



## President's Column

### Workers Compensation

On 10 October the Special Minister for State, The Hon. John Della Bosca MLC, tabled a draft Workers Compensation Legislation Amendment Bill in the Legislative Council.

Among the reforms proposed in the draft Bill are:

- a requirement that the injured worker elect to seek lump sum compensation, either through the workers compensation scheme or the common law, rather than enabling the worker to pursue a common law claim and later accept compensation under the *Workers Compensation Act 1987*;
- requirements that both parties to a conciliation provide lists identifying all evidence they hold 'relevant to the dispute' and a prohibition on the use of any other evidence, whether before the conciliator or the Compensation Court; and
- amendments intended to restrict the number of medical reports that can be obtained for proceedings.

The Association, through its Working Group on Workers Compensation, met with the Special Minister's adviser and officers of WorkCover, concerning the Amendment Bill. We have drawn to their attention a number of concerns the Association has with the proposed amendments.

Among the matters raised were:

- Our objections to provisions giving the election requirement any retrospective effect. We have also pointed out that the requirement that an injured worker elect to seek lump sum compensation at an early stage would not necessarily have the desired effect of reducing legal costs. Up-front costs would still be incurred in initial investigations to determine which of common law or the compensation route was most advisable for the worker;
- The inherent injustice in the evidence notification proposals. At the moment, those provisions could both breach the obligations of client privilege and also prohibit the use of documents that had come into existence after the critical date.



Ruth McColl S.C., President.

- We have also objected to any arbitrary limit being placed on the right to call relevant evidence, in particular medical reports.

We expect these matters to be given due consideration. The process of consultation with the Minister will continue.

### GST and memoranda of fees

I noted in the *Annual Report* that the Association was working with the Law Society of New South Wales and the ATO to resolve the issue of GST and memoranda of fees. Some solicitors are suggesting that, due to accounting and cash flow considerations associated with the introduction of the GST, barristers should send memoranda of fees directly to the client.

That issue has now been resolved. Elsewhere in this edition of *Bar Brief* you will find an extract from the Law Society's *Caveat*, issued to all its members, setting out the text of the interpretative advice it has now received from the Australian Taxation Office on this question.

The bottom line is that the solicitors' concern that unless memoranda of fees were remitted directly to the clients, the quantum of the barristers fees would be included in their annual turnover has been

answered by the ATO in the negative in circumstances where the solicitor is acting as agent of the client.

By way of explanation, in giving that interpretative advice, the ATO acted on the basis that:

- as between the barrister and the solicitor, the obligation to pay the barrister's fee is that of the solicitor, even though the solicitor acts as agent of the client;
- a barrister will normally address a fee note to the solicitor and not the solicitor's client;
- monies received by a solicitor from a client for the payment of a barrister's fees are deposited to the solicitor's trust account and held in trust for the client until the barrister's tax invoice (memorandum of fees) is received and, during the period the monies are held in trust, they play no part in the calculation of the solicitor's assessable income for the purposes of the *Income Tax Assessment Act 1997* ('1997 Tax Act');
- once the barrister's memorandum of fees is received, monies are paid from the trust account to the barrister and, again, the payment plays no part in the calculation of the solicitor's assessable income;
- in circumstances where the memorandum of fees is received prior to the client putting the solicitor in funds, the money subsequently received for the payment of the barrister's fees are paid into the solicitor's trust account and then to the barrister and again, the receipt and payment play no part in the calculation of the solicitor's assessable income; and
- in the rare situation where a solicitor pays the barrister's fee from the general account prior to being put in funds by the client, that payment and receipt play no part in the calculation of the solicitor's assessable income.

Many thanks are due, again, to Gzell QC for the hard work he put on our behalf to achieve this outcome.

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## The Olympics

The Olympic Games substantially affected the Bar with virtually no judges sitting in any Court during the Games, save to hear urgent matters. Many members recognised the inevitable and took a break during the Games. (Commiserations to those who fled overseas as the dollar went through the floor!)

Notable exceptions were the 70 or so barristers who volunteered to participate in the Bar's Olympic pro-bono scheme. A document outlining the Bar's scheme and providing contact details was included in the papers given to the *Chef de Mission* for each country participating in the Games. While most of those who took advantage of the scheme were from the countries most expected to need it, namely Africa and Eastern Europe, the Scheme was also called upon by athletes from Canada and the United States.

Enthusiastic volunteers appeared before the Court of Arbitration for Sport on short notice, at all hours of the day and night.

They appeared in cases representing athletes in a wide range of sports, from kayaking to Greco-Roman wrestling. Issues ranged from selection/elimination of athletes for a variety of reasons, including recently changed nationality, late arrival in Sydney and allegations of drug use. Among the cases the volunteers undertook was one in which a Bulgarian weightlifter was restored to the Games. He had been eliminated when fellow team members tested positive to drugs. He had been excluded on the basis that the whole team should suffer the like fate. Once restored, he went on to win a silver medal. Volunteers also appeared (and will continue to appear) in two criminal cases involving, respectively, an official and an athlete.

The Scheme was not confined to New South Wales. Some sports, notably soccer, were being played in South Australia, Victoria, the ACT and Queensland. I wrote to the President of the Bar in each of those jurisdictions, inviting them to nominate some of their members to assist any athletes who became involved

in breaches of criminal law (all Court of Arbitration for Sport cases are heard in Sydney). Each of those Bars enthusiastically provided the names of various members for this purpose.

The Scheme is being extended to provide assistance during the Paralympics.

We propose to prepare a report to the IOC concerning our experience with the operation of the Court of Arbitration for Sport. I will also write to the President of the American Bar Association and the Utah Bar Association outlining the Scheme and suggesting the implementation of a similar scheme for the Winter Olympics to be held in Salt Lake City in 2002.

A more detailed report on the operation of the Scheme during both the Olympics and Paralympics will be prepared for inclusion in the next *Bar Brief*.

In the meantime, thanks to the organisers of the Scheme, Slattery QC, Holmes QC and Duncan Miller, all the volunteers and Chris Winslow, who provided the administrative support.

