## Inaugural Sir Maurice Byers Lecture

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

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

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

The Hon. Sir Gerard Brennan AC KBE

His professional eminence and success do not explain why the Bar Association of New South Wales commissioned his portrait to hang in these rooms and created an annual lecture to be delivered in his honour. Professional eminence and success are not alone sufficient to produce, or are even conducive to the production of, the fond response of colleagues. That response reflects a peer group's appreciation of a mind and manner and disposition which commanded affection as well as a profound respect. Tom Hughes identified these qualities in an obituary[4] in which he said that Maurice was –

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

Byers came to the Bar in 1944, without the professional or familial connections that might have eased his entrance to this most competitive of professions. Sir Anthony Mason has told us that Byers 'had to make his own way at the Bar, relying on work from less fashionable and smaller firms of solicitors whose clients needed a clever but responsible counsel to argue a legal point when very often that was all that there was to go on.' He was available to appear for anybody who had need of his services. It would seem that his clients of that time were not the large corporations. His talents were sharpened on the intricacies of the *Fisheries and Oyster Farms Act*[5] and on the law which the authorities believed to be inimical to the sale of liquor at the Black Tulip Restaurant[6]. He took silk in 1960, before the risks of that step were minimised by the abolition of the two counsel and two-thirds rule. As with many of the towering figures of the Bar, the quest for financial security was suppressed in favour of the passion for advocacy. That was a symptom of the rugged individualism which is characteristic of the Bar's leaders. Chief Justice Gleeson has noted[7] that 'Maurice Byers belonged to the legal profession before some

people gained the insight that it would serve the public better if it were a business.'

Rugged individualism is essential to the barrister's assumption of personal responsibility for the advice given or the course of advocacy pursued. David Bennett, sometime Byers' junior and now his successor as Solicitor-General, tells of the occasion when he suggested to his leader that they should take instructions on some question of policy that would be affected by the litigation. Byers' reply was: 'I don't take instructions – I give them'. His constitutional arguments in the High Court were developed according to his view of the Constitution, whether or not that view was preferred by the Government of the day. Gareth Evans MP, then attorney-general for the Commonwealth, speaking at a testimonial dinner on Byers' retirement from the office of solicitor-general, acknowledged that Maurice, in his role as Second Law officer of the Commonwealth had 'displayed outstanding qualities of objectivity and courage'. The attorney no doubt had in mind Byers' appearance before the Senate Committee into the Loans Affair. There he displayed a great deal of courage in refusing to disclose the secret counsels of the Crown – but, as Simos QC (as he then was) observed at the Bench and Bar Dinner in honour of Byers in 1994[8] 'such courage is characteristic of our guest of honour'.

'Not every barrister can exhibit the style and affability of Byers.'

Of course, objectivity and courage are esteemed in a barrister because they are conducive to the giving of advice that is correct and to advocacy that is relevant, cogent and persuasive. What the Bar offers to its clients – both solicitor and lay clients - is a high level of expertise in the provision of advisory and advocacy services. That calls for a complex of capacities in the practising barrister: knowledge of the law, a facility for research, analytical skill, tremendous commitment and energy and a familiarity with the courts before which the barrister appears and with modes of judicial thinking. Byers exhibited these capacities to an outstanding degree. Simos knew him to have a phenomenal and detailed memory of decided cases and to have been a prodigious worker[9]. Justice Gummow remembers that his submissions were 'preceded by reflection and speculation' and were calculated to draw the Court into the heart of the matter. Alan Robertson speaks of his intellectual curiosity which led him to look radically at each problem and to re-examine the fundamentals. And he remembers Maurice seeking to enlist the support of a waitress in a French restaurant in Canberra for the proposition that French was the language of reason – a proposition which elicited only a look of profound consternation.

He was an agreeable and entertaining companion whose conversation ranged over music and philosophy and a notion of the cosmic God. Byers' curial arguments, delivered with a 'mellifluous voice' and 'courtly gestures'[10], were always directed to 'the critical grey area of the case'[11] As Sir Harry Gibbs noted, Byers identified 'the point or points on which the decision will rest and advance[d] clearly and strongly, but without undue repetition, the arguments directed to those points, keeping to the main road and not wandering off into side tracks and blind alleys, however attractive they may seem from a distance.'[12] Byers' own opinion was 'the isolation of the matter [for decision] is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy'.[13] Of course, as Gareth Evans remarked: 'The counterpoint to brevity, that which sets it off… is style and that's a quality that Maurice has in abundance.' Sir Anthony Mason remembers a style of his advocacy which Byers described to a junior counsel: 'Put the ball into the scrum and let the politics of the court take over.' Sir Anthony[14] comments that 'he apparently omitted to tell the junior that in feeding the scrum he put the ball into the second row'. Although Byers was a consummate practitioner of the arts of advocacy, the practice of these arts was only a means to his end. Chief Justice Gleeson remembers him as 'a man who hungered, and thirsted, after justice'.[15] It was a concatenation of capacities and personal qualities that endeared Maurice to the Bar and earned him the plethora of accolades that accompanied him in life and on his death – capacities and qualities that commanded the affectionate respect of his clients, who to use Gareth Evans' words, 'valued enormously the wisdom, experience, integrity and objectivity of Maurice Byers'.[16]

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

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

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

The strengths of the Bar are buttressed by its rules and practices. Partnerships have not been acceptable at the Bar, so that each barrister must take individual responsibility for his or her advice and advocacy. The conventional view has been that solicitors facilitate the objectivity of the barrister by providing a *cordon sanitaire* which keeps the barrister at a certain distance from the lay client. A brief is not accepted if the advice or advocacy for which the barrister is retained would be compromised by personal or commercial relationships or by knowledge acquired elsewhere. The confidentiality and commitment which are offered by a barrister to a client are secured by more than a Chinese wall[17].

