



Francis Forbes Lecture on Australian Legal History

The inaugural Francis Forbes lecture on Australian legal history will be held on 28 November 2002. The lecturer will be Ian Barker QC, speaking on 'The history of trial by jury in New South Wales'.

In his address, Barker QC will deliver a detailed analysis of the way in which a penal colony, governed by the military, and with deep social divisions, was able to implement a system of trial by jury and gradually broaden eligibility for jury service.

Barker QC will describe how the penal colony of New South Wales was at first ruled by governors who were necessarily dictators, and whose edicts were enforced by the military.

The governor had very great power. He decided times of religious observance, rights of assembly and publication, whether people could marry, whether a man was sane or not, how much men should drink, how much those victualled by the government should eat, and what should be taught in schools. He could pardon, grant tickets of leave and grant land. The extent of his powers was uncertain because of the difficulty in distinguishing between executive acts and those legislative in character.

For the convicts, the colony was a prison. Punishments were harsh. For offences not capital, the commonest was flogging. Refinements such as being nailed by one's ears to the pillory, burning on the hand, starvation diets and being chained in close confinement were not uncommon.

A criminal 'court' had all the trappings of a military court martial. There was no judge, but a judge advocate. The first two judge advocates were not lawyers. There was no jury, but a tribunal of military officers. There was no grand jury to consider in the first place whether there was a case. The judge advocate was both prosecutor and one of the decision makers.

The deep social divisions in New South

Wales in the early nineteenth century were serious impediments to the establishing of a fair legal system which included trial by jury. Even if the first free settlers did bring with them the right of trial by jury it served no practical purpose, for there was no place for a jury in a convict settlement.

Until 1833 there were no jury trials in the Supreme Court in criminal cases because they were legally proscribed. The jury system was not complete in criminal cases until 1839 and in civil cases until 1844.

Barker QC concludes with an overview of more recent legislation that has served to gradually restrict the right of an accused to a trial by jury. He warns that this important protection of a civil right is increasingly denied to citizens accused of all but the most serious of crimes and calls for trial by jury to be protected.

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Barker QC also suggests it is at least strongly arguable that the so-called insurance crisis and the recent restrictive torts legislation are the product of the virtual abolition of civil jury trials.

Venue

Date: 28 November 2002

Time: 5.30pm

Venue: The lecture will be held in the Banco Court, Law Courts Building, Queen's Square, Sydney.

Admission: Free of charge

Contact: Travis Drummond • Ph: 02 9229 1720 • e-mail: tdrummond@nswbar.asn.au

CPD Accreditation: attendance at the lecture will attract 1 point in the substantive law strand.



About the Forbes Society

The Francis Forbes Society for Australian Legal History (ACN 099 158 620) is a registered public company, limited by guarantee.

The aims of the society, as expressed in its Constitution are to:

- encourage the study and advance the knowledge of the history of Australian law;

- publish and promote, for the benefit of the public, books, journals, periodicals and other literary publications;
- arrange and promote, for the benefit of the public, continuing education; and
- promote the compilation of authentic records relating to Australian law.

For enquiries about membership of the Forbes Society, contact the society on e-mail: forbessociety@nswbar.asn.au or by ringing Geoff Lindsay SC on (02) 9232 6003.

Continuing Professional Development Programme

Visit the Bar Association's web site at:

<http://www.nswbar.asn.au/database/cpd/index.php> to obtain the latest information on CPD events

Report of the CPD Sydney Downtown Mini-Conference

**Dr Tom Hickie,
Sydney Chambers.**

On Friday and Saturday, 8-9 November 2002, the Bar Association held its 'CPD Sydney Downtown Mini-Conference'. Although it would be wonderful to have the time and money to undertake CPD at some exotic holiday destination, the Friday evening and half-day Saturday at downtown Ultimo was a great substitute in terms of what was achieved.

The first paper by Andrew Haesler of the Public Defender's Office provided 'An overview of DNA testing and the new *Crimes (Forensic Procedures) Act 2000*'. For those who did not attend, it is recommended that you obtain a copy of his paper - particularly as he raised a number of questions challenging the widely held perception in NSW (the 'law and order' state) that DNA testing is somehow foolproof under the current 'the innocent have nothing to fear' mantra as we look forward to another 'lynch mob' mentality state election. Which party will be the highest bidder? Stocks in Martin Place? But I digress.

The second paper by John Garnsey QC 'Barristers and ethics over 30 years - For better or worse' was the right temperament for a relaxed Friday evening delivered with humour and passion with an occasional barb at the media, the Bench and the Bar Association itself. Yes, it may be arguable that the decision in *Wentworth* was not one of the highest points for our legal system in New South Wales.

The paper by Steven Rares SC on 'The independent Bar and human rights', whilst reminding all present of some of the high points of the Bar over the past few centuries, perhaps was of less relevance in

the current climate. The requirement that we pay professional indemnity insurance and that we can lose our certificate for having been bankrupt has surely undermined that independence! That he also saw fit to include within his paper a paragraph supporting 'open-ended' judicial appointments seemed awkward and out of context. Surely, this is an issue for a separate paper at another time. Yes, 'the institution of an independent judiciary is vital' but whether 'open-ended' appointments necessarily reinforces such independence is arguable. Perhaps the time will come for debate in the not too distant future as to whether judicial appointments should be fixed terms (such as 10 years) with a two-year gap before any reappointments.

