



## President's Column

### Commonwealth Briefs and GST

Shortly before 30 June many counsel received letters from the Australian Government Solicitor's Office and the Office of the Commonwealth Director of Public Prosecutions advising that for counsel receiving Commonwealth briefs, the approved increase in fees was 8.5 per cent.

The Bar Association made both verbal and written representations to the Commonwealth to have the figure increased to 10 per cent, reflecting the full impact of the GST. It was apparent from discussions with Commonwealth representatives that the 8.5 per cent was not based on any assessment of whether the New Tax System led to actual savings for barristers. Rather, the portion of GST which counsel was expected to bear, if only permitted to raise fees by 8.5 per cent, was the product of an unpublished econometric model concerning the impact of the tax reforms on service businesses generally.

The Association submitted a cost-variation template to the Australian Government Solicitor, indicating the level of costs of an average barrister practising at the junior Bar. The effects of The New Tax System, including reduced indirect taxes and increased compliance costs, were factored in. It demonstrated that while minimal savings on printing and stationery, telephone expenses and bank charges are expected, accountancy fees would double, thus leading to a net increase of total expenses.

It demonstrated that the New Tax System imposed entirely additional costs, with no benefit besides compliance. Generally, it requires new accounting methods so that barristers may return and pay GST, as well as comply with the new, more onerous PAYG reporting standards.

The inevitable conclusion was there was no basis for reducing the pre-GST component of barristers' fees. To recoup the burden of GST and match the input tax credit which the Australian Government Solicitor and its clients were able to claim, barristers' fees should rise by 10 per cent from 1 July.



Ruth McColl S.C., President.

The Victorian Bar also made a submission to the Australian Government Solicitor. Using a detailed analysis of the typical expenditure of Victorian barristers, it demonstrated that they should be permitted to increase their fees by the full 10 per cent.

The Commonwealth Attorney-General's Office has now advised that, after consultation with the ACCC, the Attorney-General has agreed that counsel's fees, as at 30 June 2000, may be increased by 9.5 per cent (rounded down to the nearest \$5). Where counsel had an approved Commonwealth rate set on or before 30 June 2000, that rate has now been increased by 9.5 per cent (rounded down to the nearest \$5) effective from 1 July 2000.

It might be noted that 9.5 per cent is the figure the ACCC recently included on its web site as estimating the effect of the New Tax System on the price of legal services. That figure which, again, appears to be based on an estimate of cost savings rather than an actual analysis of a barrister's typical costs, estimated the price of legal services would fall by 0.5 per cent in line with the cost savings said to be achieved

in providing these services. The sort of areas given as illustrating where legal service providers would make indirect savings were those currently attracting WST or fuel excises such as 'diesel, electronic equipment, printed matter such as advertising, telecommunication services and radio and television station service'. Any barrister who has noticed reductions in expenditure flowing from their usage of any of these items will no doubt recognise the wisdom of the 9.5 per cent figure.

Those who take the view that such items do not figure large in their income/expenditure statements will no doubt be comforted by the original advice from the AGS that:

...if you consider your fees should increase by a figure greater than 8.5 per cent [for which you should presumably now read 9.5 per cent] you should provide a submission setting out your justification for an increased percentage [which] should be in accordance with the ACCC's Price Exploitation Guidelines which you can find at: <http://gst.accc.gov.au>.

The result is that AGS brief fees are now marked as *inclusive* of 9.5 per cent for GST. The decision to uplift the figure from 8.5 per cent to 9.5 per cent appears to have been taken by accepting the ACCC's figures, without any critical analysis of the submissions by either the New South Wales or Victorian Bar Associations, showing *no* appreciable savings and concluding the figure should be 10 per cent. Considering this Association was not consulted by the ACCC in producing the model figures set out on its web-site, it might have been thought it would appreciate some input from the coal-face when a specific question about possible savings for lawyers from the New Tax System arose!

In the meantime, I wish anyone going in to bat for that elusive 0.5 per cent all the best!

*Continued on page 12*

# Bar Council business for June

Any member interested in a particular matter should contact either the relevant member of Council of the Executive Director for further information.

## President's Report

### Victorian Bar Dinner, 3 June 2000; NSW Magistrates Dinner, 1 June 2000

The President advised that she had represented the Association at the Victorian Bar's and the NSW magistrates' annual dinners.

### Coup in Fiji

The President advised that she asked the Law Council and Australian Bar Association to issue a media release decrying the threat to the rule of law in Fiji.

### Federal Court Rules conference, 20 May 2000

The President had participated in this conference, which was aimed at there being greater uniformity in court rules across Australia.

### Meeting with Indian Attorney General on 25 May 2000

The President advised that the Indian Attorney General, Mr Soli Sorabjee met with a number of members of the Bar Council and other members of the Bar Association, including the NSW Attorney General. The Indian Attorney General had presented the Bar Association with a copy of his country's Constitution.

### Meeting with Special Minister of State, The Hon. John Della Bosca MLC concerning Workers Compensation legislation on 8 June 2000

The President advised that she and the Executive Director had met with Special Minister of State Della Bosca to discuss the Government's review of the Workers Compensation legislation.

### Regional Conference 10-11 June 2000 - Evidence: Recent Developments and Evidentiary Issues

The President advised that the Regional Conference had been successful; 42 barristers and solicitors had attended. She thanked the Education Manager and her staff for their work in arranging the conference.

### Professional indemnity insurance

The President advised that the very large increases in PII premiums were of concern. The insurers have advised that the increases are necessary because they have been paying \$2.50 in administrative and claim costs for each \$1 of premium income. The brokers have stated that only two insurers are prepared to provide insurance for NSW barristers. Some members had

received quotes for cover as high as \$45,000. The premiums being quoted by the two insurers were similar, although there was considerable inconsistency between quotations received by members with a similar claims history.

The President had appointed a Professional Indemnity Insurance Committee comprising Meagher S.C. (chair), Garling S.C., Allsop S.C., Hutley S.C. and Michael Ball of Allen, Allen & Hemsley, the Association's PII adviser, to consider what might be done (if anything) to alleviate the problems of this year, and to advise what might be done to try and ensure similar problems do not arise in the future. The Committee had a wide-ranging brief. The Committee would consider issues such as the Association appointing its own PII broker; barristers joining the Law Society's LawCover scheme; and the exclusion of professional conduct costs from the approved policies.

The Committee met on 5 June with the Sydney representatives of AON and Heath Lambert. It is also to meet with AON's Melbourne-based national co-ordinator for barristers' PII.

### Chester Porter QC - Honorary Life Membership

The President advised that Chester Porter QC, who was admitted to practise on 12 March 1948, was retiring on 30 June.

Bar Council resolved that Porter QC to be made a Life Member for his exceptional service to the Bar Association and the profession of law.

### Senior Counsel Selection Committee for 2000

Bar Council resolved the Senior Counsel selection committee for 2000 comprise the President, McColl S.C.; Senior Vice President, Walker S.C.; Wheelahan QC, (chair of the Common Law Committee); Game S.C. (Chair of the Criminal Law Committee) and John West QC.

## Items for consideration

### Proposed new lease between the Bar Association and Blocus Pty Ltd, trading as Table Matters

Bar Council resolved to approve the proposed new lease between the Bar Association and Blocus Pty Ltd that had been drafted by Back Schwartz & Vaughan, subject to the legal requirements for a lease of less than five years being effected; Slattery QC to settle the lease.

### Refund of fees for major social events and seminars - handling charge

Bar Council resolved that a handling charge of 10 per cent be imposed where a member sought a refund for an event, such

as the Bench and Bar Dinner and the Regional Conference to defray the administrative costs that would otherwise be borne by other members.

### Letter to the President from the NSW Attorney General dated 6 June 2000 concerning a proposed increase in court fees to take effect on 1 July 2000

Bar Council resolved that while the increases were probably inevitable, the President reaffirm the Association's opposition to the high level of court fees.

### Barrister's Superannuation Fund - amendment of Trust Deed

Bar Council endorsed Harrison S.C. and Slattery QC executing the Deed of Amendment.

### 'A Strategy to Assist Indigenous Lawyers to Practise at the New South Wales Bar' - a strategy proposed by the Equal Opportunity Committee

Bar Council resolved to:

- (a) adopt in principle the scheme described in the memorandum to assist indigenous lawyers to practise at the NSW Bar;
- (b) authorise the Equal Opportunity Committee to implement the scheme with a view to it being available to assist indigenous lawyers to come to the Bar commencing in the first Readers' Course of 2001.
- (c) authorise the President and the Executive to approve the final detail of the scheme after necessary consultations take place with third parties, with a view to the scheme being launched by the Bar in October 2000.

