fortune, but it is hard not to agree with the Full Court's assessment of Barton's litigation: 'This suit had its origins solely in, and was never contemplated until, [the earlier Full Court] decision'.¹¹

No doubt Barton's lack of success as a party to litigation before the Privy Council moulded his desire - not satisfied until 1986 - to establish the High Court as the ultimate Australian appellate court.

Barton's subsequent impecuniosity in the mid 1890s was solved in a way which enabled him to participate in the second federal convention. The 'workaholic' silk Charles Gilbert Heydon - described in the *Australian Dictionary of Biography* as 'the most inveterate worker that ever wore a wig' - accepted the task of reviewing the whole of New South Wales statute law for repeal, consolidation and simplification, and turned away a railway arbitration over which Barton was then asked to preside. The arbitration lasted 323 hearing days, but with adjournments whenever the convention was sitting (Barton's great friend and fellow delegate Richard O'Connor who was appearing before him was similarly advantaged by this arrangement).

It was at the second convention that Barton's skills both as chair and on the Drafting Committee were most needed. In addition to pushing through debate on the hundreds of amendments which the colonial legislatures had proposed, he, together with Reid, caused to be incorporated amendments prompted by secret memoranda which Reid had received from the Colonial Office when he had visited London to participate in the Jubilee celebrations.⁷ For example, the Colonial Office required the removal of references to 'treaties made by the Commonwealth', because the Commonwealth was not contemplated to be a sovereign entity; accordingly, Barton had moved this amendment in the Legislative Council, and Barton and Reid put the argument for the deletion, successfully, in the convention. On less important matters, amendments were inserted by Barton's Drafting Committee without debate. Many more of the proposed amendments were pedantic, and were ignored by Barton, who in relation to one wrote 'This is a Constitution, not a Dog Act'.

In Bolton's book, one will read little of Barton's 16 years of service on the High Court, the judgments from this period being covered in fewer than 10 pages within a short concluding chapter (although even this slight coverage is far superior to all alternative accounts). Nonetheless, the conventional implied criticism that he failed to dissent from Griffith CJ in the first eight years of the Court's existence is repeated; one asks why is it necessarily a bad thing for an appellate court to be in agreement? Together with Griffith and O'Connor, he introduced underlying doctrines from United States constitutional law into Australian constitutional jurisprudence (see eg *D'Emden v Pedder*¹³ and *Duncan v State of Queensland*¹⁴), an approach in part eschewed by the majority of the court shortly after his

death in *Engineers*.¹⁵ But many United States doctrines remained unquestioned. In particular, Australia did not need a chief justice of the legal and political skill of John Marshall to establish the applicability of the principles in *Marbury v Madison* - more important than the early decisions of the High Court in this regard was the work undertaken by Barton and others in the preceding decade.

In private law, Barton J's judgments continue to carry weight. In *Perpetual Executors and Trustees Association of Australia Ltd v Wright* he showed how the presumption of advancement may be rebutted when a transfer of property is made in an illegal attempt to defraud creditors, that illegal purpose not having been carried into effect.¹⁶ His analysis was cited with approval by the English Court of Appeal in *Tribe v Tribe*,¹⁷ and remains authoritative in Australia, notwithstanding *Nelson v Nelson*.¹⁸

As a political biography, the work is lucid, fascinating and first-rate, and benefits from more thorough research (partly from sources not previously available) than that used by earlier biographers. It will become the standard work. Although there are some shortcomings in Bolton's treatment of Barton's contribution to the law, it does not purport to be a legal biography, and doubtless it is churlish to criticise the book on this ground in the absence of legal biographies of Australian judges of far greater significance.¹⁹