The papers by John Fernon on 'Fee disclosure and costs recovery' and Bret Walker SC on the *Civil Liability Act 2002* are essential reading for all members of the Bar. In particular, the Bar Association should be commended for providing some examples of fee disclosure agreements and realising that this is an area for *more* CPD discussion not less!

After the sombre closing to Friday evening, Saturday morning began a little more upbeat with an enlightening and stimulating presentation by Stuart Littlemore QC on 'Advocacy before juries'. As the large proportion of criminal matters are now dealt with in the Local Court, perhaps next year we can hear a follow-up presentation on advocacy in that arena.

The second paper on Saturday was by Mary Walker 'Mediation: The legal background' and was an important discussion touching on many of the issues

this area has raised as it has developed over the past decade.

The third paper by John Levington on 'Financial risk management for barristers' again was one of the *must* papers of the conference. I would suggest that next year this be expanded into the Saturday morning session.

The conference concluded with a paper from Anna Russell 'Postcard from Dubbo: A regional barrister's practice' to make many of us remember that there is life outside Phillip and Liverpool Streets!

Overall, in terms of venue, location, catering and topics covered, the conference rated 8/10 (which corresponds with the number of CPD points!)

All papers from the conference are held in the Bar Library.



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Professional Standards Scheme

Members were advised in the September/October 2001 edition of *Bar Brief* that the Bar Council was considering submitting to the Professional Standards Council a scheme for approval under the *Professional Standards Act 1994* (NSW) to limit the damages payable for the liability of members. A lot of work has had to be done before a formal application can be lodged with the Council. However, the application is near completion.

Capping damages is a priority for the Bar Council. The Association is currently seeking the claims information from insurers that is required to accompany the application to satisfy the Professional Standards Council that the level of cover set under the scheme will indeed protect the public. The Attorney General approved the current year's professional insurance policies on the condition that the insurers provide the Association with claims data. This directive could not be retrospective, but discussions are being held with the insurers to try and obtain past claims information to satisfy the Professional Standards Council requirements. Depending on what the claims data shows, the levels of insurance required under the Association's scheme may need to be set according to the types of practice undertaken, not by seniority as was previously envisaged.

The Professional Standards Act currently excludes claims for personal injury matters, which effectively excludes a significant number of barristers from being able to take advantage of the legislation simply because they specialise in personal injury work. The Executive Director, on behalf of the President, wrote to the Attorney General on 26 December 2001 asking that the limitation concerning personal injury claims imposed by paragraph 5(1)(b) of the Act be reviewed, as it was not in the public interest. The President has met with the Attorney General on several occasions in recent months to discuss both the required amendment to the Act and the

Association's proposed application. The Attorney General is considering this request as part of a general review of the legislation being undertaken by his Department.

Along with the Law Council of Australia, of which the Association is a constituent body, the Association fully supports the development of a national system of capped damages in relation to professional liability based on the New South Wales Professional Standards Act. This issue was discussed at the most recent ministerial summit on the insurance crisis and state governments have been considering the merits of the NSW and WA system, which is being discussed again in November at the insurance ministers' summit and the Council of Australian Governments. The Law Council has written to the officials assisting with the ministerial summit was held on 15 November expressing its support of the development of a national system.

Even when the Association's proposed scheme is approved, there are problems posed by plaintiffs sidestepping the limit on damages by suing under the *Trade Practices Act 1974*, which is not affected by state law. The possible amendment of the Trade Practices Act to make claims under the Act arising from the professional work of professional persons subject to the 'cap' provisions of the Professional Standards Act and interstate equivalents is also a matter under discussion.

It is hoped that the Association's scheme will be in place next year but it would have little impact until the federal government amends the Trade Practices Act to render liabilities under it subject to capped damages. Discussions on this matter are being held with the relevant Commonwealth minister.

The Association's scheme will apply only to barristers who hold a New South Wales practising certificate and who are members of the Association (excluding crown prosecutors, public defenders and other public office holders).



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Dear colleagues

I have been a member of the Board and the Management Committee of the National Children's and Youth Law Centre since it started in 1993. Due to time limitations in the Centre's Constitution, I am not eligible for reappointment in 2003.

Consequently, the Board is seeking a replacement legal practitioner who would be interested in playing an active role in the management of the centre in a voluntary capacity.

The centre aims to:

- provide advice and information to children and young people, their parents and advocates and the wider community, about young people's legal rights and responsibilities;
- bring about changes to laws, policies and practices to advance the interests and rights of young Australians;
- promote the implementation of the United Nations Convention on the Rights of the Child;
- promote opportunities for participation by children and young people in decision making at all levels;
- undertake selected test cases on behalf of children and young people to clarify or further their legal rights; and
- be a centre for research, training and policy development in matters of children's rights.

These form the foundation of the centre's ethos and guide all activities and programs the Centre undertakes.