Bar Council expressed its appreciation to Slattery QC for his work in developing the scheme.

### Memorandum to Bar Council from Chair, Mediation Committee and the Chair, Arbitration Committee dated 1 June 2000 concerning NSW Bar Association Panel of Mediators, Arbitrators and Early Neutral Evaluators

Bar Council noted that the Association's panels of mediators, arbitrators and early neutral evaluators expire on 30 June 2000.

Bar Council resolved to extend the existing panels of mediators, arbitrators and early neutral evaluators until the end of October 2000 to enable the Association's timetable to be brought into line with the Supreme Court's timetable.

It was further resolved that the Chairs of the Mediation and Arbitration Committees respectively be requested to bring to the Bar Council proposed new criteria for the

## Bar Council business *Continued from page 2*

selection of arbitrators, mediators and early neutral evaluators.

### **Memorandum from Slattery QC to Bar Council dated 8 June 2000 concerning the Bar and the Olympics; memorandum to the Executive from Slattery QC dated 7 March 2000 concerning the Bar and the Olympics**

Bar Council resolved to approve the proposed scheme to provide pro bono representation for athletes appearing before the Court of Arbitration for Sport during the Sydney Olympics. A list of possible participants is to be compiled in consultation with Holmes QC; the Committee to determine how to select the most appropriately qualified people from among the volunteers.

It was further resolved that the Committee consider whether pro bono representation should be offered in areas apart from the Court of Arbitration for Sport, and if so, how this might be managed.

### **Other business**

#### **Rendering memoranda of fees on clients rather than solicitors**

Bar Council noted that solicitors were writing to barristers asking that as of 1 July they issue their memoranda of fees addressed to the client, rather than the solicitor. This procedure is said to be to ensure that the client obtains the input tax credit where appropriate, and to avoid unnecessarily and costly duplication of claims.

The Executive Director advised that he was compiling with the Law Society a list of possible problems the introduction of the GST may cause in the working relationship between barristers and solicitors. These matters would be referred to Gzell QC, chair of the GST Committee, for the Committee's consideration.

Note: because of the confidentiality provisions in the *Legal Profession Act 1987* (s171P), the Bar Council's deliberations on professional conduct matters cannot be noted in these summaries.

Matters discussed by the Bar Council reported elsewhere in *Bar Brief*, too, are omitted from these summaries.

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## Human Rights Law Award 2000

The important contribution made by Australia's lawyers to the promotion of human rights is celebrated every year on Human Rights Day, 10 December, with special Award by the Human Rights and Equal Opportunity Commission (HREOC).

The Law Council is proud to sponsor the Award, begun in 1999, which recognises this vital area of legal work. Last year the Human Rights Law Award was won by the Public Interest Advocacy Centre in recognition of the assistance it provides to disadvantaged groups in the community.

The Commission also awards the Human Rights Medal annually to an individual who has made an outstanding contribution toward the advancement of human rights in Australia. Others awards are also given for work in the areas of Youth, Corporate and Community, Media and the Arts which promoted human rights in Australia. In 1999 the National Children's and Youth Law Centre won the Human Rights Award in the Community category.

Do you know of an organisation or individual who deserves recognition for their legal work toward the advancement of human rights in Australia? Nominate them now!

Nomination forms are available at [www.hreoc.gov.au/hrawards/](http://www.hreoc.gov.au/hrawards/) Nominations close 14 September 2000.

Tickets for the HREOC Awards will be available in October. For more information contact the Human Rights and Equal Opportunities Commission on ph: (02) 9284 9675

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## Barristers' Benevolent Fund

The introduction of The New Tax System on 1 July 2000 required the Bar Association to re-apply for the Barristers' Benevolent Fund to be a deductible gift recipient.

The Australian Taxation Office has since endorsed The Barristers' Benevolent Fund as a deductible gift recipient under Subdivision 30-BA of the *Income Tax Assessment Act 1997*.

Contributions to the fund, which affords assistance in deserving cases to people who are, or have been, members of the Bar Association and their immediate families, are appreciated.

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# An Inspector Calls

A contemporary message in a period piece

*Gerald:* After all, y'know we're respectable citizens and not dangerous criminals.

*Inspector:* Sometimes there isn't as much difference as you think. Often, if it was left to me, I wouldn't know where to draw the line.

*Gerald:* Fortunately, it isn't left to you is it?

*Inspector:* No, it isn't. But some things are left to me. Inquiries of this sort, for instance....

In a season which lasts until Saturday 9 September 2000, the Genesian Theatre Company is currently presenting J B Priestley's play *An Inspector Calls*, directed by none other than our own Brian Donovan QC.

The play was first presented in London on 1 October 1946. It is set inside the backdrop of the impending First World War, which clashes with the optimism of the patriarch of a middle-class family and the less certain future of his children. A mysterious Inspector



*Other cast members with Brian Donovan.*

enters the family home one evening and shatters their sense of respectability with a series of interrogations, directed to each member of the family, demonstrating their personal association with the tragic suicide of a beautiful young lady driven to despair by poverty and lack of compassion.

In the intimacy of the Genesian Theatre the socially upright family crumbles, catches a glimmer of insight, and reverts to form before its natural com-

placency is finally confronted with an element of doubt. In all this, the Inspector plays the critical role in a succession of short, sharp demonstrations of cross-examination technique.

In all his years of teaching advocacy Donovan, it seems, was but preparing himself for his direction of this play! Well...perhaps not but the possibility remains that Brian and Barry Jenkins, who plays Inspector Goole with strength and purpose, have each gained something from the association of barrister and thespian.

In a set designed by Peter Henson the story unfolds in three continuous Acts, each of which takes place in the family dining room. In the first Act prosperity and pretension have pride of place, the room is cosy and well adorned. In the second Act, after the Inspector has started his work, and again in the third, when self-realisation makes a fleeting visit the disintegration of that pretension is symbolically and dramatically represented through changes to the set and costumes. The symbolism reflects the underlying tension in the dialogue.



*The Inspector.*

Each member of the cast makes a positive contribution to the story. Dave Kirkham excels as the family patriarch, a minor 'public man' keen to play in the major league. Caroleen Heaton, as the family matriarch, matches his performance. Ann Leslie, as their daughter, is the rose of the family. She is quite delightful, displaying youthful freshness, not yet stuck in the mould. Jason Murdoch convincingly plays her fiancé, Gerald. Although he shares something of her freshness, he is clearly in the same 'Tory' mould. Marc Taylor's portrayal of a dissolute young man (the family son and heir), wandering in search of himself, draws the tragedy together in an entertaining way. Janet McCauley plays the hired help who comes and goes without pretension as occasion demands.

The Genesian Theatre provides a good setting for a play like this. It is small enough to enable the players to engage their audience as if all were in the family dining room. The atmosphere, in the foyer no less than the theatre, is friendly. There is a sense of everybody being involved in an activity they enjoy.

The third Act, courtesy of Priestley's dialogue, borders at times on heavy, laboured moralising but, 'Profound Truth' does not detain us long. We need but note the closing words of the Inspector:

We don't live alone. We are members of one body. We are responsible for each other. And I tell you that the time will come soon when if men will not learn that lesson, then they will be taught it in fire and blood and anguish. We don't live alone. Goodnight.

The theatre is located at 420 Kent Street, Sydney. Parking is available in Wilson's Kent Street Car Park, diagonally opposite the theatre. For bookings, contact MCA Ticketing, on ph: (02) 9873 3575.

*Geoff Lindsay S.C.*



## Ermenegildo Zegna

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# Legal Profession Amendment (Costs) Regulation 2000 (NSW)

The President of the Bar Association, Ruth McColl S.C., recently received a letter from the Attorney General of NSW, The Hon. Bob Debus MP, regarding the impact of the goods and services tax on the scales of fees charged by legal practitioners under the *Legal Profession Act 1987*. The Attorney General said:

Although these fees primarily concern the work of solicitors, the increases may be of interest to members of the Bar Association.

I am pleased to advise that a Regulation was made on 30 June 2000, permitting solicitors to increase scales of fees governing lump sum debts, liquidated sums for damages, and for enforcement of a judgement by a judgement creditor, in the Supreme Court, District Court, and Local Courts, and in probate matters. The Regulation also provides for GST to be added to the scales of fees set for workers compensation matters. The Regulation will permit solicitors to increase fees by 10 per cent of the amount payable in respect of the legal or other service governed by the scales, or the amount permitted by the New Tax System Price Exploitation Law, whichever is less. I am enclosing a copy of the Regulation for your assistance.