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# Bar Council business for August 2000

## Business Arising

### **GST: solicitors' annual turnover and barristers' fees**

The President advised that solicitors were continuing to ask barristers to address their fee invoice direct to the client, rather than to the solicitor. The President, Senior Vice President, Gzell QC and the Executive Director met on 31 July with the President of the Law Society and members and staff of the Society to discuss this matter. The solicitors had raised a problem where the present arrangements may cause a practical difficulty. This is that in some instances the inclusion of counsels' fees in a firm's turnover may result in the turnover exceeding \$1 million a year, so that the firm would have to adopt accrual rather than cash accounting. It had been agreed that a joint approach to the Commissioner of Taxation be made asking that counsels' fees be excluded from solicitors' turnover. [See article on page 8]

### **GST and practising certificates: A New Tax System Goods and Services Tax (Exempt Taxes, Fees and Charges) Determination 2000 (No.2)**

The Executive Director advised that the Federal Treasurer had exempted practising certificates from GST.

## President's Report

### **'For the Public Good': The First National Pro Bono Law Conference, Canberra, 4 - 5 August 2000.**

The President advised that she, the Executive Director and the Legal Assistance Manager had attended this conference. The Federal Attorney-General had stated that the conference was 'aimed to honour and promote the valuable work being done around Australia and to encourage further development in the field.' The Attorney-General had emphasised that he did not see pro bono work as being a substitute for legal aid. At the conclusion of the conference an 'outcomes advisory group', which included the President, had agreed that a national taskforce be established to examine a wide range of pro bono issues.

### **Chambers and Regional Visits**

The President advised that she, Slattery QC, Harrison S.C. and the Executive Director had visited Henry Parkes Chambers on 26 July 2000.

### **Arthur J S Hall and Co. v Simons (A P), House of Lords, 20 July 2000**

The President advised that following the handing down of the judgment in *Hall's Case*, Heath Lambert had 'suspended' the current premiums on barristers'

professional indemnity insurance. The President had asked the Professional Indemnity Insurance Committee to take *Hall's Case* and the insurers' reaction to that judgment into account in its deliberations about the future arrangements for barristers' professional indemnity insurance.

## Items for consideration

### **UNSW Symposium 2000 - 'Mandatory Sentencing - Rights and Wrongs'**

Bar Council endorsed the Executive's recommendation that the Bar Association contribute \$2000 towards the cost of this symposium.

### **Counselling Service to Barristers**

The Executive Director outlined the way in which the Law Society's LawCare scheme operated and how a similar scheme might be established for the Bar. He noted that there were a number of reasons why the Bar's scheme should be separate from that of the Law Society. Bar Council resolved that a BarCare scheme be established.

### **Court transcripts**

Bar Council resolved that the continuing problem of lack of transcripts in the District Court be raised with the Attorney General.

### **Court sitting times and family responsibilities**

Bar Council noted that at the meeting on 13 April it had approved a series of recommendations by the Equal Opportunity Committee to enhance the equality of opportunity for women at the Bar. Several recommendations concerned changes to court practices and sitting times. The paper before the Bar Council contained proposals for implementing those recommendations.

Bar Council resolved to authorise the Equal Opportunity Committee to initiate debate within the Bar, and to raise with all courts exercising jurisdiction in NSW, proposals for 'Twin Session Courts' and 'Short Matters on Mondays' arrangements.

### **District Court Practice Note No. 55, Listing at Country Circuit Criminal Sittings**

Bar Council noted that regional practitioners had identified a number of practical problems with the arrangements for criminal trials in the country as set out in Practice Note 55. It was resolved to raise the problems with the Chief Judge.

### **Duty Barrister Scheme at the Bidura Children's Court during the period of the Olympic Games**

Bar Council was advised that eight barristers had volunteered to provide a Duty Barrister service at the Bidura Children's Court during the period of the Olympic Games. It was suggested that, if the scheme was successful, it might be possible to provide a permanent service. Bar Council noted that the Bidura Court would be the only Children's Court in the metropolitan area operating for both Criminal and Care matters during the Olympic Games. The Court will be open from 8am to 8pm, 7 days a week.

Bar Council resolved to approve the proposed Duty Barrister Scheme for Bidura Children's Court during the Olympic Games

### **Minutes of Common Law Committee meeting on 19 July 2000.**

Bar Council noted that there are continuing complaints about listing problems in both

the District and Supreme Courts. The President asked that the Common Law Committee prepare a report for the Bar Council on the problems being experienced by practitioners, with specific examples.

### **Draft Guidelines for barristers on dealing with self-represented litigants**

The President advised that she had asked Brian Knox to draft these 'guidelines' because of problems that had arisen when members were appearing against unrepresented litigants. It was intended to publish the guidelines as soon as possible.

### **New Law Society Advocacy Rules**

Bar Council noted that the Law Society had adopted the recent amendments to the NSW Barristers' Rules, with minor changes to include appropriate references to 'practitioners' and 'instructing practitioners'.

### **NSW Council of Professions**

Bar Council resolved to renew the Bar Association's membership of the NSW Council of Professions for 2000/2001.

### **Richard Conti QC – appointment to the Federal Court of Australia**

Bar Council resolved to congratulate Justice Conti on his appointment to the Federal Court of Australia.

### **Meeting with the Attorney General of NSW, The Hon. Bob Debus MP**

The recently appointed Attorney General, the Hon Bob Debus MP, met with the Bar Council at the conclusion of the Council's consideration of business.

The President presented Mr Debus with his practising certificate, which had been formally issued on 9 August 2000. The President also welcomed Mr Debus as a member of the Association (the Bar Council having admitted him to membership earlier in the meeting.)

The Attorney General spoke of the excellent working relationship that had existed between the Bar Association and the former Attorney General, the Hon. Jeff Shaw QC, MLC. He hoped this relationship would continue. The Attorney General also referred to the integrity of the NSW judicial

system, and noted the Association's high standard of work on professional conduct matters.