Further information about the centre can be obtained from its web site: www.ncylc.org.au and from the centre's innovative online legal advice and information service for children and young people: www.lawstuff.org.au

If you would be interested in having further information about the role I have performed and the work and commitment it will require in the future, please contact me – preferably first by e-mail or fax.

Chris Ronalds

Barrister

Frederick Jordan Chambers

E-mail: ronalds@fjc.net.au

Fax: 9221 6944

Ph: 9229 7378

Important changes to the Bar Association's web site

In January of each year, the Bar Association's web site is given a major overhaul. The aim is to install content management systems, improve the layout and provide added functionality.

One of the main objectives of the 2003 upgrade will be to implement member-only access to a number of pages on the web site. This will enable the Bar Association to provide more value-added and confidential information directly and exclusively to its members.

Whilst the upgrade is underway, there will be no interruption to the existing web site. The Continuing Professional Development pages, for example, will continue to function as normal.

Gaining access

Early in 2003, each member will receive in the mail or DX a letter that will include a temporary log-in and password. In the first instance, they will be randomly generated alpha-numeric combinations. They will be used to gain initial access to the restricted section of the web site, whereupon each member may choose to input a new, personalised log-in and password combination.

For further information about password access and upgrading the web site, contact Kim Nichols, on ph: (02) 9229 1756 or e-mail: knichols@nswbar.asn.au



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Norrish DCJ launches the SRACLS - Bar Association Pro Bono Scheme

On 18 October 2002, the Sydney Regional Aboriginal Corporation Legal Service (SRACLS) - New South Wales Bar Association Pro Bono Scheme was launched by his Honour Judge Stephen Norrish QC of the District Court of New South Wales. Michael Slattery QC spoke on behalf of the Bar and Mr Peter Bugnan spoke on behalf of SRACLS.

In a passionate speech marking the launch of the scheme, Norrish DCJ praised the efforts of the Bar and its members who have, as his Honour rightly observed, made a great contribution with respect to the provision of pro bono legal services in New South Wales. The full text of Judge Norrish's inspirational speech will appear in the forthcoming edition of *Bar News*.

About the SRACLS – Bar Association scheme

The scheme, which was conceived pursuant to an article published in the December 2001 issue of *Bar Brief*, has been in operation since May of this year. It was born out of a pragmatic realisation that the present level of available resources is

simply insufficient to meet the needs of SRACLS's clients, many of whom belong to the most marginalised and disenfranchised communities in Australian society.

After the collapse of the original Aboriginal Legal Service in 1996, the Aboriginal and Torres Strait Islander Commission (ATSIC) established SRACLS. Funded by ATSIC, SRACLS provides legal services to the indigenous population of the greater Sydney region, including Wollongong. The service maintains offices in Redfern, Blacktown, Liverpool and Wollongong and currently employs around 20-25 legal officers. That the organisation is operating at full capacity or beyond is at best an understatement. The Redfern office alone services seven local and three children's courts, in addition to representing clients in the District and Supreme Court and in the Court of Criminal Appeal.

The scheme consists of approximately 30 barristers who provide services on a pro bono basis in a range of criminal matters. These include, for example, appeals to the Court of Criminal Appeal, Parole Board hearings, Coroner's Court and Children's



Judge Stephen Norrish QC.

Court matters. Those who volunteer are placed on a register and contacted by SRACLS when the need arises, usually no more than once or twice a year.

The benefits of the scheme to SRACLS and to its Indigenous clients are obvious. The benefits to those barristers who participate in the scheme, though less tangible, are no less rewarding. Any person who is interested in volunteering for the scheme should contact:

Rachel Pepper
12 Wentworth Chambers
ph: (02) 9235 2157
e-mail: pepper@12thfloor.com.au



Legal Aid fee increase in Commonwealth family law matters

By Lindsay Brooker

Legal Aid Commission of New South Wales

The Legal Aid Commission of New South Wales has long recognised that legal aid services throughout New South Wales are best delivered in a partnership arrangement with the private profession and the commission is committed to doing everything it can to preserve that partnership.

With this in mind, the commission is very pleased to announce that the commission's board has approved an increase in the hourly rate that the commission pays private practitioners in Commonwealth family law matters to \$120.00 per hour, effective from 1 October 2002. The increase will be in respect to grants made from 1 October 2002.

Any further movement of fees in Commonwealth family law matters will be reconsidered towards the end of the financial year when the Commonwealth's funding intentions are known. At the very least, the commission hopes to be able to provide a CPI increase annually to its fee levels subject to sufficient funding being available.

Details of the commission's increased fee scales can be found at its web-site www.leqalaid.nsw.gov.au from 1 October 2002.

Any queries concerning the increased rates can be made to Lyndsay Brooker, Manager, Policy, Grant Division on (02) 92195859.



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Administrative law essay prize

Entries are being invited for the 2003 Australian Institute of Administrative Law Essay Prize in administrative law. The length of the essay is 8-10,000 words. The amount of the prize is \$2000. Entries must be submitted by 31 March 2003.