Reviewed by Mark Leeming

- 1 Longmans, Green & Co (London), 1954 2nd ed.
- 2 For the origins of this clause, see Leeming, 'Something that will appeal to the people at the hustings: Paragraph 3 of section 53 of the Constitution' (1995) 6 PLR 131 and Schoff, 'Charge or burden on the people: Third paragraph s53 of the Constitution' (1996) 24 *Fed L Rev* 43.
- 3 *Edmund Barton*, Oxford University Press (Melbourne), 1974.
- 4 Barton made application on 23 November 1874, and wrote further letters dated 7 December 1874 and 11 March 1875 (personal communication, Mr Dennis Murphy QC, Parliamentary Counsel).
- 5 Including *The Odessa* [1916] 1 AC 145 and *The Roumanian* [1916] 1 AC 124.
- 6 *Taylor v Barton* (1884) 6 NSWLR 1; *Barton v Taylor* (1886) 11 App Cas 197.
- 7 *Willis and Christie v Perry* (1912) 13 CLR 592.
- 8 See *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.
- 9 *Bank of New South Wales v Campbell* (1886) 11 App Cas 192. (1890) 15 App Cas 379.
- 10 By coincidence, Taylor's and the Bank's successes are reported on consecutive pages of the Appeal Cases, and the Solicitor-General, Sir Horace, later Lord, Davey appeared for the appellant on both occasions.
- 11 This was first pointed out by de Garis and La Nauze: B K de Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in Martin, *Essays in Australian Federation* (Melbourne University Press, 1969), pp94-121; La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), pp172-221.
- 12 (1904) 1 CLR 91.
- 13 (1916) 22 CLR 556.
- 14 (1920) 28 CLR 129 esp at 146.
- 15 (1917) 23 CLR 185.
- 16 [1996] Ch 107.
- 17 (1995) 184 CLR 538.
- 18 Notably, Sir Owen Dixon. Grant Anderson's excellent but unpublished monograph (1991) on Dixon (from which was derived his ADB entry) demonstrates how informative such a biography would be.

Human Rights in International and Australian Law

By Ryszard Piotrowicz and Stuart Kaye
Sydney, Butterworths, 2000

At the time of writing this review, the Senate was undertaking an inquiry into the whether the *Sex Discrimination Act 1984* (Cth) should be amended in order to allow for the lawful discrimination against women on the basis of their marital status in respect of access to artificial reproductive technology (for example, in-vitro fertilisation). Such an amendment is clearly contrary to the objectives of the Act.¹ If passed, it will arguably put Australia in breach of its international human rights obligations.² That it could even be contemplated today, sixteen years after the legislation was passed, is remarkable and nicely illustrates the tension between the place of human rights in an international as opposed to domestic context. While the book touches upon this issue, it fails ultimately to adequately explore it, notwithstanding its title and its target audience.

The book purports to be designed for students and to this end it is accessible and general enough in its scope to give, as Professor Ivan Shearer AM aptly described in the Foreword, 'the shape of the woods' without descending into the often tangled thicket of human rights. Accordingly, for those practitioners for whom human rights law is not their area of speciality, this book provides a good introduction to the various international and local instruments governing this field of law and the framework within which they operate.

The book is divided into three parts and contains an excellent set of reference tables (to cases, statutes, conventions and other relevant instruments) together with a well-constructed index. Part I of the book gives a broad but solid overview of the nature and origin of human rights law and the measures that comprise international human rights, including their enforcement. Of particular interest is Part II, which is devoted to international humanitarian law, an often overlooked but nonetheless important part of human rights law. For as the authors emphasise, it is precisely in times of conflict and war that adherence to human rights becomes of critical importance. Part III deals with human rights in an Australian context and examines the means by which Australia fulfils its international human rights obligations within the limitations imposed by the Constitution and also examines the various legislative mechanisms for the protection of human rights at a local level.

It is, however, in this latter section where the book disappoints. Put simply, much more time and detail ought to have been allocated to examining the treatment of human rights within Australia. As it stands, the title is somewhat misleading when a little under a third of the text is devoted to this topic (for example, discussion of the *Sex Discrimination Act* is limited to less than one

page). Consequently, only the most limited discussion of the importance of administrative law as a bulwark against human rights violations occurs and scant, if any, reference is made to Commonwealth and State industrial relations legislation which have done much to protect human rights in the sphere of employment.

Equally lacking is any real analysis of Australia's attempt to implement its international human rights obligations at a national level. In the current atmosphere of mandatory sentencing and the attempted abrogation of women's human rights under the *Sex Discrimination Act*, this is a critical omission. While it is acknowledged that the stated aim of the authors was not to provide a single comprehensive guide to human rights within Australia, in order to provide anything other than the most cursory coverage of such rights more material is required. In sacrificing detail the authors have equally sacrificed any meaningful articulation of the tension between Australia's human rights obligations abroad and the political reality of their implementation and enforcement at home. A tension which must be appreciated by practitioners and students of human rights alike and which, as recent events have demonstrated, is far from resolved.

Reviewed by Rachel Pepper

- 1 See s3(b) of the *Sex Discrimination Act 1984* (Cth).
- 2 Articles 2 and 26 respectively of the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women.