The Attorney General noted that the Bar Association had not supported legislation to allow the incorporation of law firms. He undertook to pay attention to the concerns raised by the Association; he was anxious to ensure that incorporation did not lead to any lessening of the standards of prudence and ethics.

The continuing problems being experienced by judges, practitioners and clients because of the unavailability of transcripts in the District Court was raised. It was noted that only transcripts from 3 Courts were available each day (and then were not always available), yet there could be 15 trials being held. When the Supreme Court had transferred a large number of matters (and jurisdiction) to the District Court a few years ago, an undertaking had been given that transcripts would be available. The Association made numerous representations to the Chief Judge, the former Attorney General and the Director General of the Attorney General's Department seeking an improvement in the provision of transcripts.

**Note:** Because of the confidentiality provisions in the *Legal Profession Act 1987* (s.171P), 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.

## **Correction**

The 'Bar Council business' column in the September edition of *Bar Brief* was entitled 'Bar Council Business for June'. This was incorrect. It should have read 'Bar Council Business for July.' The Editor of *Bar Brief* regrets any confusion this may have caused.



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# Timely completion of chamber work and return of briefs

The June 2000 edition of *Bar Brief* contained two articles the Council commends to members, namely the extracts of the articles 'Instructing Counsel' by Margaret Connors and 'When may you return your brief?' published by Heath Lambert Professional Indemnity Pty Ltd and Resource Underwriting Pty Ltd.

The Council thought it would be useful to give its perspective on complaints it has received about failure to complete chamber work in a timely fashion and to return briefs on request, which may have unforeseen consequences of the type described in the first of those articles.

Such complaints are generally made either informally by telephone to the staff of the Professional Affairs Department, or by formal referral of complaint through the Office of the Legal Services Commissioner.

Normally the complainant wishes only to achieve one object, namely to have the chamber work completed or the brief returned. Making a complaint is a means

to achieve this end. Such complaints are often made as a result of frustrated attempts to speak with the barrister concerned or to obtain a satisfactory outcome.

If complaints are made informally, and a member is requested by the Professional Affairs Director or her Deputy to cooperate, either by completing the advice/chamber work within a short turn round time or returning the brief if the member is unable to do so, then every effort should be made to co-operate. In such cases the Bar Association staff are acting in the mutual interest of both the barrister and the potential complainant to seek to avoid the need for a formal complaint being made.

Rule 41 of the New South Wales Barristers' Rules (which took effect on 6 March 2000) provides:

41. A barrister must seek to ensure that:
  - (a) the barrister does work which

the barrister is briefed to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and

- (b) warning is given to the instructing solicitor or the client, and to the opponent as soon as the barrister has reasonable grounds to believe that the barrister may not complete any such work in time.

While barristers will always be under pressure from time to time to complete chamber work, those barristers who find themselves under constant pressure should consider putting in place practice management systems to manage the load.

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## Appointments

### District Court of New South Wales

Audrey Balla has been appointed as a judge of the District Court of New South Wales, effective 3 October 2000.

### Crown Advocate

Richard Cogswell S.C. has been appointed Crown Advocate, effective 16 October 2000. The term of the appointment is seven years.

### Crown Prosecutor

Kenneth Magnus has been appointed Crown Prosecutor, effective 14 September 2000.

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## At the Lectern

### 13 November – 'Alternative Dispute Resolution'

Convenor – ADR Committee

### 16 November – 'Voice and Presentation in Court'

(New Barrister Seminar)

Speaker: Robyn Fraser

## Law Council rebuts NCC community information paper

On 7 September 2000 the Law Council issued a commentary paper, providing a detailed rebuttal to the National Competition Council's Community Information Paper: *Reform of the Legal Professions*. A copy of that paper may be obtained from the Law Council's web site at <http://www.lawcouncil.asn.au/rebutncc.doc>. A copy is also held in the Bar Library.

The National Competition Council contends that a competitive, national legal services market is hindered by the fact that 'each State and Territory regulates the legal profession differently (and extensively)'. The Law Council responded by reminding the NCC that the Commonwealth does not have the constitutional power to regulate the legal profession.

The Law Council also rebutted the NCC claim by pointing to the progress in developing a national market for legal services. One of the key elements in that rebuttal is the 'travelling' practising certificate scheme. The paper argues that, when fully implemented, it will facilitate the development of a national legal services market by removing constraints, which have precluded unrestricted practice throughout Australia.

The Law Council's proposal for a 'travelling' practising certificate regime is now operational in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Victoria. The Northern Territory passed its legislation in mid-June 2000 and it was proclaimed to commence on 1 October 2000. Tasmania introduced its legislation earlier this year and it is expected to be debated before the end of 2000. This leaves Western Australia and Queensland.

While good progress is now being made towards the goal of Australia-wide operation of the national travelling practising regime, the target date of 1 January 2001 will not now be met. This, however, is beyond the profession's control.

# Bar Library: Photocopying and printing

As indicated in the August issue of *Bar Library Bulletin* and the September issue of *Bar Brief*, a new accounting system has been installed in the library for photocopying and printing. The system is similar to those at university and public libraries. The main difference is that an actual 'card' will not be issued. Instead, members will receive a user ID ('membership number') and a PIN code (for security). It was decided that making it 'virtual' would be easier for those library users who do not visit the library in person and for the many members who delegate their copying to their chambers staff.

Members will no longer be required to fill out debit forms, and monthly invoices will not be sent. A credit balance will enable members to copy and print information from the resources in the library. The credit balance on the system may be checked at any time.

In order to print or photocopy at the Bar Library or make telephone requests for information, library users will need their membership number and PIN code to access the system.

Members (and floors) can establish a photocopy account with a minimum of \$20.00 deposit through Reception at the Bar Association. Cash, cheque, EFTPOS and credit cards are accepted. For members not in the CBD, credit card or cheque payments are recommended. An application form for a 'virtual card' is inserted with this issue of *Bar Brief*. A copy may also be obtained from the Bar

Library. Identification codes will be issued along with a tax invoice on receipt of payment.