Further details may be obtained by writing to:

Emeritus Professor Dennis Pearce
Faculty of Law
Australian National University
Canberra ACT 0200
e-mail: dennis.pearce@anu.edu.au



Personal injury mentoring scheme to be expanded

An article in the April / May edition of *Bar Brief* announced the creation of a mentoring scheme for barristers whose practices are centred around common law and workers compensation. The object of the scheme is for senior practitioners to provide advice and practical assistance to participants who wish to redeploy their skills in other areas of practice.

The scheme was initially offered for twelve months to barristers who have been admitted for five to ten years. The Bar

Council has resolved that it will now be made available to *all* junior counsel who specialise predominantly in personal injuries work. Applications will be accepted on a 'first come first served basis' until all the available spots are taken.

Any member wishing to apply should send their resume, together with an indication of their preferred areas of practice, to Anna Katzmann SC at a.katzmann@mauricebyers.com or call her on ph: (02) 8233 0301.



The overriding objective of avoiding a costs order!

A message from the Bar Association's Mediation Committee

Since March 2000 the 'new' Rules of the Supreme Court ('SCR') providing for a 'just, quick and cheap' civil procedure have applied to litigation in the Supreme Court of New South Wales, see *Bar Brief* Special Edition February 2000.

Part 1 r3(1) of SCR introduced an overriding purpose to the Rules: 'to facilitate the just, quick and cheap resolution of the real issues in (civil) proceedings'.

Part 1 r3(2) requires the court to give effect to the overriding purpose when it 'exercises any power given to it by the Rules or when interpreting any rule'.

Part 1 r3(3) provides that a party to proceedings is under a duty to 'assist the court to further the overriding purpose to participate in the processes of the court ...

and...to comply with directions and orders of the court.'

The Court of Appeal UK recently considered the equivalent provisions and obligations imposed by the *Civil Procedure Rules 1998* (UK) (CPR), which incorporated a similar concept of an 'overriding objective' in the 1999 and 2000 amendments.

The overriding objective is addressed in CPR rules 1.1 to 1.4.

- r1.1 – (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable-

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c)
- (d) ensuring that it is dealt with expeditiously and fairly; ...

r1.2 The court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

r1.3 The parties are required to help the court to further the overriding objective.

Bar hosts function for refugee advice scheme

The Bar Association hosted a function recently for barristers and solicitors participating in the Federal Court Refugee Legal Advice Scheme. Panel members were given feedback as to the operation of the scheme and were given an opportunity to raise any problems they may have experienced. Mr John Mathieson, Deputy Registrar of the Federal Court of Australia advised the scheme had been extended to include the Federal Magistrates Court.

A statistical breakdown was provided of the matters referred. Since the scheme's inception in July 2001, approximately 270 applications have been reviewed by panel members.

Mr Mathieson also expressed the court's appreciation to panel members. Mr Doug Walker, Assistant Secretary, Visa Framework Branch, Department of Immigration, Multicultural and Indigenous Affairs, answered questions from the floor.

Mr Leonard Karp, junior counsel to Walker SC in the case of *NAAV v Minister for Immigration & Multicultural Affairs* heard before the full bench of the Federal Court of Australia, addressed the gathering on the decision and its ramifications.

Continued on page 8

Bar Council business

September – November

President's report

Meeting with the opposition

The President advised that he, the Senior Vice-President and the Executive Director met with Mr Chris Hartcher, Deputy Leader of the Opposition and Shadow Attorney General, and the Hon Michael Gallagher, Leader of the Opposition in the Legislative Council, on Wednesday 25 September 2002.

Draft Civil Liability (Personal Responsibility) Bill 2002

In September, the President advised that the Bar Association will be making submissions on the draft Bill based on comments by the Personal Injuries Litigation Committee, as well as by other interested barristers. The President noted with thanks the work that Katzmann SC and the committee had put into reviewing the draft Bill. Bar Council agreed that the President continue to try and persuade the government to make amendments to the draft Bill.

Civil Liability Amendment (Personal Responsibility) Bill 2002

In November, the Bar Council discussed at length the Bill introduced into parliament on 23 October 2002. The Bill differs significantly in parts from the draft Bill released on 3 September 2002 for public comment and on which the Bar Association had made a number of submissions to the government.

Bar Council expressed serious concern at the approach taken in parts of the Bill. The Bill was drafted in an unusual manner; some provisions are very specific, others are in abstract terms. The terminology used in parts of the Bill was vague and would have to be given precise meaning by the courts.

The Bar Council noted that the Personal Injuries Litigation Committee was examining the Bill in detail.

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002

The President discussed the Criminal Law Committee's recommendation that the Bar Association firmly oppose the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*.

The President reminded Bar Council that he and the Senior Vice-President had discussed the association's views on the Bill (and on the opposition's proposed sentencing legislation) with the Attorney General and the Shadow Attorney General. They had also both spoken with the media about the Bill.

Bar Council resolved to oppose the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* for the following reasons:

- whilst the Bill does not remove judicial sentencing discretion to the same extent as that proposed by the opposition, it does impose some fetters on that discretion;
- sec 54B(2) of the Bill is likely to be interpreted as a statutory presumption which significantly fetters sentencing discretion; and
- the Bill is likely to result in a substantial increase in the length of prison sentences for the nominated offences without sound policy justification.