I would be grateful if you would make arrangements to ensure that any clients of barristers who charge the fees are aware that the increases to the scale fees have been made because of the introduction of the GST, and that the increases are not attributable to any other factor. These arrangements will ensure that practitioners are accountable for the amount by which prices are increased, and that the price increases are transparent.

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## Application of GST to practising certificates

The NSW Attorney General's Department recently sought an exemption for fees paid for practising certificates, issued under section 27 of the *Legal Profession Act 1987*, on the grounds that they are fees of a regulatory nature.

Under Schedule 1, Item 2.22 of *A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) Determination 2000 (No.2)*, the fees are to be exempt from GST. A copy of the determination is held at the Bar Library.

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## New members of the Bar Association

### Local Practising Practitioner

Kevin Andronos  
Andrew Davis  
Garry Jauncey  
Robert Kelly  
Joseph Klarica  
Anthony McGrath  
Carolyn Morris

# ECONOMIC LOSS

# REPORTS

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# Registrar-General of the Land Titles Office: Representation by legal practitioners

The President of the Bar Association, Ruth McColl S.C., recently received a letter from the Director General of the NSW Attorney General's Department, Laurie Glanfield, regarding representation of the Registrar-General of the Land Titles Office by legal practitioners. Mr Glanfield said:

The Real Property Amendment (Compensation) Act 2000 was recently passed by Parliament, and is due to commence on 1 September 2000.

It has come to my attention that subsection 126(2) of that Act would allow the Registrar-General of the Land Titles Office to be represented in certain proceedings before the Supreme Court by 'a legal practitioner or agent'. As a result of discussions between officers of my Department and the Land Titles Office, arrangements will be made for the sub-section to be amended through the next Statute Law Revision Bill, and for the words 'or agent' to be deleted. While the Real Property Amendment (Compensation) Act 2000 will commence on 1 September 2000, the Registrar General will be represented in compensation proceedings only by legal practitioners, pending the passage of the Statute Law Revision Bill.

## Letter to the Editor

The Editor of *Bar Brief* is grateful to Ian Barker QC for providing an article from the *Toronto Sun* of 14 July 2000. It told how Texas Judge Lon Harper was reprimanded for repairing two single-action Colt revolvers on the bench as he presided over jury selection in a murder trial. "The State Commission on Judicial Conduct said Harper "failed to act in a dignified manner." It appears that Judge Harper was also cited for allowing a court bailiff to read during jury selection a British tabloid 'which included a picture of a man being eaten by a python'.

In response to the article, Barker QC adds:

Over the years I have occasionally come upon eccentric judges, but I have never seen one bring his Colt revolvers on to the Bench to repair them during the empanelment of a jury. I suppose one could fairly say that as an accused person in New South Wales is allowed only three challenges, there would scarcely be time for the judge to take a revolver from its holster before the jurors were sworn. However, perhaps we should be more grateful for the quality of Australian judicial appointments.

## Abolition of administration fee on Bar's fee recovery service.

On 20 July 2000 Bar Council resolved to abolish the 10 per cent administration fee which previously applied to counsels' fees recovered from solicitors on behalf of members for work performed after the first five years in practice. The fee was previously delivered at no charge for members of less than five years standing at the Bar.

The service will now be provided free to all members of the Bar Association.

## Registries during Sydney 2000 Olympics

During the period 11 September to 6 October 2000, the Supreme Court Registry will be open between 9.00am and 4.00pm. The Duty Registrar will be available between 9.00am and 1.00pm. Clients are requested to attend the Registry before 1.00pm, as fewer staff will be available after 1.30pm. Fees apply to open the Registry before 9.00am or after 4.00pm.

During the period 18-29 September 2000, the Sydney District Court Registry will be open between 8.00am and 1.00pm, Monday to Friday.

## AUSTRALIAN CRIMINAL REPORTS (FULL SET)

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# Written submissions in the Court of Appeal: New Rules

## The Hon. Justice Keith Mason, President of the NSW Court of Appeal

For appeals commencing on or after 1 June 2000 there are significant amendments to Part 51 of the Supreme Court Rules. 'Commencement' in this context means filing of a notice of appeal **with appointment**.

### Early filing of written submissions

No longer are submissions to be filed shortly before the allotted hearing date. Written submissions are to be filed by the appellant (within six weeks) and by the respondent (within 10 weeks) of the notice of appeal with appointment being filed. Filing will take place in the Registry and three copies are to be served on the day of filing.

The purposes of this change are to encourage parties to address the real issues fought at trial; to enable Black (transcript) and Blue (exhibits) appeal books to be prepared later and to contain only the material relevant to the submissions; to enable parties and the Court to make better-informed listing decisions; and to end the need for the Court to police late filing of submissions on the eve of a hearing date. The new regime will effectively increase the early costs associated with an appeal, with savings referable to appeal book preparation. Breathing space will continue to be available to those who file a holding appeal, but the filing of the notice of appeal with appointment will be the time for the parties to take a hard look at whether the prosecution of an appeal is appropriate.

In the ordinary course, the legal practitioner would settle the notice of appeal with appointment at the same time as preparing written submissions and while the matter remains reasonably fresh in the practitioner's mind, if he or she appeared at trial.

The new scheme adopts the practice introduced in the Queensland Court of Appeal a few years ago. It has been introduced with the approval of the professional associations and the Court of Appeal Users' Committee.

The new rules require the later filing of a chronology and permit the later filing of amended submissions (at least 10 weeks before hearing date for the appellant and at least eight weeks before by the respondent):

- if the amendment is of a minor or formal nature or consists of the insertion of appeal book references or of an omission - without leave; or
- otherwise - by leave of a Judge of Appeal or the Registrar or with the consent of all other interested parties (Rule 44(2)).

The submissions must contain a schedule detailing the contentions of the parties as to personal injury damages, including appeals that extend to putting liability at issue (see new Rule 46(3)).

Orange Books A new coloured book has entered appellate practice. For appeals in which a notice of appeal with appointment is filed on or after 1 June 2000, the appellant must file an Orange Book not less than four weeks before date fixed for the hearing of the appeal. This shall contain:

- the consolidated index or, if applicable an index of its contents;
- submissions and chronologies in their final form;
- any amended Notices of Appeal or Cross Appeal or of Contention in their final form.

All parties must cooperate with the appellant to enable the appellant to complete and file this Orange Book within time (see Rule 37A).

A copy of Part 51, with the amendments highlighted, is available on the Supreme Court website at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc)



## The Chartered Institute of Arbitrators [Australian Branch]

### ENTRY COURSE - SYDNEY

Sat 18 Nov. – Sun 19 Nov. 2000

The Branch will conduct an Entry Course, leading to Associate Membership (ACI Arb). The two-day program, at a Sydney CBD venue, consists of lectures and tutorials and concludes with a written examination.

*Course fee: \$900 (incl. GST)*

### SPECIAL MEMBERSHIP COURSE - SYDNEY

Sat 18 Nov. – Mon 20 Nov. 2000

The Branch also proposes to conduct a Special Membership Course for suitably qualified candidates who are lawyers or who otherwise have sufficient experience in arbitration. The program consists of small discussion groups, in which candidates will be expected to demonstrate knowledge and skill in arbitration, followed by an Award writing exercise. Attending the Course will qualify candidates for Associate Membership (ACI Arb) and those who pass the Course examination will qualify for Membership (MCI Arb) and be entitled to undertake the steps leading to Fellowship (FCI Arb) and the title Chartered Arbitrator.

*Course fee: \$900 (incl. GST)*

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Further details from Executive Officer:  
Tel. (02) 9988 3563 Fax . (02) 9988 3571  
e-mail: [mblongstaff@ozemail.com.au](mailto:mblongstaff@ozemail.com.au)

# Bar Olympians

The Sydney 2000 Olympics are less than a month away. To prepare for this special occasion, notices were placed in *Bar Brief* seeking the names of members who had participated in the Games.

The Bar was the chosen profession of four New South Wales Olympians; The Hon. Mervyn Finlay QC, the late Ted Pain QC, His Honour Judge Fred Kirkham and Lionel Robberds QC. All were rowers. That rowing, one of the classic endurance sports, should be the specialty sport of our Olympians, says much about the qualities that make for successful practice as a barrister. Some barristers take a keen interest in sport. Some are indifferent to all sporting pursuits. The stories of these four Olympians will cross that divide.

*Michael Slattery QC, spoke with them recently on behalf of Bar Brief.*

## Helsinki 1952: Mervyn Finlay and Ted Pain

Mervyn Finlay commenced practice at the Bar in March 1952 from a corner of the young Anthony Mason's room, in the basement of Denman Chambers.

In July 1952, Mervyn rowed in Australia's celebrated Bronze medal winning eight at the Helsinki Olympics. Rowing with Mervyn was Ted Pain, then a young solicitor, who came to the Sydney Bar in 1958.