## Virtual card system: Frequently asked questions

### How will I know when I have run out of credit?

Members can check the balance of the account at any time at the library or by calling the library. If you provide the library staff member with your membership number the library staff can tell you how much you have left in your account.

### What if I forget my pin?

Unless a member has elected to change the PIN, the library staff will be able to remind the member of his/her PIN.

### Does the Bar Association pay interest on the credit in my account?

No.

### Will I get a receipt for tax purposes?

You will receive a receipt each time you put money into your account.

### Will I get a tax invoice/ receipt suitable for claiming input credits?

Yes. A tax invoice/receipt will be issued every time money is received (initial payment or top ups).

### Can I give you my credit card details and authorisation for ongoing automatic payment?

For security reasons the Bar Association will not be holding members credit card details on an ongoing basis. A "top up"

form can be faxed to member's chambers: alternatively, the form is available from reception.

### Can an account for a chambers/floor be established?

An account can be established for the chambers/floor.

It is important to remember that no statements will be issued and floors must keep their own record of copying done for individual members.

### What are the charges for printing, photocopying, interlibrary loans, etc.?

Charges inclusive of GST are:

A4 photocopying & Printing: 22c per page

A3 photocopying: 33c per page

Faxes:

Local : 22c per page

Interstate : \$1.10 per page

International : At cost

Photocopying from other libraries: 33c per page

Inter Library Loan fees: as per standard ACLIS charges

Online search fees: as per item

Kinetica search fee: \$1.10

For further information about the virtual card system, contact: Lynne Colley, Administrative Support Manager at the Bar Association on ph: (02) 9229 1713, fax: (02) 9221 1149 or via email: [administration@nswbar.asn.au](mailto:administration@nswbar.asn.au)

## Coming Up

**American Bar Association: 2001 Annual Meeting, Chicago, 2 – 8 August 2001.** The 2001 Annual Meeting will include more than 2,500 CLE programmes, seminars and special events, including the ABA Expo, featuring exhibits from more than 150 providers of legal products and services. A conference information and registration brochure is held at the Bar Association Reception. Alternatively, it is possible to register online at [www.abanet.org](http://www.abanet.org)

**Legal and business challenges in the 21<sup>st</sup> Century: 4<sup>th</sup> 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.

**A 15 Bobber** to celebrate the appointment

of The Hon. Justice Whealy to the NSW Supreme Court and The Hon. Justice Richard Conti to the Federal Court of Australia, will be held on at 5.00 pm on 24 November 2000 in the Bar Association Common Room. For more information, visit the Bar Association's web site at [www.nswbar.asn.au](http://www.nswbar.asn.au) or contact Claudia Munoz at the Bar Association on ph: (02) 9229 1720 or via email: [cmunoz@nswbar.asn.au](mailto:cmunoz@nswbar.asn.au)

A dinner to celebrate **The Hon. R J Ellicott QC' 50 years at the Bar will be held at 7.00pm on Friday, 17 November 2000 in The Westin Hotel.** For more information contact **Claudia Munoz at the Bar Association on ph: (02) 9229 1720 or via email: [cmunoz@nswbar.asn.au](mailto:cmunoz@nswbar.asn.au)**

**Christmas Carols in the Common Room.** Members and their families are invited to celebrate the Christmas season with music, wine and mince pies on Thursday, 7 December at 6.00pm. Entry is by donation at the door. Children's gifts (to the value of \$20.00) may be left beneath

the Bar Christmas tree, from where they will be passed to needy children. Gifts should be clearly and firmly labelled for gender and age. Inquiries to Kelly Wright on ph: (02) 92291722, email: [kwright@nswbar.asn.au](mailto:kwright@nswbar.asn.au)

**Nation skilling: An international symposium on immigration and labour law, University of Sydney, 23 – 24 November 2000.** Organised by the Law Council of Australia's International Law Section and the Faculty of Law, University of Sydney, this symposium will include as its Keynote Speaker the Minister for Immigration, The Hon. Philip Ruddock MP. For more information contact Gwen Fryer, Law Council Secretariat, on ph: (02) 6247 3788 or via email: [gwen.fryer@lawcouncil.asn.au](mailto:gwen.fryer@lawcouncil.asn.au)

**Edmund Barton, 'The one man for the job', by Geoffrey Bolton AO.** At 5.30pm on Friday 1 December 2000, the Chief Justice of Australia, The Hon. Justice A M Gleeson AC will Bar Association will host the launch of the first biography about Edmund Barton in 50 years.

# Francis De Saxe OAM — 1911 - 2000

Frederick Francis De Saxe OAM, a long serving clerk on 7 Wentworth Chambers, passed away on Saturday, 23 September 2000.

The funeral was held on Wednesday 27 September 2000 at Our Lady of Dolours Catholic Church in Chatswood. Bill McMahon, the former clerk of 8 Selborne, read the oration and gave permission for it to be reproduced in *Bar Brief*.

Today we celebrate the passing into eternal life of our very dear friend Fred De Saxe. We will all miss him very much. We will miss his company, which was a source of inspiration, pleasure and at times, great help to each one of us. It is our great hope that we will all meet with him again in heaven.

There should be no sadness whatsoever amongst any of us, his friends, at this time, as Fred had drained to the last drop all the possible joy that could be derived from having lived a fruitful, fulfilling and dutiful life. When Brian Bannon and I went to see him on Friday morning, he never spoke. He acknowledged things we said by nodding his head. He smiled once or twice, but he did not speak nor did he open his eyes.

When Paul Daley saw him the night before, Thursday night, he did say to Paul 'I have had a good life'. How very true a statement! And he lived it right up to the bitter end. Just who else amongst us would have had the panache to time the celebration of his spiritual rebirth to upstage the Olympic Games?