A detailed analysis of the Bill will appear in the forthcoming edition of *Bar News*.

Barristers and the HIH Claims Support Scheme

The Bar Association has asked the government to provide financial assistance for barristers adversely affected by the collapse of HIH, drawing on funds that would have flowed to the Treasury from premiums paid for professional indemnity insurance in recent years.

The President and Executive Director would continue to pursue this matter with the government as it is a very important - and pressing - issue for some members of the Bar.

Eighth International Criminal Law Congress, Melbourne, 2-6 October 2002

The President advised the Bar Council that on Saturday 5 October he presented a paper on the International Criminal Court at the Eighth International Criminal Law Congress in Melbourne.

Australian Crime Commission

The President advised that he and Game SC were contributing to the Law Council of Australia's submission to the Senate committee inquiry on the *Australian Crime Commission Establishment Bill 2002*.

Senior Vice-President's report

Law Council of Australia meeting, Canberra, 14 September 2002

The Senior Vice-President reported that he and the Executive Director had attended the Law Council of Australia meeting in Canberra on 14 September 2002. Major issues discussed included the National Practice Project, and amendments to the LCA's Constitution to give greater weight to the larger constituent bodies when voting on issues.

Executive Director's report

Meeting with the Hon Acting Judge J A Nader RFD QC, Divisional Head, Legal Services Division, Administrative Decisions Tribunal

The Executive Director advised the Bar Council that he and the Director, Professional Conduct had met with the Hon Acting Judge John Nader, Divisional Head of the Legal Services Division of the Administrative Decisions Tribunal to discuss the workings of the division.

Legal Profession Regulation 2002

The Executive Director informed the Bar Council that the *Legal Profession Regulation 2002*, which replaced the *Legal Profession Regulation 1994*, did not include a number of the amendments the Bar Association had requested.

Continued on page 8



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Bar Council business for September – November

Continued from page 7

Motor Accident Council

The Executive Director advised the Bar Council that Ross Letherbarrow SC, the Bar Association's nominee on the Motor Accident Council has resigned from the council. The Special Minister of State had yet to make a new appointment. There was no obligation on the minister to appoint a nominee of the association.

The Bar Council expressed its thanks to Letherbarrow SC for his work as the association's nominee on the Motor Accident Council since 1999.

Items for consideration

Pleadings in the District Court

Bar Council resolved to endorse the proposal by the District Court Rules Committee to provide that where the maximum jurisdictional amount of \$750,000.00 is being claimed that pleadings be expressed in the following or like terms: 'damage to be those within the jurisdiction of the court.'

Supreme Court - certification required by sec 198L of the *Legal Profession Act 1987*

Bar Council resolved to support the making of a Supreme Court Rule with respect to the form of certification required by sec 198L of the *Legal Profession Act 1987*.

Bar practice courses – social and ceremonial functions

Bar Council resolved to rationalise the number of readers' ceremonies, dinners and social functions by replacing them with an annual dinner.



The overriding objective of avoiding a costs order!

Continued from page 6

- r1.4 – (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes –
- (a) encouraging the parties to cooperate with each other in the conduct of the proceedings;...
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

The case in which the Court of Appeal (UK) considered this overriding objective was *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 2 All ER 850; [2002] 1 WLR 2434. The court dismissed the appeal but concluded that the appropriate order in the case was that there be 'no order as to costs', thereby depriving a successful defendant and respondent of costs under the usual order.

The defendant, Railtrack, had refused to accept a proposal from the court, when granting leave to appeal, that the appellant 'explore the possibility of alternative dispute resolution, so as to get shot of this case as soon as possible'. The appellant apparently indicated a willingness to do so. Railtrack refused on the basis that a reference to alternative dispute resolution would necessarily involve it in paying money in an amount greater than had been offered by it, and refused by the appellant. The court considered that it was a mistaken view on the part of Railtrack that the reference to mediation or alternative dispute resolution would necessarily involve the payment of additional money. The court noted that Railtrack had been prepared to pay £2500 as a lump sum in full settlement of the claim with interest and costs, but observed that there may have been other solutions to the appellant's claims, that a mediation might have achieved, apart from the payment of money.

Brooke LJ delivered the judgment of the court and at paragraph 15 observed:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.

The *Supreme Court Rules* do not provide directly for the 'encouragement' of the parties to use an ADR procedure as provided for in CPR Rule 1.4(2)(e). The court nevertheless under sec 76A of the *Supreme Court Act 1970* and Part 26 r1 of the Rules has power to give 'such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with the rules, for the just, quick and cheap disposal of the proceedings).' The court may also refer a matter to mediation under sec 110K of the *Supreme Court Act* and Part 72C of the Rules, with or without the consent of the parties.

There nevertheless may be circumstances where there has been no voluntary or compulsory reference to an ADR procedure but the court may be asked to deal with the question of costs of the proceedings by reference to the overriding purpose prescribed in Part 1 r3 of the Rules.

Part 1 r3 (4) provides that, 'A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3)' and further Part 1 r3 (5) provides: 'The court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.'