This was the first Olympic medal for an Australian rowing eight. The achievements of this crew are remarkable in many ways.

Mervyn took Silk in 1972 and was appointed to the Supreme Court in 1984. Ted Pain took Silk in 1986 and was appointed to the District Court in 1988. This is probably the first crew in the history of Olympic rowing to produce two judges. It is not the only crew to do so, as Fred Kirkham's eight in Melbourne 1956 later did the same.



Left and second from the left: Mervyn Finlay and Ted Pain with the Australian Olympic eight at Henley, 1952.

The achievement of this crew is even more remarkable when judged against the backdrop of Australian rowing in the early 1950s. Olympic eight rowing was then dominated by the United States and Western Europe. The United States had won every Olympic coxed eight event since the Antwerp Games in 1920. Silver and Bronze medals in the event were, since 1920, shared among the handful of specialist rowers groomed by Great Britain, Norway, Canada and Italy. The only other country to penetrate this exclusive group in this event before 1952 was Germany, which won a Bronze in Berlin in 1936.

The first Australian eight to compete in any Olympics was a police eight representing Australia in the Berlin Games. In a demonstration of 1950's Australian cultural cringe, a number of Australian Olympic rowing officials were reported in the *Sydney Morning Herald* as saying that: 'sending the crew was a waste of public money'. The US Navy crew won the Gold medal in the event convincingly, but Australia beat all the usual contenders and was only beaten by the Soviet crew for the Silver medal by less than half a length. The performance was described by the *Sydney Morning Herald* of 24 July 1952 as 'an exhibition of character and determination'.

Mervyn Finlay and Ted Pain were the same age. They both served in the RAAF for a short time at the end of the Second World War and studied law together afterwards. They also rowed together in a number of representative Australian eights between late 1950 and the Helsinki Games, with Ted Pain in the seven seat (counted from the bow) and Mervyn Finlay in the six seat. They were called 'Mr Six' and 'Mr Seven' by their rowing colleagues.

Early rowing competition demonstrated their mental agility and quick thinking in a competitive environment, essential qualities for their later lives in the court room. In some pre-Olympic competition in Christchurch, before the racing commenced the Australian eight was faced with an aggressive Hakka from the New Zealand eight. Not to be outdone, at Ted Pain's suggestion, the Australian eight did its own version of the Hakka. The Australian crew grimaced and chanted their personal initials back at their opponents. Thus Edward Oscar Guthrie Pain, EOGP, came out as 'Yoga Pah'. Mervyn's initials, 'MDF' and those of the other lawyer then in the team, Ross Selman, came out as 'Medferruls'. The New Zealand crew may not have been terrified but they were certainly mystified.

After completing their law degrees, both Mervyn and Ted did articles in Mervyn's late father's firm, as did Ross Selman. Mervyn was admitted to the Bar on 14 March 1952 on the same day as Gordon Samuels and Brian Cohen. Also in the basement of Denman Chambers in those days were Chester Porter, Jack Hiatt, Basil Hogan and John Smyth. Work at the Bar was sparse. Young barristers of the day passed time between briefs by playing dominos at 'Mockbel's', a local café.

After final selection trials, Mervyn and Ted left for the Olympics in early June 1952. They first went to England to row at Henley where the accompanying photograph was taken. Mervyn recounts that the renowned Australian miler and now Governor-designate of Victoria, John Landy, was an unforgettable feature of Mervyn and Ted's trip to London. Landy's famous coach, Percy Cerutti, had told Landy that he would suffer less jetlag if he lay down in the aisle with a towel wrapped around his head. Every trip to the back of the plane by our rowers involved delicate negotiations around the prostrate and betowelled figure of Landy.

Problems with the crew's aircraft gave them an unexpected evening in luxury at Raffles Hotel in Singapore on the way to London. After some considerable success at the Henley Regatta, the crew arrived in Helsinki.

Mervyn recalls being amazed that one could read a newspaper by natural light almost at midnight in Helsinki. The Olympic Village, 'Kapyla', consisted of blocks of flats in which all the athletes were accommodated. Led by the two strong team sports, rowing and water polo, the Australian athletes formed the Kapyla Club at these Olympics. Since 1952 this informal club has met annually. On occasions since 1952 Australia's gold medal winning sprinter at these Olympics, Shirley Strickland has joined these reunions from her home in Perth.

All the Australian eight were amateurs. Apart from the two young lawyers, Mervyn and Ted, there was a doctor, a teacher, an industrial chemist and other businesses and careers were represented in the crew.

The standard 2000 metre Olympic rowing course was set in beautiful Helsinki Harbour. In 1952 with Joseph Stalin in the Kremlin and Harry Truman in the White House, the Cold War was at its frostiest. The Australian crew attempted its own form of glasnost by immediately attempting to befriend the United States and Soviet crews.

To the Australians, the US Navy crew appeared to be giants with a well-earned reputation for speed and discipline. Eights were generally organised in those days with the smaller members of the crew at the bow and stroke with the biggest men being in the 'engine room' at about the number four or five seats. The Australian bow rower was Bob Tinning. The strength of the US competition was brought home to the Australians when Bob Tinning saw an enormous American over 6ft 6in. Tinning approached him in a friendly way saying 'Hi, I'm Bob Tinning, bow of the Australian crew, I suppose you are the five man?' This towering American took Bob's hand and looking down on him said 'Hell No Bob, I'm Hank, and I am bow too'.

Mervyn recalls that at an early break in the competition the Australians approached the Soviet crew, which was gathered around their boat. With smiles and gesticulations between the rowers the language barrier was overcome. The natural fellowship of this occasion was then interrupted by a squad of Russian 'minders' who took the Soviet crew away from this pernicious Western influence. During the course of the Games, the Soviet eight was required to stay not in Kapyla, but on Soviet ships moored in Helsinki Harbour.

In contrast to the over 10,000 athletes from over 200 countries competing in the Sydney Games, 4,925 athletes from 69 countries, competed at Helsinki. Mervyn Finlay remembers with affection the friendly spirit of all the athletes who dined together in large pavilions at Kapyla each evening. Indulging in an early form of 'modern Australian' cuisine the Australian eight tasted a different national dish each night.

The only distraction Mervyn can recall from a thoroughly rigorous training schedule was a coxswain's error, which led the crew one day by mistake into a beach set aside for female nudists. Suddenly realising where he was, the cox immediately ordered a resumption of the training schedule.

After being beaten by Yugoslavia in a heat, the Australian crew only reached the semi and final through success in a *repechage*. In the final race, neither the Soviets nor the Australians had any real chance of catching the US crew. The Australians were gaining on the Soviet eight towards the finish. Mysteriously, the Soviet eight faded at the finish and drifted across the line a bare canvas ahead of the accelerating Australians. The Australians were absolutely 'rowed out'. The whole crew felt that it had rowed as well as it could possibly have done. They were very happy with their Bronze medals.

The *Sydney Morning Herald* the next day described the scene after the race in these terms: 'The Australians were given one of the longest ovations of the finals when they rowed to the pontoon to receive their medals. It was recognised that they had come through many severe and anxious trials in the four days'.

The American Rowing Association immediately invited the Australian crew to represent the British Empire in the international competitions in Philadelphia in July 1954. This was the beginning of many lasting personal friendships between the American and Australian crews.

Ted Pain went on to Oxford to do a BCL. He was one of the four Australians who rowed in the 1954 Oxford eight, which won the Centenary Oxford and Cambridge Boat Race. After his return to Australia, as well as coming to the Bar, Ted became a sub warden at St. Paul's College in the University of Sydney. He coached over a dozen St. Paul's College crews to victory in intercollegiate rowing. He went to the Bar in 1958 and was appointed to the District Court in 1986. He retired from the District Court in 1997.

Ted died in January of this year.

Ted and Mervyn toured Europe together until September 1952. Mervyn resumed practice at the Bar in October 1952. He practiced extensively in common law, criminal and appellate work. He took Silk in 1972. Mervyn, like our other Olympians, remembers most of all the life long friendships that he developed from competing at Helsinki.

Mervyn has maintained his associations with Olympic sport. He has recently sat as Chairman of the Triathlon Australia's Appeal Tribunal, hearing appeals considering the Olympic selection of Australia's male and female triathletes.

## Fred Kirkham - Melbourne 1956

Fred Kirkham, then a young nineteen year-old probationary police constable from New South Wales, rowed in the Australian eight at the 1956 Melbourne Olympics. In 1974 he came to the Bar. After developing a successful common law practice and serving on Bar Council, he was appointed a judge of the District Court in 1988.