He was born on 26 October 1911 and died on 23 September, just one month short of his 89<sup>th</sup> birthday. In 1925, at 14 years of age, he started work as a junior barristers' clerk in Phillip Street, Sydney. He always regretted his lack of an adequate formal education – it never showed. He succeeded to the senior clerk's position at a very early age and worked continuously in that position until his retirement on 3 July 1981, a period of 56 years. He was not in chambers from 22 December 1941 until 4 January 1946, when he served in the armed forces as a Sergeant in the 117<sup>th</sup> Australian General Transport Company. He was posted to Darwin on 6 September 1944 until 22 April 1945. It is a period of his life about which he was quite reticent.

At the time of his retirement, the *Bulletin* featured an article about him in which they correctly called him 'the prince of all clerks'. That he reigned supreme in Phillip Street is unquestioned. Phillip Street will never see his like again. The historical environment in the law in Fred's time, that relied so much on a clerk's initiative and ingenuity, no longer exists. There is no longer the opportunity for a clerk of outstanding ability to give the same expression to his or her talents. Regulations and computerised court procedures introduced have limited the need for the personal involvement of the barristers' clerks in areas in which they were once indispensable.

Many years ago Fred told me a story against himself about sleeping in on Saturday morning when Olga was away. It was after a late Friday night clerks' drinks and dinner function. He said:

I must have had a bit too much to drink, as I could not find my keys, which I always left as a habit on my bedside table. What's more, I have no recollection whatsoever of where I put them. I went to the wardrobe and searched the pockets of the suit that I had on and in my briefcase, but they were nowhere to be found. Resigned to the fact that I had lost them, I showered and shaved and got dressed to go to an



engagement at a bowls competition. I opened the fridge to get a couple of eggs to cook for my breakfast and there on the shelf of the fridge were my keys, my hat and my shoes and socks.

He said it showed 'what a tidy sort of fellow I am'.

Even though it is a funny story, it was very true of him. Everything about him was always finished and put away properly, even if, as happened on this odd occasion, put in the wrong place. When he died last Saturday, all his affairs were ordered in exactly the way that he judged that they should be so arranged. He was as personally tidy right up to the end with his own affairs as he was when looking after the affairs of others.

The *Bulletin* described Fred as a 'prince of clerks'. He was the prince who clerked for kings. The names of those for whom he worked as clerk that come to mind

include three barristers who became judges of the High Court of Australia;

- The Chief Justice of Australia The Hon. Justice AM Gleeson AC;
- Former Chief Justice of Australia, The Hon. Sir Anthony Mason AC KBE;
- Former High Court Judge, The Hon. Justice Sir Alan Taylor PC KBE;
- Former Chief Justice of New South Wales, The Hon. Sir Laurence Street AC KCMG;
- Former President of the NSW Court of Appeal, The Hon. Justice Sir Bernard Sugerman;
- Judge of Appeal The Hon. Justice R Reynolds AO;
- Judges of the Supreme Court of New South Wales: The Hon. Justices Taylor, Ferguson, Manning, Maxwell, Ash, Hunt, Waddell, Allen, Cole, Clarke, Wood and Studdert;
- The Hon. Justice Sheppard of the Federal Court (now retired);
- The Hon. Justice J S Lockhart, formerly of the Federal Court and now legal officer of the World Bank; and
- Judges of the District Court, Melville, Sinclair and J G Smythe.

A now deceased, very good American friend of mine used to be always talking about 'the best people'. I once asked him who he meant by 'the best people'. He said:

The best people always had the same qualities, which were: commonsense, naturalness (they were always themselves and not trying to imitate someone else) and a love of freedom properly understood and that no social class had a monopoly of these people – they were where ever you found them.

It is a wide and deep set of parameters. I had long ago identified Fred as one of those rare individuals whose great and good life resounded with the virtues to fill out all of my friend's criteria. He was one of the 'best people' by anybody's standard.

There are many stories about Fred from Phillip Street. Suffice for today to tell two of his own, for they no doubt were memories he cherished. In 1951 there was an Australian law conference held in Sydney. Sir Harry Alderman, who was in charge of the conference, asked Fred to arrange and manage the transport for

all the overseas and interstate visitors for the whole time of the conference. This Fred did, and it was no surprise to anybody that it all ran with clockwork efficiency. Sir Harry gave Fred an inscribed gold watch in appreciation of his efforts. Fred always wore that watch with pride.

The second one was concerning the appointment of judges. During the time of the Cahill Labor government in New South Wales, Reg Downing was Attorney General. Every time Reg needed a new judge he would phone his good friend J W Smythe QC and ask him to recommend a suitable candidate. John Smythe, who was also a good personal friend of Fred's, would call him into his chambers and ask him to find somebody suitable for the particular jurisdiction that he could recommend to Reg Downing. Fred, in his usual efficient and perceptive manner, would pick out some worthy candidate and cautiously proposition him with the prospect of appointment and pass on the name of that person to John Smythe, with a run-down on his suitability. John Smythe would phone the Attorney and recite to him the brief as given by Fred. The Attorney would phone Fred's candidate and make the offer to the new judge, which would be accepted. Fred used to say with that wry smile of his, that during Reg Downing's long Attorney Generalship: 'I appointed all the judges and there was not one dud amongst the lot of them'.

The very centre of Fred's earthly existence was Olga. He once said to me that 'neither the demands of work or, in fact, any other thing ever really worried me, as long as things were all right with my bride'. Olga's love for Fred was just as complete as his was for her. The low point in his life was when she died in 1989. He said it took him two years to come to terms with the loss and the consequent loneliness of life without her. The memorial notice, which he placed in the *Sydney Morning Herald* after her death, was his way of announcing to all the world the anguish in his heart. He just had to cry out to anyone who would listen to him about his lost treasure

A heart of gold stopped beating  
Two blue smiling eyes at rest  
If love could build a staircase  
And memories form a lane  
I would walk the way to Heaven Olga  
And bring you home again.

In a role reversal, Olga has now reached down and taken him to their new and eternal home.