There is no authority yet in New South Wales to the effect that a party, by failing to participate in an alternative dispute resolution process would be in breach of the duty imposed by Part 1 r3(3). It is not inconceivable however that the court might take the view that a party who belligerently rejected a proposal for alternative dispute resolution in circumstances where the court considers it ought to have participated, might be deprived of costs when it was otherwise successful. Evidence as to the refusal to participate might be admissible, for example, under sec 131(2)(h) of the *Evidence Act 1995*.

It further follows, as at least a possibility, that a failure on the part of a barrister to perform the duty imposed by New South Wales Barristers' Rule 17A to 'inform the client ... about the alternatives to fully contested adjudication of the case which are reasonably available to the client', might fall foul of Part 1 r3(4), and might be susceptible to a costs order under Part 52A r43(a) which deals with the liability on the part of barristers for costs. Such an order might also be made under Part 1 r3(5).

The moral from this analysis of the Rules is simply that an appropriate exercise of the duty under Barristers' Rule 17A, apart from providing the benefit to the client that the Rule contemplates, might reduce the prospect of an order contemplated by the Rules and referred to by Lord Justice Brooke as an 'uncomfortable costs consequence'.



Changes to the CPD points system

The Bar Council has approved changes to the system of accumulating points under the Bar Association's Continuing Professional Development Programme. The most important of these relate to points exemptions for interstate barristers and others who are absent from their practice for extended periods.

Bar Council resolved that, with respect to the practice year 2002-2003, holders of practising certificates who are normally resident in NSW, but who are absent from the state because of practice commitments or appointments elsewhere for extended periods, or who are absent from their practices for extended periods for personal or health reasons, may apply in writing to

the Bar Council to have their CPD requirements thereby proportionally reduced.

The Executive Director, in consultation with the Director of Studies (and Executive where he considers that to be appropriate), is now authorised to approve on behalf of Bar Council specific reductions in the 10 point annual CPD requirement.

Barristers from interstate (other than those from the ACT) and overseas who hold a New South Wales practising certificate are exempt from the 10 point Continuing Professional Development requirement for the 2002-2003 practice year.

In April of next year, the Director of Studies will review the arrangements that will apply in respect of interstate and overseas holders of practising certificates during 2003-2004.

Any CPD points accumulated by the holder of a barrister's practising certificate in the period 24 April 2003 – 30 June 2003 may, at the discretion of the PC holder, be counted towards their CPD requirements for the practice year 1 July 2003 – 30 June 2004.

Bar Council confirmed that tutors in the Bar Association's Reading Program are not eligible for CPD points on the basis of their work as a tutor.



Bar Association prizes

During a recent meeting of Bar Council, it was noted that the present arrangements by which the Bar Association donated annual prizes to some NSW law schools had developed in an ad hoc manner and that the arrangements need to be reconsidered.

Bar Council resolved that the association offer to fund four annual prizes at \$250 per prize for advocacy, ethics, practice and procedure and evidence to the following university law schools:

- University of Newcastle
- Macquarie University
- University of New South Wales
- University of Wollongong
- University of Technology, Sydney
- Sydney University
- University of Western Sydney
- University of New England
- Southern Cross University

These prizes will have a title along the lines of 'The New South Wales Bar Association Prize for Advocacy'.

Speeches to note

'Equity – too successful?', by the Hon Justice Bill Gummow. This address was delivered in Brisbane as the 2002 WA Lee Equity Lecture, on 31 October 2002. A copy of the speech is held in the Bar Library.



'Children and family law: Paramount interests and human rights', address to the International Association of Youth and Family Judges and Magistrates, XVI World Congress, by the Hon Justice Michael Kirby AC CMG 27 October 2002. Justice Kirby noted relevant changes in our society, post Kinsey, DNA, and the Family Law Act. He dealt with the problems facing judges in relocation decisions, pointing out that in Australia, in 84 per cent of cases the mother becomes the resident parent, and modern communications and transport allow greater child/parent access at distances. In his opinion, 'paramount' consideration of the child's interests is not the same as 'sole' consideration, that 'to take the contrary view is to entrench gendered social and economic consequences of care-giving upon women that is contrary to [international law].' Whilst approving of the more relaxed prevailing view of relocation within Australia than to relocation overseas, he summarised his minority argument in the landmark case of *U v U*. Justice Kirby also noted the growing domestic influence of international law and conventions on human rights, and the challenge facing lawyers and the judiciary to adapt to this global revolution in the way the law is viewed. A copy of the speech is available at www.hcourt.gov.au/speeches and also from the Bar Library.



'Are lawyers lemons? Competition principles and professional regulation' the 2002 Lawyer's Lecture, by the Hon J J Spigelman AC, 29 October 2002. Justice Spigelman looked at professional ethics as a means of countering asymmetric information and ensuring the number of 'lemons' in the market are minimised. As countervailing institutions, he pointed to fiduciary obligations, quoting Posner, as 'the law's answer to the problem of unequal costs of information,' and reputation, and noted the difficulty of applying multidisciplinary reforms to lawyers. With the basic paradigm of whether law is a business or a profession, he went on to summarise applications of competition policy to the legal profession and the issues involved, including public interests. In conclusion, Justice Spigelman strongly suggested that 'The complex task of balancing the public interests involved in applying competition principles to the law must be affected by the values of those called on to do the balancing.' A copy of the speech is available at www.lawlink.nsw.gov.au/sc and also from the Bar Library.