Agency Law

By Simon Fisher
Butterworths 2000

The stated aim of *Agency Law* is to present a modern and up-to-date account of agency law, written specifically for an Australian audience, drawing primarily (but not exclusively) on Australian authority. That said, the book necessarily draws heavily on English case law and commentary from *Bowstead & Reynolds on Agency*.

The book is easy to read and understand, as the author has gone to the trouble of assuming that the reader may be one that is not knowledgeable as to basic concepts.

The book is divided into six parts and twelve chapters. Parts one and two of *Agency Law* contain repetition of some matters and a dispersal of topics, which may have been more conveniently covered in one area. The index is useful in attempting to locate material. This allows a practitioner (as is our want) to dip in and out of the book, safe in the knowledge that all the relevant material has been located.

However, there was one example where the index did not lead to the Promised Land. A direction led the

user to paragraph 4.1.1 for the meaning of ‘constructive authority’. The label was not familiar, and I was eager to learn more. When I located the correct paragraph the author, rather disappointingly, states that ‘constructive authority’ is more commonly known as ‘ostensible’ or ‘apparent authority’, and he also groups agency by ratification under this so-called authority. The wisdom of introducing yet another label for a well understood concept escapes me, particularly when the author otherwise continues to use the common labels.

The author deals with the subject of agents as fiduciaries in, rather confusingly, two separate places. Firstly under the heading of ‘The points of similarity between bailment and agency’, and then in the chapter headed ‘Duties of the agent to the principal’. The subject of the existence and scope of the fiduciary duties is covered too briefly.

Further, the book deals too briefly with Crown agents and the subject the principal’s vicarious liability for the action of its agent. As McHugh J recently commented, vicarious liability is an important area of the law, which is evolving under circumstances where the contracting out of work has become commonplace. The High Court decision in *Travis Kane Scott v Geoffrey Arthur Davis* [2000] HCA 52 (5 October 2000) is an extremely good read for those who wish to explore the current thinking of the High Court on vicarious liability and the history and development of agency principles with respect to owners and drivers of motor vehicles.

On balance, this book fulfils its purpose to provide a book within ‘a moderate compass, avoiding the intricacies of detail that tend to obscure’. It is a useful addition to a practitioner’s library on the law of agency in Australia.

Reviewed by Sheila Kaur-Bains

Outline of Succession (2nd Edition)

By Ken Mackie and Mark Burton
Butterworths Australia 2000

According to its preface, *Outline of Succession* is intended as an introduction to the law of succession aimed primarily at the undergraduate law student embarking upon the subject for the first time.

As its title suggests, *Outline of Succession* is not, and does not purport to be, an exhaustive analysis of succession law. It seeks rather to provide a general overview of the basic features of the legislation and case law in each of the Australian jurisdictions.

The book is wide in its scope, seeking to deal with the laws of succession in each of the Australian jurisdictions. As the authors themselves point out more than once in the book, the absence of uniformity across the Australian jurisdictions renders it impossible in a

work of this size to canvass in any detail the legislative provisions and case law of each of the states. The reader is frequently advised to consider for him or herself the specific legislation of interest or to refer to other texts in the area. Such an approach is unlikely to find favour with students who, due to limited time and resources, would be inclined to prefer a text which could be used as a ‘stand alone’ reference. Without consulting the legislation itself or the various other texts referred to, it is unlikely that a student reading this book alone would be capable of answering the questions which appear at the end of each chapter.

Whilst the authors generally do identify the key cases in each area, there is on the whole scant reference to Australian authority, with most references being to English decisions. Peculiarly, where the legislation of each of the Australian jurisdictions resembles the United Kingdom *Wills Act 1837*, the provisions of that Act are cited in preference to those of any of the Australian jurisdictions.

Whilst the book is written in a readily understandable style, there is excessive use of somewhat simplistic ‘Samuel is the owner of a property called ‘Redacre’ type illustrations. Explanation by reference to the facts of reported cases may have been more instructive.

For practitioners, *Outline of Succession* provides at best a starting point for research. It must be said that the book does not profess to be of more than occasional use to practitioners. This is particularly the case for practitioners in New South Wales, as many of the more difficult and commonly encountered areas of the law of succession in this state are glossed over in the book. For example, in Chapter 9 ‘Distribution on Intestacy’, only passing reference is made to s61D of the *Wills Probate and Administration Act 1898*, pursuant to which a surviving spouse has a right to acquire the appropriation of the matrimonial home.