Australian rowing repeated its Helsinki Olympic achievement in Melbourne. The 1956 Australian eight earned a bronze, trailing United States gold and Canadian silver. Gold and bronze were separated by a mere half-length. The long-standing assumption of United States supremacy in Olympic eight rowing just survived the Melbourne Olympics, only to be finally crushed by new West German training techniques at Rome in 1960. Behind these simple sporting facts lie two extraordinary stories: one about the generous recognition of Fred's prodigious talent by an otherwise wholly Victorian eight; the other about an Australian eight that gave the United States crew a foretaste of the defeat it was to suffer four years later in Tokyo.

All the Bar's Olympians rowed for New South Wales Clubs. Fred Kirkham rowed for Mosman. Mervyn Finlay and Lionel Robbards were both members of Leichhardt Rowing Club.



Fred Kirkham, (right) and two of his fellow rowers from Australia's Olympic eight in 1956.

The interstate regatta held at Lake Wendouree near Ballarat in May 1956 doubled as the Olympic selection trials for the sixteenth Olympiad in Melbourne. That year the winner of the King's Cup, the interstate championship eight event, was to represent Australia at the Olympics. Lake Wendouree, which had already been chosen as the Olympic course, was a cold grey and windswept piece of water of the type much loved by Victorians. Not surprisingly, that year the usual King's Cup interstate rivalry was even tougher than usual.

Peter Evatt, the son of the former High Court judge and then Federal Leader of the Opposition, Doc Evatt, was the stroke and

*Continued on page 10*

coach of the New South Wales eight. Fred Kirkham rowed in this eight. Lionel Robberds was the cox. The New South Wales eight was widely thought to be the most polished combination in the King's Cup. The Bar's John Webster, then a law student, was the reserve for the crew. Despite New South Wales assumptions of natural superiority, the Victorian eight recorded the fastest time in the heats. To win the Cup final Evatt developed a fateful race plan designed to out-manoeuvre his main competition. The idea was to allow the Victorians to take the lead and then overtake and demoralise them in the last few hundred metres.

The plan failed. First, after taking the lead, the independent-minded Victorians showed no readiness to be either overtaken or demoralised by anyone from New South Wales. Second, no doubt sensing the imminent failure of his plan, Evatt set a gruelling stroke rate in the second half of the race. Although New South Wales gained rapidly on Victoria, Evatt himself collapsed just before the finish. David Anderson, the crew's number six, who had rowed with Mervyn Finlay in Helsinki, took control and stroked the crew over the line but into second place.

The Victorian crew had won the right to represent Australia in the Olympics. Shortly after the race, in a decision still lauded in Australian rowing circles for its generosity and foresight, the Victorian coach Bob Aitken, no doubt with the concurrence of the whole Victorian eight, invited Fred Kirkham and Ralfe Currall from the defeated New South Wales eight to try out for the Olympic crew. Aitken's purpose was to assemble the best Australian eight to challenge the hegemony of the United States over this event. Aitken's wisdom produced an initial success well beyond anyone's expectations.

Sir Ivan Holyman, a keen rowing enthusiast and the owner of Australian National Airlines, flew Fred and Ralfe to Victoria to perform trials with the Olympic crew. Fred ultimately was the only interstater selected to row in the otherwise Victorian crew. Fred took the number three position, displacing John Hunt, a Victorian, from the crew. John and Fred became the best of friends. John later moved to New South Wales and started the retail chain, Hunt Leather.

Fred relocated to Victoria and trained there between June and November 1956, the month of the Olympics that year. The New South Wales Police Service was very supportive and transferred Fred to its recruiting branch in Melbourne for six months. The Olympic crew that Fred joined included a Melbourne University law student, Jim Howden, who later went to the Victorian Bar and was appointed to the Victorian County Court. In keeping with the amateur spirit of the day, a wide range of occupations were represented in the crew. Apart from its few student members who went to lectures, the crew went to work in Melbourne by day and trained on the Yarra at night.

Rowing heats commenced on the first day of Olympic competition, so Fred and his fellow crew members missed the opening ceremony in Melbourne. Fred is making up for this by going to the Sydney opening ceremony.

The Fates and the Olympic draw set Australia against its most feared opponent in the very first heat on 24 November 1956. This time the eight representing the United States came from Yale University. It carried the reputation of a nation undefeated in this event in over thirty-six years. The winner of that first heat would go straight to the semi-final. The loser would still have the chance to fight through the *repechage* system to the semi-finals and possibly the final. Most Australians expected their crew to take the longer route to the final. In that first heat the Australians astonished the rowing world with a clear win over the United States crew. Fred recalls that the United States rowers were stunned and depressed by the result. This race proved to the

world that the Americans were defeatable in this event. However the Americans used the enforced extra competition to their advantage.

Australia again met the United States in the semi final. This time the Americans prevailed by less than half a second, the then barest of margins. *The Sydney Morning Herald* of the following day recorded the strain of this race on the U.S. crew in these words, 'The Americans were exhausted as they slowly made their way back to the boathouses.' As the next day was to show, they soon recovered.

The final was a wide open and hard fought event all the way, in which the United States eight retained the gold. Only half a length behind, Australia came in third. As expectations had been raised, the Australian crew was disappointed with this result. Fred recalls it though as a character building loss for all of them.

The competition has had its compensations for Fred. He has enjoyed lifelong friendships with the men from Yale and their families. He has also gained the opportunity to pass his skills on to his own family. Fred's two daughters and one of his sons have each rowed with great individual distinction in recent years.

One American acquaintance that Fred well recalls making in Melbourne was that of the United States single scull champion, Jack Kelly Jnr from Philadelphia. Jack, a brother of the actress Grace Kelly, won a bronze in his event in Melbourne. Whilst most of the Australian crew speculated on the possibility of an introduction to his famous sister, Fred recounts that this charming American unwound from his training schedule by swapping 'Dad and Dave' style humour with the Australian rowers. Kelly's father, John, had been a single sculler in 1920s international competition, but without a university education he had been banned from rowing at Henley. With the right credentials and encouragement from his father, Jack Jnr became the first Kelly to row at the Henley Regatta.

Even as this Olympic race was being rowed in Australia, back in West Germany sporting technocrats were developing the concept of interval training, which was to become the future conditioning template for all endurance sports such as rowing. Interval training focused the athlete's programme on regular periodic bursts of intense activity simulating the effort of actual competition. As a result of this development, Lionel Robberds witnessed a very different set of rowing results at the next Olympics in Rome.

### **Lionel Robberds - Rome 1960**

In 1960 Lionel Robberds was in his third year at Sydney University Law School, with ambitions ultimately to go to the Bar.

In the same year, he coxed an Australian four into 5th place at the Rome Olympics. Lionel came to the Bar in 1966 and was made Silk in 1982. He practises in Frederick Jordan Chambers.

Lionel started coxing at the age of seven. By the time he was 15, he had competed in the Empire Games, the predecessor of the Commonwealth Games. He competed and won Gold at the Empire Games in Vancouver in 1954. He competed again at the Commonwealth Games in Cardiff in 1958, where he won Silver and Bronze.

In March 1960 a series of selection trials took place in Sydney for an Olympic test event to be held in May at the Lake Wendouree Olympic course in Ballarat. Lionel and two others from Leichhardt Rowing Club were selected to represent New South Wales at Lake Wendouree. The four that Lionel coxed only had a month to work together but still managed to win and achieve Olympic selection.

Olympic selection meant intense training in Australia before departing for Rome. It also meant juggling the academic requirements of third year law. Both of these presented practical challenges for Lionel.

A problem faced in those days by Australian rowers selected for Olympic competition was that there was no crew of a similar standard with which to train. Of the Australian crews selected in 1960, the eights came from Western Australia, the coxless four came from Victoria, and the coxed four from New South Wales. A very cold winter that year added to the loneliness of the training.

All of Lionel's four were either at University or in full time jobs. Lionel approached Professor K. O. Shatwell, the then Dean of Sydney Law School, to inquire how the University would assist in accommodating his competing in the Olympics with Law School exams. Dean Shatwell gave him the simple and practical advice 'Study three out of the four subjects and if you pass the three we will give you a post in the fourth'. Lionel took this advice and decided not to trouble himself with equitable jurisprudence whilst in Rome. He was duly granted a post in Equity.



Lionel Robberds, cox of the Australian olympic coxed – fours, takes a break from training before the Rome Games.

The Olympic rowers both trained and competed in almost idyllic conditions outside Rome. From the Olympic Village each day the athletes travelled out to Lake Albano which is near the town of Castel Gandolfo. Standing above the lake is the summer residence of the Pope. The rowers trained twice a day and then were bussed back to the Olympic Village in the evening. Lionel recalls the lake as an excellent course with good weather and no unfair wind.