Address upon the occasion of the retirement of the Hon Mr Justice Philip Powell AM, by the Hon J J Spigelman AC, 8 November 2002. Justice Spigelman applauded Justice Powell's many contributions to the law and to the people, both as a barrister and as a judge, citing his meticulous attention to detail and encyclopaedic knowledge of the intricacies of legal procedure and history and his courtesy to all involved, noting that 'everyone who appeared before you left the court knowing that their cases mattered.' Summarising the many cases of public significance in which he was involved, like the *Spycatcher* case, he went on to note how Justice Powell's work had decisively developed the law, such as in the Protective jurisdiction and Probate. He quoted instances where Justice Powell came down from the bench to sit with a disabled person and explain what was happening and why. Justice Spigelman also praised his superior command of the English language, where precision, clarity and lucidity always prevailed, despite the breathtaking length of sentences, in which punctuation and subordinate clauses were used with mastery. A copy of the speech is available at www.lawlink.nsw.gov.au/sc and also from the Bar Library.



In Brief

Table matters to close

The Dining Room and Table Matters will close its doors on 17 December 2002.


Appointments

The Hon Jeff Shaw QC has been appointed as a judge of the Supreme Court of New South Wales, effective 4 February 2003. Details of the swearing in ceremony will be announced closer to that date.

Graeme Little SC has been re-appointed as an acting judge of the Compensation Court of New South Wales, effective 23 November 2002 to 22 November 2003.

Appointment to Bar Association Committees

A memorandum seeking expressions of interest for membership of the Bar Association's various committees, together with a form listing all current committees, was circulated to the Bar on 18 November 2002. Copies of the form are held at the Bar Association's Reception. Please note that the closing date for expressions of interest for appointment to committees is 2 December 2002.



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The New South Wales Bar Association

Bar Christmas Carols Concert

Members and their families and staff are invited to celebrate the Christmas season at the Bar Association on...

**Thursday 12 December, 2002
in the Common Room at 6.00pm**

Carols will be led by the Bar Choir under the baton of
Justice Peter Hidden.

Once again, you will be invited to place a child's
gift under the Christmas Tree.

All gifts and donations of money at the door will
be given to the...

Smith Family Christmas Appeal.

Please mark this date in your diaries and make
Christmas at the Bar a special occasion in 2002.

Children are welcome.



For more information you can contact...

Travis Drummond on phone: (02) 9229 1720

Fax: (02) 9221 1149 or email on tddrummond@nswbar.asn.au

Public Register of Disciplinary Action

On 4 October 2002 the *Legal Professional Amendment (National Competition Policy Review) Act 2002* (the Act) came into effect. The Act requires the Bar Council, the Law Society Council and the Legal Services Commissioner (the commissioner) to publicise disciplinary action taken against legal practitioners. Reprimands issued to practitioners are not required to be published. The commissioner must keep a register of disciplinary action and the register will be available on the Internet. This means that members of the public will be able to access the register.

The amendments are incorporated in the *Legal Profession Act 1987* by the new Division 9A to Part 10 of the *Legal Profession Act 1987*. Section 171LA defines *disciplinary action* to include:

'disciplinary action means any of the following actions, whether or not taken under this Part:

- (a) the suspension or cancellation of the practising certificate of a legal practitioner,
- (b) the refusal to issue a practising certificate to a qualified person,
- (c) the removal of the name of a legal practitioner from the roll of legal practitioners,
- (d) any order made by a regulatory authority in respect of a legal practitioner following a finding of professional misconduct or unsatisfactory professional conduct by the legal practitioner'

Members will be aware that for some time now the Bar Association has published on its website all disciplinary action which would fall within the new definition of sec 171LA. The Bar Association will continue to publicise such disciplinary action on its website.

The commissioner will place on his register any finding of professional misconduct or unsatisfactory professional conduct against a legal practitioner which has been made by the Legal Services Division of the Administrative Decisions Tribunal (the tribunal) or the Supreme Court. Publication of such findings will, of course, be subject to any order which the court or tribunal may make. Should the Bar Council resolve to cancel, suspend or refuse to issue a practising certificate, then that decision must also be published by the commissioner on the register.

Section 171LB(4) requires that only that disciplinary action taken after 4 October 2002 must be published. However, the commissioner has indicated that he intends to publish disciplinary action taken against all legal practitioners since 1 July 1994 - being the date upon which the Office of the Legal Services Commission was created.

Section 171LB, sec 171 LC and sec 171 LF(4) require that the name and other identifying particulars of the relevant practitioner must be published when the publication is made by the council and/or the Legal Services Commissioner. The commissioner, the Council of the Law Society of New South Wales and the Bar Council have agreed that, for the purposes of the commissioner's register, sufficient identifying particulars are the place of practice of the legal practitioner the subject of the publication.

The register will also include some details of the disciplinary action. If the decision or finding giving rise to the listing on the register, is quashed on appeal or reversed on review by the commissioner, then the register will note this information.