The discussion in Chapter 10 ‘Family Provision’, in relation to the matters to be considered by the court in the exercise of its discretion as to what provision, if any, ought to be made in favour of an applicant is of such brevity and superficiality that it would offer no real assistance to a practitioner considering whether such an application would be likely to succeed. The complicated provisions in Division 2 of Part II of the *Family Provision Act 1982* relating to notional estate are given only cursory attention. Typically of the book as a whole, the chapter offers little in the way of guidance as to procedural matters.

In summary, *Outline of Succession* is unlikely to be of great assistance to practitioners. It may, however, provide a useful overview of the laws of succession for students.

Reviewed by Elizabeth Frizell

Invalidation of Securities upon Insolvency

By G Hamilton

The Federation Press, 2000

This book is part of the *Australian Legal Monographs*, a series of short legal treatises, the stated intention of which is to provide an avenue for publication of scholarly works which might otherwise not be available because of their brevity and narrow subject matter.

The author is a well-known insolvency practitioner. The treatise originally comprised the dissertation component of an SJD (Doctor of Juridical Science) completed by the author at the Queensland University of Technology. The focus of the book is the various legislative provisions which operate to invalidate securities granted in favour of individuals or companies who later become insolvent.

The book provides a good analysis of the relevant legislative provisions under the Corporations Law and the *Bankruptcy Act 1966* (Cth) both current and prior to recent amendments (see the *Corporation Law Reform Act 1992* (Cth), and the *Bankruptcy Legislation Amendment Act 1996* (Cth)). The general layout of the book is good, the table of contents is clear and the subject heading references provide a useful guide throughout the text.

The author examines in detail many of the difficult issues of statutory construction and the practical legal consequences of invalidation provisions. This involves a detailed analysis of the relevant statutory provisions, and highlighting gaps and apparent anomalies in the legislation.

Some of the questions raised by the author in respect of the Corporations Law, might be considered to have been determined by earlier authority. For example, at pages 38 – 39 the author refers to the statement by Burley J in *Olifent v Australian Wine Industries Pty Ltd* (1996) 14 ACLC 510 at 516, that the former case law did not offer any assistance on the question of whether under s588FA(3) of the Corporations Law a liquidator is entitled to choose any point during the six month preference period in his endeavour to show that, from that point on, there was a preference payment.

However, this issue had been settled under the earlier companies legislation by Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR 210 at 221, where it was held that the liquidator can choose any point during the statutory period, including the point of peak indebtedness, as the point from which there was a preferential payment. To the extent that choosing the point of peak indebtedness involves a degree of arbitrariness (particularly where there is a 'running account' between the debtor and creditor), then the connection between the alleged preferential payments and dealings prior to the chosen date are not to be

ignored. It is appropriate to have regard to the substance and reality of the debtor/creditor relationship, to choose a period which is a realistic unity (see *M & R Jones Shopfitting Co Pty Ltd (in liq) v National Bank of Australasia Ltd* (1983) 7 ACLR 445 per Wootten J; and *Hamilton v Commonwealth Bank of Australia* (1992) 9 ACSR 90 at 110 per Hodgson J (as he then was)).

There is a very good analysis of the question whether the various statutory provisions under the law which invalidate securities as against a liquidator, administrator of the company, or the Deed's administrator, have any application where the property the subject of the security is realised by the creditor prior to the appointment of the liquidator or administrator of the company.

The authorities in relation to earlier companies legislation, suggested that avoidance of the security upon insolvency, for example, for non-registration (see now s266 of the Corporations Law), or in respect of a floating charge (see now s566 and s588FJ), had no effect on the secured creditor to the extent that he or she had realised his or her security or otherwise obtained payment before the commencement of the insolvency proceeding which rendered the security vulnerable. This was because the security had already been satisfied and there was nothing for the secured creditor to enforce, and the invalidation of the security interest was not retrospective (see *Re Row Dal Construction Pty Ltd* (1996) VR 249; *Mace Builders (Glasgow) Ltd v Lunn* [1987] Ch 191). The author suggests that some of the current invalidating statutory provisions may now have retrospective effect (namely, ss267, 566 and 588FF of the Corporations Law), whilst noting the introduction of s588FJ(6) to reverse the effect of *Mace Builders* in respect of floating charges. The author provides a very useful and insightful analysis of the question of retrospective invalidity, an issue not often considered by other commentators.

Although the book is a specialised work, it is a useful contribution to the legal analysis of the vulnerability of securities upon insolvency. This will always be a topical area.

Reviewed by Fabian Gleeson