All expectations of the rowers competing at the Rome Olympics

were altered by the revolution in rowing training which had just emerged from West Germany. West Germany won the coxed eights, the coxed pairs and Lionel's race, the coxed four. The United States of America collected only one rowing Gold at that Olympics in the coxless fours, and a Bronze in the coxed pairs.

All the Australian rowers had been using their normal training methods and were not aware of what the West Germans were doing with interval training until they arrived in Rome. It was then too late to change.

Lionel's Australian four reached the final. After West Germany's Gold in the event France took the Silver and Italy the Bronze. Russia in fourth place only beat Lionel's crew by a tenth of a second. Although there was no medal this time, the coxed four was the best performer of all the Australian crews that year. No other Australian crew reached a final at the Rome Olympics.

Lionel had a different challenge to the rowers that he was coxing. Olympic competition in those days required that the cox weigh at least 7 stone 12 lb. When Lionel left Australia he weighed 9 stone 6 lb. Two weeks later, when competing in the final, he weighed in at 8 stone 6 lb.

Although most of the Australian rowers missed the opening ceremony, after his final Lionel was able to return to the main stadium where he watched Australia's Herb Elliott win the Gold medal in the 1500 metres. After the Games, Lionel and two of the other crew members travelled around Italy for a week and then flew back to Australia.

Lionel belonged to Leichhardt Rowing Club, Mervyn Finlay's club. Two of the oarsmen in Lionel's crew were also from Leichhardt, which was then the top club in New South Wales. All the crew members had other jobs: one was an insurance agent, another a builder, a third an electrician and the fourth owned a small business.

Rowing involved a fulltime training commitment every night. Lionel realised soon after the Olympics that he would not readily be able to fit it in with legal practice. He took up squash in 1962 and three retired from rowing in 1964. Lionel then demonstrated his sporting versatility by captaining the Australian squash team in 1972, 1973 and then again in 1976. In 1973 the Australian team won the World Teams Championship in South Africa. Lionel won a New South Wales squash championship and was runner-up for two Australian titles.

Lionel's example stands as permanent rebuke to all those at the Bar who say they do not have enough time for exercise. Lionel was still playing first grade State competition squash when he turned 50, which was not all that long ago.

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## In-Court Immunity

By now, no doubt, all members are aware of the House of Lords judgment in *Arthur J.S. Hall & Co. v. Simons (A.P.)*, delivered on 20 July 2000. In essence, a Bench of seven Law Lords held that the traditional immunity from suit, conferred on barristers in respect to in-court work should be abolished. Justin Gleeson has prepared a note about the judgment which will appear shortly in Bar News. It is worth noting that the decision to abolish in-court immunity was delivered in the context where the claim involved allegations of negligence against solicitors in respect to advice given on settlement of an action. Immunity from suit was claimed because the advice was said to relate to how the matter would run in court. The Court of Appeal had rejected the solicitors' claim on the basis of precedent because there was not the necessary connection between their allegedly negligent advice on settlement and the conduct of proceedings in Court. As Gleeson suggests in his detailed article, it might be thought that a 'far reaching change such as removal of immunity would be better considered on the facts of a case clearly coming within the core ambit of the immunity, such as, for example, a barrister taking a decision in the strategic conduct of a case where the balance of professional opinion was that the course was inappropriate'.

As he also says the prospects that the High Court might be persuaded to follow the English lead cannot be ignored nor, too, can the possibility that s42 of the *Fair Trading Act 1987 (NSW)*, or its interstate equivalents, might be invoked to pursue a claim against counsel.

I recommend a thorough reading of Gleeson's discussion of *Hall's* case.

## Anwar Ibrahim

The trial and recent conviction of Anwar Ibrahim in the Malaysian High Court represent a sorry episode in the history of the administration of justice.

The charging and trial of Anwar bore blatant political overtones. The charges were laid when Anwar's political activities represented a real challenge to the incumbent administration of Dr. Mahathir Mohamad. The trial itself proceeded in an unprecedented manner. The principal witness against Anwar at various periods during the hearing accused him, retracted the accusations, then changed the date upon which the offences were alleged to have occurred. The prosecution was

permitted to amend the charges during the trial to reflect these substantial alterations.

The prosecution first claimed the offences took place in a particular block of flats in May 1994. When Anwar produced an alibi in relation to this time period, the charge was changed to allege the offence took place in May 1992 at a particular location. When the defence pointed out that the flats where the offence was alleged to have occurred had not been built at the time of the charge, the prosecution was permitted to change the charge again to an unspecified date between January and March 1993. In his judgment the trial judge solemnly wrote: 'the first accused must show he was at a different place from January 1 to March 31, 1993.' Notwithstanding the numerous shifts in the substantive allegation, the trial judge was able to find that the evidence of the chief prosecution witness was credible and Anwar's failure to find an alibi for a period of three months indefensible!

In a disturbing sidelight to the various charges brought against Anwar, his counsel has been charged with sedition over statements made in court while defending his client. Members will also recall that in November 1999 the Malaysian High Court restrained the holding of an extraordinary general meeting of the Malaysian Bar which was to be convened to discuss the Malaysian judiciary. More recently, a solicitor has been sued for defamation in respect of a letter of demand he wrote to a Cabinet Minister.

Since the mid-1980s, the executive branch of government has methodically undermined the independence of the judiciary and curtailed the freedom of the Malaysian Bar. The Anwar case is another manifestation of this elimination of the separation of powers. Justice in Malaysia moves, not so much in mysterious, but disturbing ways.

## Professional Indemnity Insurance

Further to my report in the June 2000 *Bar Brief*, the Professional Indemnity Committee has formally reported to the Bar Council, which has adopted all its recommendations. The effect of adopting those recommendations is:

- (a) that the Bar Association is to appoint a broker to act on its behalf, initially to advise generally about the placement of professional indemnity insurance on behalf of its members and, thereafter, probably to arrange that insurance;

- (b) Peter Maiden and Jacqueline Gleeson have been added to the Committee to ensure it reflects the interest of members with different levels of income; and

- (c) consideration will be given, in consultation with the Bar Association's broker, to what alterations, if any, could be made to the excess levels and extent of cover provided under the policy approved pursuant to s38R of the Legal Profession Act 1987.

## Olympic Pro Bono Scheme

The response to this scheme has been enthusiastic. The Scheme will be officially launched on 23 August. Some notable Barrister-Olympians are featured later in this issue.

## Sir Maurice Byers

Lady Byers has drawn to my attention that it has been said, since his death, that Sir Maurice appeared in *Mabo*. This is not correct. As she said, she was sure Sir Maurice would have wanted to set the record straight.

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# Papers to note

*Higher Criminal Courts Australia 1998-99 (ABS 4513.0)* This report by the Australian Bureau of Statistics provides measures of the 'volume and flow defendants through the Higher (Supreme and Intermediate) Courts across Australia' for the period 1 July 1998 - 30 June 1999. According to the ABS, the median time taken in the higher courts in Australia to finalise cases in 1998/99 was 21 weeks. New South Wales recorded the longest median time to finalise defendants' cases at 35 weeks. A copy is held in the Bar Library.

*ALRC Discussion Paper 63: Review of the Marine Insurance Act 1909 (Cth)*. The Australian Law Reform Commission is seeking submissions on the issues raised in DP 63, ahead of its final report, due to be delivered to the Federal Attorney-General in April 2001. Submissions should be lodged with the Commission no later than 30 November 2000. A copy of DP 63 can be obtained from the ALRC web site at [www.alrc.gov.au](http://www.alrc.gov.au). A copy is available for loan from the Bar Library.

*Advocates' Performance and Training Survey*, 30 June 2000. Hugh Selby, instructor at the Australian National University's Legal Workshop, in conjunction with Gavin Freeman, Sports Psychologist at the Australian Institute of Sport, has conducted a nation-wide survey of advocates. One hundred and twenty five responded to a series of questions about advocacy training, court performance and case preparation. A copy of the report is held in the Bar Library. The author may be contacted on ph: (02) 6249 5720 or via email: [hugh.selby@anu.edu.au](mailto:hugh.selby@anu.edu.au)

*Parenting Plans: Letter of advice to the Federal Attorney-General prepared by the Family Law Council and the National Alternative Dispute Resolution Advisory Council*, 16 March 2000. A copy is available for loan from the Bar Library.

*NSW Supreme Court, Defamation List: Practice Note No. 114*. On 25 July 2000 the Supreme Court announced new procedures for the management of cases in the Defamation List. The new procedures come into effect for defamation proceedings commenced on or after 1 September 2000. Practice Note 114 may be obtained from the Supreme Court's web site at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc). A copy is held in the Bar Library.