The same sort of commitment that Fred gave to his marriage and to his profession as a barristers' clerk, he gave to everyone and everything in life that he judged worthy and worthwhile. He sailed as a crew member on Sydney Harbour in the eighteen footer boat belonging to the legendary international rugby league footballer Joe Pierce, when it was the pride of the fleet in the late 1930s and early 1940s. He was at a time, Major Singles Bowls Champion at Chatswood and Indoor Bowls champion at the New South Wales Leagues Club.

A number of we retired contemporaries of Fred's, which included: Greg Isaac, Frank Dawson, Brian Bannon, Les O'Brien, Ted Rumble, met regularly with Fred to have lunch and a drink and gossip about old and new times. There was no doubt that Fred looked forward to all these occasions and his joy to talk and listen was palpable. For a long while we met at the New South Wales Leagues Club, but to meet Fred's convenience over the last two years we shifted to the Chatswood RSL. The last occasion we did this was just a few weeks ago. Paul Daley,

who is younger than the rest of us and who is still working, also attended our last get-together. He was off work at the time, recuperating from a spell in hospital. He has been a constant friend and companion to Fred in these last weeks of his life. We had planned to have a get-together of many of his friends and [their] spouses on 26 October to celebrate his 89<sup>th</sup> birthday. It just was not meant to be.

No words written or spoken on the life of Fred De Saxe would be complete without referring to his and Olga's relationship with Jenny and Monica James. Their lifelong friendship and their constant companionship have been such they have been part of Fred's family by adoption.

You will appreciate that I am able only to speak of those aspects of Fred's life with which I am familiar and those persons whom I have known who were his friends and associates. I wish no discourtesy to any family members of other friends of Fred who may be here today, who I am unable to acknowledge by my being ignorant of them and their particular relationship to either Fred or Olga.

It is consistent with every value in Fred's life that he remained faithful to his belief in eternal life after death. He never wavered in the practice of his Christian faith. His dialogue with his Lord and Saviour that we call prayer and the regular reception of the sacraments were the substance of his life. He knew by way of that great intuitive sense of his that these were the normal ways that the sanctifying grace, needed for salvation, is imperceptibly infused into a soul-fashioning it to Christ's own self. It showed – he never missed a beat anywhere.

On this same subject and for our own consolation, there is a very appropriate spiritual perspective that I think is worth reflecting upon at the departure of our dear friend.

No, we die not, we change our home and nothing more. God does not act like a hunter, who waits for the smallest slip on the part of his prey to shoot it down. God's like a gardener who cares for the flowers: He waters them and He only cuts them when they are at their best and in full bloom. God takes souls to himself when they are ripe.

One of Fred's great professional virtues as a barristers' clerk was his ability to find the best and most suitable advocate for every case at court. In our prayers for Fred it is nothing less than appropriate that we should endeavour to obtain for him for his appearance before the heavenly judge none but the very best of advocates; the Blessed Virgin Mother Herself. She, who by mentioning only to her son the problem at the marriage feast at Canaan, was able to bring about the miracle of changing the water to wine. There will be a big scramble for the junior brief. If Fred has any say at all, it will no doubt go to his mate and erstwhile floor leader, J W Smythe QC, if he is free to take it. It would be a brief that any barrister would be pleased to take on a pro bono basis, without a moment's worry of not collecting a fee because of an unsuccessful result.

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# ATO advises on GST implications of barrister's fees

The Law Society of New South Wales has received interpretative advice from the Australian Taxation Office on the GST and PAYG implications of solicitors' annual turnover and barristers' fees. The following article from *Caveat News Bulletin 214* has been reproduced with the permission of the Law Society.

The Society sought answers to the following four questions:

1. Do barristers' fees paid by a solicitor form part of the solicitor's annual turnover for the purposes of section 188-10 of *A New Tax System (Goods and Services Tax) Act 1999* ('the GST Act')?
2. If the answer to question 1 is yes, will the Commissioner allow solicitors to account for GST on a cash basis under section 29-45 of the GST Act if the reason turnover meets the \$1million threshold is that barristers' fees are included?
3. Do moneys received by a solicitor from a client for payment of barristers' fees form part of the solicitor's instalment income for the purposes of section 45-120 in Schedule 1 of the *Taxation Administration Act 1953* ('the TA Act')?
4. Can the solicitor's client claim an input tax credit for a barrister's fee when the tax invoice prepared by the barrister is addressed to the solicitor and not to the client?

The full text of the ATO's advice has been published on the Law Society's GST web site at:  
<http://www.lawsocnsw.asn.au/gst>  
the answers to questions 1 and 4 are set out below:

1. Do barrister's fees paid by a solicitor form part of the solicitor's annual turnover for the purposes of section 188-10 of the GST Act?

Where the solicitor is acting as agent of the client - No.

Where the solicitor is acting as principal - Yes.

According to sections 188-15 and 188-20 of the GST Act, annual turnover includes supplies that you make, or are likely to make, other than:

- (a) supplies that are input taxed;
- (b) supplies that are not for consideration and are not supplies to associates; and
- (c) supplies not made in connection with an enterprise you carry on.

Where a solicitor acts as an agent for a particular client in obtaining a barrister's services, the general law of agency applies. That is, a thing done by an agent as agent for a principal is a thing done by the principal. In these circumstances, it is the barrister and not the solicitor who is making the supply to the client. Therefore, even though the solicitor may pay the barrister on behalf of the client, it is not a supply by the solicitor to the client. As there is no supply by the solicitor, it is not included in the annual turnover of the solicitor.

Whether a solicitor is acting as agent when acquiring specific goods or services depends upon the particular circumstances of each case.

If there is some doubt that an agency relationship exists in relation to a specific transaction, then a solicitor may wish to include a description of the solicitor as an agent, having authority to act for the client, in the memorandum of agreement to make the situation clearer. It should be noted that the actions of the relevant parties, in addition to any written agreement and legislation governing the activities of the various parties, must be taken into consideration in establishing whether an agency relationship exists.

Where the solicitor obtains a barrister's services as a principal and then charges a client having reference to the services of the barrister, there are two separate supplies. The first supply is from the barrister to the solicitor. The second supply is from the solicitor to a client. As the solicitor is making a supply, the supply is included in the calculation of annual turnover.