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Bar Council regional representatives

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Stuart Hill	Hargraves Chambers Cnr of Church & Crown Streets Wollongong NSW 2500	ph: (02) 4228 8977 fax: (02) 4226 3947	harlaw@hotkey.net.au
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Bill Walsh	William Owen Chambers 121A Byng Street Orange NSW 2800	ph: (02) 6361 7959 fax: (02) 6361 7921	
Geoff Radburn	Lismore Chambers 32 Molesworth Street Lismore NSW 2480	ph: (02) 6621 2854 fax: (02) 6621 3898	radburn@nor.com.au
Stewart Austin	Chambers 30 Church Street Newcastle NSW 2300	ph: (02) 4926 2844 fax: (02) 4926 2841	sca371@ozemail.com.au

The 2002 Great Bar Boat Race



Start Time: 11:00 am on Monday, 23 December 2002
Start Line: Vicinity Shark Island
Course: Sailing instructions will be provided prior to the start (about 2½ hours sailing)
Finish: Store Beach
Post-race Activities: (i) Picnic at Store Beach
(ii) Presentation of trophies
Entry Fee per Boat: \$120.00
Sailing Pennant: \$25.00

Final race details will be provided to all confirmed entrants on Thursday, 19 December 2002.

All members who own or can borrow yachts or otherwise take part in what is expected to be a most enjoyable day on the harbour are requested to send a cheque, together with a completed entry form

(see next page) to the Events Coordinator, New South Wales Bar Association (Attention: Mr T Drummond), DX 1204 Sydney, *before* Wednesday, 27 November 2002.

All other enquiries should be addressed to:

Victoria Bradshaw at Jack Shand Chambers (ph: 9233 7711 or email: victoria@jackshand.com.au)



Late fee and entries

Due to problems experienced in recent years concerning handicapping late entries, a \$100.00 late penalty (payable upon entry) for all entries received and accepted by the organising committee after Wednesday, 27 November 2002 will be imposed.

Although best endeavors will be made, the organising committee is unable to guarantee the acceptance of entries received *after* 27 November 2002.

Post race activities

Other members who have access to power boats and who would like to join in the activities on Store Beach on completion of the race would be most welcome upon a donation to the 2002 Bar Charities being The New South Wales Breast Cancer Institute at Westmead Hospital and the University of New South Wales Prostate Cancer Research Project at the Prince of Wales Hospital

Insurance

The Bar Association's insurance policy does not cover this activity. It is a strict condition of entry that all skippers have arranged appropriate third party, property and personal injury insurance, to cover themselves, their crew and their guests for the duration of the event.



Changes to the Senior Counsel Protocol

On 18 July 2002 the Bar Council made some minor amendments to the form and structure of the Senior Counsel Protocol. A new section was added to the protocol concerning the cessation of the appointment of Senior Counsel. That section reads as follows:

Cessation of appointment

30. Appointment as Senior Counsel is restricted to barristers who hold a practising certificate.
31. An appointee as Senior Counsel whose name is struck off the roll of legal practitioners or whose practising certificate has been cancelled or suspended pursuant to Part 3, Division 1AA of the Legal Profession Act 1987 and Part 10 of the Legal Profession Act 1987 ceases thereby to hold appointment as Senior Counsel, and is not permitted to retain the title of Senior Counsel.
32. Reinstatement of a practising certificate does not automatically result in reinstatement of an appointment as Senior Counsel. A barrister will not however be prevented from re-applying for appointment as Senior Counsel.'

The amendments took effect from 18 July 2002. The revised protocol was posted on the association's web page at that time.

Entry form . . .

The Great Bar Boat Race

Please provide the following details regarding the yacht competing. This form must be returned to the address below with the \$120 entry fee, no later than Wednesday, 27 November 2002.

All cheques should be made payable to **'The New South Wales Bar Association'**.

1. Your name: _____
2. From which chambers/court: _____
3. E-mail address: _____
4. Name of Yacht: _____
5. Place of departure (ie, mooring, marina, etc.): _____
6. Telephone contact number of skipper: _____
7. Sail number: _____
8. Description and/or type of yacht: _____
9. Date when yacht first launched: _____
10. Does the yacht race competitively on a regular basis? If so, please provide some details:

11. In the event that the yacht has competed in organised races, please provide some details as to results, success rate, etc., in any races entered into in the last 12 months:

12. General experience of crew proposed on yacht on day of race: _____
13. Any other information that you feel ought be considered in handicapping same (eg. IOR rating or current club handicapping):

NOTE: Sailing instructions will be sent by e-mail to all skippers on Thursday, 19 December 2002. Alternatively, sailing instructions will be made available for collection from the Bar Association Reception. If you do not have a pennant you can purchase one at this time.

Insurance

The Bar Association's insurance policy does not cover this activity. **It is a strict condition of entry** that all skippers have arranged appropriate third party, property and personal injury insurance, to cover themselves, their crew and their guests for the duration of the event.

Send to . . .

**The Great Bar Boat Race
c/- The New South Wales Bar Association
DX 1204 Sydney
Attn: Mr Travis Drummond**