*Federal Court Amendment Rules 2000 (No.3)*. This Rule amendment facilitates electronic filing of documents, commencing 14 July 2000. A copy is held at the Bar Library.

*NSW District Court Practice Note No.55: Listing at country circuit criminal sittings*, 10 July 2000. A copy is held at the Bar Library.

*Industrial Relations Commission of NSW Practice Direction No.5: Applications for declaration under section 9 of the Child Protection (Prohibited Employment) Act 1998*, 14 July 2000. A copy is held in the Bar Library.

*Migration matters: Notice to litigants and practitioners*, 18 July 2000. This notice applies to proceedings commenced in the NSW District Registry of the Federal Court with regard to applications filed by applicants who are NOT represented by a legal practitioner and who commence a relevant Migration Act application. The notice revokes an earlier notice issued on 25 June 1998. A copy of this notice is held at the Bar Library.

*The Rule in Pigot's Case: Draft report*, 8 August 2000. The New South Wales Law Reform Commission draft report contains a draft of the Conveyancing Amendment (Rule in Pigot's Case) Bill 2000 (NSW). Interested persons are invited to submit comments on the draft report before 14 September 2000. Comments should be directed to Joseph Waugh, Legal Officer, on ph: (02) 9288 8227.

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# Speeches

'More than money', by The Hon. Justice Catherine Branson, Federal Court of Australia. This speech was delivered at *Partnerships across borders: An international forum on access to justice*, hosted by the Association of the Bar of the City of New York on 6 - 8 April 2000. Justice Branson discusses the issue of 'cultural disadvantage' in the Courts and the way in which it may impede access to justice. Judges and legal practitioners must be conscious that Indigenous people have a deep distrust of the legal system and are often unwilling to give evidence or disclose information before a court. Justice Branson outlines some of the culturally sensitive practices adopted by the Federal Court since it began hearing native title claims. A copy of the speech is held at the Bar Library.

'...And justice for all', by the Hon. John Phillips AC, Chief Justice of the Supreme Court of Victoria. This speech was delivered at the St James Ethics Centre's 'Lawyers Lecture' on 1 - 2 August 2000 (Melbourne and Sydney, respectively). Chief Justice Phillips warned that many thousands of Australians cannot afford legal advice and that cuts to legal aid are ineffectual, counterproductive and incur significant social costs. To alleviate this situation, he urged the legal profession to make an 'additional effort' to provide legal assistance to indigent Australians. He appeals to a sense of professional fulfilment that requires 'activity of an altruistic kind.' As he points out, however, this can be no more than a stopgap until governments increase legal aid funding. A copy of the speech is held at the Bar Library.

'Address to the Australia-Britain Society on the centenary of the signing of *The Australian Constitution Act*', by the Hon. J J Spigelman AC, 10 July 2000. A copy of the speech may be obtained from the Supreme Court's web site at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc). A copy of the speech is held at the Bar Library.

'Opening Address. For the Public Good: The First National Pro Bono Law Conference', by the Commonwealth Attorney-General, The Hon. Daryl Williams AM QC MP. This speech was delivered at the National Convention Centre, Canberra on 4 August 2000. A copy of the speech may be obtained from the Attorney-General's web site at <http://www.ag.gov.au/ministers/attorney-general/speeches.html>. A copy of the speech is held at the Bar Library.

# The trial of Chhouk Rin *By Bill Wodrow, Henry Parkes Chambers*

On 26 July 1994 Australian backpacker David Wilson, Frenchman Jean-Michel Braquet and Briton Mark Slater were on a train travelling from Phnom Penh to Sihanoukville, when it was attacked by Khmer Rouge guerillas. The trio were forced off the train, held captive for three months and then executed when negotiations for their release failed. At least 13 Cambodians were also killed in the ambush.

The Wilson family engaged me to appear for them in the Phnom Penh Municipal Court at the trial of Khmer Rouge Commander Nuon Paet on charges of abduction and murder. The Wilsons believed that Commander Paet was a scapegoat and pressed for further indictments. I needed to cross-examine two of his superior officers - General Sam Bith and Colonel Chhouk Rin.

On Monday 7 June 1999 Her Honour Judge Buninh Bunnary started proceedings with the shock announcement that both Bith and Chhouk Rin would appear as witnesses without the protection of immunity.

In what was widely seen as a victory for the rule of law in Cambodia, General Sam Bith and Colonel Chhouk Rin were subsequently charged under the *Cambodian Penal Code* with murder, terrorism, armed robbery, illegal detention of hostages and wilful destruction of public property. In July of this year, I returned to Cambodia for the trial of Chhouk Rin in the Phnom Penh Municipal Court. I was accompanied by Mr Peter Wilson, father of the murdered 29 year-old Australian backpacker, David Wilson.

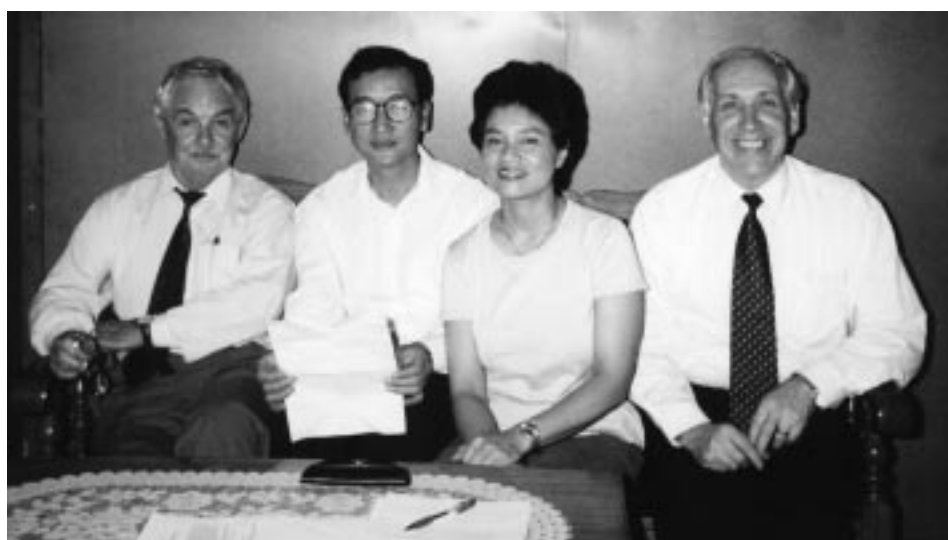
Three days before the trial I was provided with only a partial brief, almost entirely composed in the Khmer language. In the limited time available I had to prepare for cross-examination by translating questions from English to Khmer.

On the morning of 18 July, before a packed Phnom Penh courthouse, I was able to address the presiding judge, Thong Ol. Through my interpreter, I told him that, amongst other things, in our system of justice people were more important than property. All human life was precious both in the eyes of God and before the Court, whether it was the life of a Westerner from Australia, France or Britain, or that of a humble Cambodian from the provinces.

I soon discovered that the prosecution was not properly prepared and that no defence witness statements had been provided in the brief. Ultimately, it took only six hours for Judge Thong Ol to acquit Rin. Incredibly, he relied on Article Five of an amnesty passed by the Cambodian National Assembly on 7 July 1994. This law gave all Khmer Rouge guerrillas a closed period of



*Left to right: Mr Peter Wilson (Mel), Bill Wodrow (Barrister), Mrs Dorothy Slater (England) and Mr JeanClaude Braquet (France). "The day before the Trial" (17 July 00).*



*Left to right: Mr Peter Wilson, Mr Sam Rainsy, Leader of the opposition in Cambodia and his wife Tioulong Saumura, a member of the Cambodian National Assembly with Bill Wodrow the Canberra Barrister.*

six months within which to defect to the side of the Cambodian government. However, the amnesty was retrospective: it did not sanction *prospectively* any murder, rape or mayhem.

As well as being a travesty of justice the decision dealt a devastating blow to the aggrieved parents, who were present in the Court. By contrast, Rin's supporters, of whom there were many in the Court, shouted out in jubilation. The verdict set back the Cambodian justice system and left any rule of law in Cambodia at the crossroads, which is a tragedy for ordinary Cambodians who are a friendly and peace loving people. The decision also has serious implications for the UN position that Cambodia be allowed to preside over its own war crimes tribunal in relation to those Khmer Rouge leaders responsible for the atrocities of the 'killing fields'.

The truth is we had all been deceived. We had been lulled into a false sense of security over the success we experienced

on 7 June 1999, when Nuon Paet had been convicted in the same Phnom Penh Municipal Court, on the very same charges.