4. Can the solicitor's client claim an input tax credit for a barrister's fee when the tax invoice prepared by the barrister is addressed to the solicitor and not to the client?

Yes, providing it is a creditable acquisition to the client. The fact that a tax invoice shows the solicitor (who is acting as agent for a client in relation to the acquisition) as the recipient of the supply rather than the client will not prevent that acquisition being a creditable acquisition of the client.

The ATO's view in relation to tax invoices is set out in GSTR 2000/17. In relation to goods or services supplied or acquired through an agent, paragraphs 35 and 36 state:

35. Division 153 has special rules about tax invoices and agents. It reflects the position at common law that a supply or acquisition your agent makes on your behalf is no different from one that you make yourself. Accordingly, if you make a taxable supply through an agent, your agent can issue a tax invoice for you.

Similarly, you may claim an input tax credit for a creditable acquisition you make through your agent if your agent holds the tax invoice.

36. Where this Division applies, the Commissioner will treat a document as a tax invoice if it shows your agent's name and address or ABN instead of your name and address or ABN. This will apply whether you are the supplier or the recipient of the supply. It will align the tax invoice requirements with the existing commercial practices of many agents.

In accordance with the ruling, the client is entitled to claim an input tax credit for the creditable acquisition of a barrister's services that were acquired through a solicitor as agent even though the tax invoice may show the solicitor as the recipient of the supply.

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## Speeches

'An international perspective on tort system reforms', by The Hon Justice Michael Kirby AC CMG. This speech was delivered at the 2000 PIAA International Workshop, The Royal College of Physicians, London, England, 11 September 2000. A copy of this speech may be obtained from the High Court's web site at [www.hcourt.gov.au](http://www.hcourt.gov.au). A copy is held in the Bar Library.

**Notre Dame University Law School's Annual Formal Dinner**, delivered by the Commonwealth Attorney-General, The Hon. Daryl Williams AM QC MP Fremantle Town Hall Saturday, 14 October, 2000. Among the topics covered by the Attorney-General were pro bono work and the Legal Profession Amendment (Incorporated Legal Practices) Bill 2000 (NSW). A copy of the speech may be obtained from the Attorney-General's web site at <http://www.law.gov.au/ministers/attorney-general/speeches.html>. A copy is held in the Bar Library.

# Bar Council Social Calendar

## October

Friday, 27 October 2000: Bar Council & Committee Drinks  
5:00pm – Bar Association Common Room  
Attire: Lounge Suit

Tuesday, 31 October 2000: Executive Meeting  
5:00pm – Executive Director's Office

## November

Wednesday, 8 November 2000: Bar Council Meeting  
4:30pm – Bar Association Boardroom

Thursday, 9 November 2000 2000 Silks Ceremony  
5:30pm for 6:00pm – Bar Association Common Room  
Attire: Lounge Suit

Thursday, 16 November 2000 Bar Council Meeting  
4:30pm – Bar Association Boardroom

Friday, 17 November 2000: 50 Year Anniversary Dinner – The Hon. RJ Ellicott, QC  
7:00pm for 7:30pm – The Westin Hotel  
Attire: Formal

Thursday, 23 November 2000 Parliamentary Lawyers Drinks  
6:00pm – Bar Association Common Room

Friday, 24 November 2000 15 Bobber – Conti & Whealy JJ  
5:00pm – Bar Association Common Room  
Attire: Lounge Suit

Wednesday, 29 November 2000 Bar Council Drinks with Magistrates & Duty Barristers  
5:30pm – Bar Association Common Room  
Attire: Lounge Suit

Thursday, 30 November 2000 Sir Maurice Byers Memorial Address  
5.00pm to 7.30pm – Bar Association Common Room

## December

Friday, 1 December 2000 Sir Edmund Barton Book Launch/High Court Presentation  
5.00 pm – Bar Association Common Room  
Attire: Lounge Suit

Thursday, 7 December 2000 Christmas Carols Concert  
6.00pm to 8.00pm – Bar Association Common Room

## Media Briefing

Media releases and letters to the editor issued by the New South Wales Bar Association

*NSW Bar represents Canadian athlete*, 14 September 2000.

Media releases and letters to the editor issued by the Law Council of Australia

*Australian Lawyers Show Support for Malaysian Colleagues*, 9 October 2000.

*Law Council Releases Multidisciplinary Practices Paper*, 5 October 2000.

Visit the Law Council of Australia's web site at [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au) for a full list of submissions and press releases.

Make [www.nswbar.asn.au](http://www.nswbar.asn.au) your home page.

## In Brief

Mark Ierace S.C. has accepted a position as a prosecuting trial attorney in the International Criminal Tribunal for the former Yugoslavia, based in The Hague.

### Civil Business Committee of the District Court

The Bar Association has nominated the following members as its representatives on the Civil Business Committee of the District Court of New South Wales:

Brian Murray QC and Andrew Lidden

The following have been nominated as alternate representatives:

Richard Bell and Jeremy Gormly

# Papers to Note

*New South Wales Law Reform Commission Discussion Paper No. 43: Contempt by publication.* This Discussion Paper contains reform proposals on the law and procedures of contempt by publication. The inquiry originated from the introduction into Parliament of the Costs in Criminal Cases Amendment Bill 1997. The Commission invites views and comments from members on the 33 reform proposals by 30 November 2000. A copy of the paper may be obtained by visiting the NSWLRC page on the Lawlink web site at <http://www.lawlink.nsw.gov.au> A copy is held in the Bar Library.

*New South Wales Law Reform Commission Report No. 95: The right to silence.* In August 1997, the Commission was directed to consider a number of issues surrounding the right to silence, the operation of s20 of the *Evidence Act 1995* and pre-trial defence disclosure provisions. The report contains 15 recommendations, including the retention of s89 of the Evidence Act and the present law concerning the right to silence at trial. Other recommendations relate to disclosure requirements for defendants and enabling the Supreme Court and District Court to make rules requiring disclosure. A copy of the report may be obtained from the Lawlink web site at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au). A copy is held in the Bar Library.