There were two key differences between the verdicts. Firstly, General Paet had never defected to the government. Secondly, Paet's trial coincided with negotiations between Cambodia and the international community, including Australia, on a five-year aid program. That program is now in place, effectively removing any incentive to dispense justice.

## **Appealing the decision**

The Wilson family has 60 days in which to appeal. However, Mr Wilson is a pensioner, and cannot be expected to take on the Cambodian government in an appeal without financial assistance. It is to be hoped that the Federal government, and others, will lend some support in order to mount a proper appeal before a fresh tribunal to review *all* of the evidence against Chhouk Rin.

# Coming up

**Julius Stone Address, 5.30 pm on 24 August 2000, Banco Court of the Supreme Court of NSW.** The Inaugural Julius Stone Address is to be delivered at 5:30 p.m. on 24 August by Professor William Twining, in the Banco Court of the Supreme Court of NSW. The title of the lecture is 'The Province of Jurisprudence Re-examined: Globalisation, Particularity, and Clean Water'.

In Asia and the Pacific, as in Africa and Eastern Europe, in developing as in developed countries alike, prosperity and stability depend upon the ways in which laws can guard against corruption and safeguard ethics. It is increasingly being recognised that solutions to global problems will come not just through economics and politics, but through the development of legal principles, which convincingly balance pluralism and diversity against universal standards.

Professor Twining was formerly Quain Professor of Jurisprudence and is now Research Professor in Law, at University College London. His many books include *Karl Llewellyn and the Realist Movement*, *How to Do Things With Rules*, *Blackstone's Tower: The English Law School*, and most recently, *Globalisation and Legal Theory*. His address is named to commemorate the life and work of Professor Julius Stone, for many years Challis Professor of Jurisprudence at the University of Sydney.

The lecture is sponsored by the Educational Heritage Foundation. Upon its

conclusion, there will be a dinner in Government House to honour the presence of Professor Twining and the legacy of Professor Stone. Members who are interested in coming to the dinner or organising a table, please contact Shona Smith on ph. (02) 9351 0231; further enquiries about the lecture should be made to the Director of the Julius Stone Institute, Dr Desmond Manderson, on ph. (02) 9351 0278. A copy of the registration form is held at Reception.

**National Environmental Law Association, 19th Annual Conference, 6-8 September 2000, Notre Dame University, Fremantle, Western Australia.** The title of this conference is 'Building towards the future: Does our future lie in our past?' The list of speakers include: Professor David Bellamy, The Right Hon. the Lord Slynn of Hadley, Emritus Professor C G Weeramantry, The Hon. Justice Murray Wilcox of the Federal Court and Justice Bignold of the NSW Land and Environment Court. Topics include Greenhouse Emission Trading, Managing Water Scarcity and Waste Management, as well as a field trip to sites that represent significant town planning, bio-diversity and sustainable development issues. Further information may be obtained from the NELA web site at [www.nela.tsx.org](http://www.nela.tsx.org) or by contacting the Conference Secretariat on ph: (08) 9322 6662, fax: (08) 9322 1734 or via email: [conwest@congresswest.com.au](mailto:conwest@congresswest.com.au). A conference registration brochure is held at Reception.

**International Bar Association 2000 Conference, 17-22 September, Amsterdam, the Netherlands.** The IBA 2000 Conference will attract legal practitioners from around the world to participate in working sessions on 120 topics. Information about the conference, together with an online registration facility, can be obtained from the IBA web site at [www.ibanet.org](http://www.ibanet.org) A registration form is included as an insert in this edition of Bar Brief.

**Retirement of the Honourable Justice James Burchett.** There will be a Full Bench Ceremony to mark the retirement of the Honourable Justice James Burchett on Friday, 6 October 2000. The ceremonial sitting will be held at 9.30 a.m., Courtroom 21A, Level 21, Law Courts Building, Queens Square, Sydney. Robes are to be worn. Wigs are **not** to be worn. President Ruth McColl S.C. will speak on behalf of the Bar. All inquiries should be directed to Claudia Munoz on ph: (02) 9299 1720 or via email: [cmunoz@nswbar.asn.au](mailto:cmunoz@nswbar.asn.au).

**Legal and business challenges in the 21st Century: 4th Lawasia Business Law Conference, 1 November 2000, Shangri-La Hotel, Singapore.** Topics include 'What we learnt from the Asian Financial Crisis', 'International harmonisation of trade and business laws' and 'Challenges of the new financial landscape'. Information about the conference may be obtained from the conference web site at [www.conference.calendarone.com/lawasia](http://www.conference.calendarone.com/lawasia). A registration brochure is held at the Bar Association Reception.

## Appointments

### Federal Court Judge

Richard Conti QC has been appointed as a judge of the Federal Court of Australia, effective 15 August 2000.

Margaret Stone has been appointed as a judge of the Federal Court of Australia, effective 9 October 2000.

### Acting Judge of the NSW District Court

Paul Flannery QC has been appointed as an Acting Judge of the District Court of New South Wales for the period commencing on 1 July 2000 and expiring on 30 June 2001.

### Magistrates

Terry Murphy, Elizabeth Corbett and Elaine Truscott have been appointed as Magistrates and as Mining Wardens, effective 31 July 2000.

### Senior Children's Magistrate

Roger Dive has been appointed Senior Children's Magistrate, effective 4 August 2000.

### Deputy State Coroner

Jacqueline Milledge, Magistrate, has been appointed as a Deputy State Coroner, commencing on 3 July 2000 and expiring on 2 July 2005.

### Licensing Magistrates

The following Magistrates have been appointed as Licensing Magistrates for the period commencing 1 September 2000 and expiring on 30 September 2000: Graeme Henson (Deputy Chief Magistrate) Allan Moore Jennifer Betts Janet Wahlquist

### Acting Public Defenders

Peter Pearsall and Dina Yehia have been re-appointed as Acting Public Defenders, effective 28 July 2000 to 27 July 2001.

## Request for details of counsel's outstanding fees

On 20 July 2000, pursuant to s114B of the Legal Profession Act 1987 (NSW), Andrew Brown was appointed Manager of Michael Geoffrey Green, Solicitor (Manager Appointed) practising as Michael Green and Co.

Mr Brown said that while he could not guarantee fees outstanding would be paid in total or recovery of any fee due from any source, he would do his best to assist counsel owed fees.

Mr Brown may be contacted on ph: (02) 99260321, fax: (02) 9926 0166 or via email [asb@lawsocnsw.asn.au](mailto:asb@lawsocnsw.asn.au)

# Remuneration of cost assessors

The Director General of the NSW Attorney General's Department, Laurie Glanfield, recently wrote to the President of the Bar Association, Ruth McColl S.C., regarding remuneration for cost assessors pursuant to Schedule 7 clause 3 of the *Legal Profession Act 1987*. Mr Glanfield said:

The new determination, which took effect from 18 July 2000, allows fees for cost assessors to be increased by 10 per cent, or the amount permitted by the New Tax System Price Exploitation Law, whichever is the less, to accommodate any GST payable by a cost assessor to the Federal Government.

Cost assessors should clearly indicate on an invoice or voucher the amount of GST payable in respect of the service provided.

All cost assessors must provide the Department with their Australian Business Number (ABN) and confirmation that they are registered for GST. Where an ABN is not provided, 48.5 per cent of the value of the invoice will be withheld and forwarded to the Australian Tax Office. Cost assessors can fax their ABN to the Accounts Branch, Financial Services, Level 18 Goodsell Building, on 9228 8525. Enquiries regarding ABNs should be directed to Brad James, GST Implementation Manager, on 9228 7138.

## Workers' Compensation Working Group

The President has invited the following persons to participate in a working group to assist Bar Council in matters relating to possible legislative and administrative changes in the Workers' Compensation jurisdiction.

Anna Katzmann S.C.	Maurice Byers
Allan Cooley	4th Floor Wentworth
Phillip Perry	Edmund Barton
Brian Ferrari	Elizabeth Street
Leigh Stone	Elizabeth Street
Robert Taylor	Edmund Barton

Persons with issues and concerns relating to Workers Compensation legislation and proposed changes are invited to contact members of the Working Group.

## Media Briefing

### Media releases issued by the Law Council of Australia

*Law Council deeply concerned about Malaysian justice system*, 11 August 2000.

*Law Council Welcomes Pro Bono Law Conference*, 3 August 2000.

*Law Council Says State Cooperation Imperative for Australian Business*, 18 July 2000.

## Bar Library photocopying and printing

This month's edition of Bar Library Bulletin includes important information concerning a new photocopy system in the Bar Library, to be implemented on 11 September 2000. All members and clerks should study the document carefully and retain it for future reference.

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*Contributions and advertising bookings and material for Bar Brief must be received by the end of the month prior to publication.*

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