*Notification of annual indexation of limitations upon damages awarded under the motor accidents scheme,* 28 September 2000. On 22 September 2000, the Special Minister for State and Assistant Treasurer, The Hon. John Della Bosca MLC, signed the Motor Accidents (Determination of Non-Economic Loss) Order No. 11 and the Motor Accidents Compensation (Determination of Loss) Order No.1. The Orders will allow for the indexation of limitations upon motor accidents scheme damages. The *Notification* includes the Orders, the Indexed Amounts and s79-79A Schedules of Damages that apply from 1 October 2000. A copy is held in the Bar Library.

*Report of the Deliberative Forum on Criminal Trial Reform,* June 2000. This report used as its starting point the findings of the Standing Committee of Attorneys-General (SCAG) Working Group on Criminal Trial Procedure Report ('The Martin Report', September 1999). The report contains 68 recommendations. A copy may be obtained in PDF format from the Commonwealth Attorney-General's web site at <http://www.law.gov.au/publications/pubs.htm> A copy is held in the Bar Library.

*Law for all: An analysis of legal needs in inner Sydney today,* October 2000. This report examines the legal needs of 'emerging and hidden communities', including young people, Indigenous communities, the homeless and people

with mental disabilities. It was initiated by the Kingsford, Marrickville, Redfern and Inner City Legal Centres and is intended to be a resource for the imminent Commonwealth Government review of community legal centres in NSW. A copy is held in the Bar Library.

The Victorian Bar Inc., *Annual report 1999-2000.* A copy is held in the Bar Library [A copy may be obtained from the Victorian Bar's web site at [www.vicbar.com.au](http://www.vicbar.com.au)]

*Second review of the Protected Disclosures Act 1994: Report of the Committee on the Office of the Ombudsman and the Police Integrity Commission,* August 2000. The Committee found that few of the recommendations contained in its first report had been adopted. Consequently, it recommended, among other things, an amendment to the *Protected Disclosures Act 1994* to provide for courts to make orders suppressing the publication of material which would tend to disclose the identity of a public official who has made a protected disclosure. A copy of the report is held in the Bar Library.

District Court Amendment (Referral for Legal Assistance) Rule 2000; Form 148 (Pro Bono Referral Certificate); amends the District Court Rules 1973 to provide for a scheme of Court referrals to a panel of barristers and solicitors who are prepared to act for litigants on a pro bono basis. A copy of the rule is held in the Bar Library. Copies may be also be obtained from the NSW Parliamentary Counsel's Office web site at [www.pco.nsw.gov.au](http://www.pco.nsw.gov.au)

Land & Environment Court Rules (Amendment) No.4 2000. Commenced 1 September 2000. A copy is held in the Bar Library. Copies may be also be obtained from the NSW Parliamentary Counsel's Office web site at [www.pco.nsw.gov.au](http://www.pco.nsw.gov.au)

## New members of the Bar Association

### Local Practising Practitioner

John Connors – 6 St James Hall

Edward Cox – 16 Wardell

Geoffrey Gemmill – Maurice Byers

Stephen Loughnan – 11 St James Hall

Dallas Morgan – Elizabeth Street

### Legal Practitioner other than Local Practising Practitioner

Arthur Adams QC – Owen Dixon Chambers (Melb.)

Lorna Sproston – Pump Court Chambers (London)

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## SIR MAURICE BYERS' ANNUAL ADDRESS

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Thursday 30 November 2000  
at 5.30pm

Bar Association  
Common Room

The Hon Sir Gerard Brennan  
AC KBE

will deliver the address.



Invitations will be issued to all members.

# Carols in the Common Room

Members and their families are invited to  
celebrate the Christmas season with  
music, wine and mince pies.

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## Land and Environment Court – amicus curiae list

In 1994 the Land & Environment Court established a list of legal practitioners willing to appear as amicus curiae with respect to unrepresented persons. The intention is to provide such assistance as may be appropriate in applications for civil enforcement, motions for contempt and summary criminal prosecutions.

It is intended that, if any occasion arises when it would be desirable to have a practitioner appear as amicus curiae, one of the persons on the list who is in the precincts of the Court will be approached by an associate or Court staff member to ascertain if they can appear. It is not intended to approach practitioners on the list at their chambers or offices.

The Chief Judge of the Court, Justice Mahla Pearlman AM, wishes to update the list. Members of the Bar who would like have their names placed on the list should notify the Registrar of the Land and Environment Court at DX 264 Sydney.

# New office bearers in Australian Bar Associations and Law Societies

## The Law Society of the Northern Territory

At the Annual General Meeting of the Law Society of the Northern Territory, held on Thursday 7 September 2000, the following members were elected as office bearers:

President	Jon Tippett
Vice President	Ian Morris
Secretary	Merran Short
Treasurer	Eileen Terrill

## Victorian Bar

At elections held on 13 September 2000, the following persons were elected as office bearers of the Victorian Bar:

Chairman	Mark Derham QC
Senior Vice-Chairman	Robert Redlich QC
Junior Vice-Chairman	Jack Rush QC

Honorary Treasurer	Robin Brett QC
Assistant Honorary Treasurer	Richard McGarvie
Honorary Secretary	Richard Attiwill
Assistant Honorary Secretary	Sharon Moore

## ACT Bar Association

At the Annual General Meeting of the Australian Capital Territory Bar Association, held on 28 September 2000, the following members were elected as office bearers:

President	F J Purnell S.C.
Vice President	B Meagher
Treasurer	S Pilkington
Secretary	N Adams

## Join the American Bar Association

The Constitution and By-laws of the American Bar Association provide for associate affiliation by lawyers in other nations who have not been admitted to the Bar of any state or territory in the United States. 'International Law Associates' may attend ABA meetings, receive Association publications and affiliate with Sections, Divisions or Forums. A 2000-2001 Associate enrolment form is held at Bar Association Reception. Alternatively, it is possible to enrol online at [www.aba.org](http://www.aba.org)

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