Touting for work has been frowned upon and the barrister's remuneration has been confined to payment for specific work done on the solicitor's instructions. In the jurisdictions where an independent Bar has been established, whether by law or in practice, the remuneration of the practising barrister has never been a wage paid by a solicitors' firm or a proportion of the firm's profits[18]. The piecework nature of the solicitor-barrister relationship relieves the barrister from an ongoing concern about the lay client's non-legal objectives. The barrister's attention is focussed on the application of the law, not on the consequences of the law's application. Hence the duty in advocacy is to assist the court to a conclusion that is legally correct, even to the disadvantage of the client. The duty in advising is to be legally objective, not to furnish an opinion which gladdens the client's heart. And when a person who offers a reasonable fee, seeks the barrister's services in an area in which the barrister ordinarily practises, the barrister must accept the brief even though he or she would not wish to do so. That is the cab-rank rule which secures both the reasonable availability of the Bar's services and the independence of its individual members.

These are not merely the rules and practices of an exclusive club. They are calculated to ensure that the barrister is able to perform, efficiently and with objectivity, the function of assisting in the administration of justice according to law. The lofty words of Lord Eldon[19] are worth repeating, if only to restate the reason why the Bar exists:

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

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

> When we appear before the courts we are engaged in the administration of justice and thus owe to the courts in this ministerial undertaking a duty which prevails over our duty to our client. The practice of the law is thus radically and essentially different from the practice of other professions or callings. We participate and they do not in the administration of justice to the same extent as the judge, though our function differs.[20]

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

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

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

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

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

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

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

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When Lord Woolf conducted his inquiry into Access to Justice, he had as an Information Technology Adviser Professor R E Susskind, legal scholar, editor of the *International Journal of Law and Information Technology* and author of several texts including *The Future of Law*. In that book, the author points out that, with the advent of print, the quantity of legal materials was increased and was capable of widespread dissemination. In that milieu, the doctrine of precedent developed. With the advent of massive data bases, the available bodies of law have become more complex and the specificity and detail of the mass of material often renders the law impenetrable. Current technology has been devoted to data processing giving access to this mass, which needs then to be sifted and analysed by experienced legal practitioners. There is much work to be done by the practising lawyer, but developing technology is directed not only to data processing; it is directed also to knowledge processing so that the user is able to pinpoint *all but only* the material relevant to the solution of a problem. When that technology is combined with the public's ability to seek information by operating a television set interactively, there is likely to be a significant alteration in what might be termed the advisory market.

Susskind foresees massive investment, perhaps by legal publishers, in the development of legal information products and services which will provide solutions to many legal problems. Lawyers will be employed as legal engineers, engaged because of their analytical skills and specialist knowledge, in the creation of programmes from which advice can be obtained. The programmes will be cost effective, for the advice will not be sought by, and given to, a single client but will be devised for and sold to many. The legal engineer will be called on to think in more general terms than the adviser to a particular client but the programmes will be sufficiently detailed to resolve specific legal issues. If simple-to-operate but technically complex and legally sophisticated information services become the most familiar way in which the public obtains legal advice, situations which presently lead to litigation may be prevented from arising or may be solved without litigation. Court lists may well contract. One can foresee that much advisory work of the simpler kind will no longer require the services of the Bar.

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

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

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

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

> The perceived dichotomy between business and the professions is regarded by many as being outdated, and the legal profession is recognising that ethical and commercial issues can and must be dealt with simultaneously.
>
> As commercial transactions become increasingly complex, the need to establish multidisciplinary teams is growing. Clients are increasingly demanding more integrated professional services to meet their financial and legal needs. Big firms (and governments) are streamlining their staffing down to 'core business' functions and outsourcing entire programs.

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

> The forces of change are bearing down on society and the legal profession with an unprecedented intensity. They include: continued client interest in more efficient and less costly legal services; client dissatisfaction with the delays and outcomes in the legal system as they affect both dispute resolution and transactions; advances in technology and telecommunications; globalization; new competition through services such as computerized self-help legal software, legal advice sites on the Internet, and the wide-reaching, stepped-up activities of banks, investment companies, and financial planners providing products that embody a significant amount of legal engineering; and the strategy of Big Five professional services firms and their smaller-size counterparts that has resulted in thousands of lawyers providing services to the public while denying their accountability to the lawyer regulatory system.

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

One of the 'Big Five', Price Waterhouse Coopers, is said to have 1600 lawyers employed in 42 different countries[22]. Anderson Legal and Pricewaterhouse Coopers Legal are now the third and fourth biggest legal firms worldwide.[23] England and Canada are moving in the direction of multi-disciplinary practices and, as you know, New South Wales is perhaps leading the movement with the enactment of the *Legal Profession Amendment (Incorporation of Practices) Act 2000*.

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

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

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

Of course, if the Bar did not subject the duty to the client to an overriding duty to the court and if the cab-rank rule were abandoned, the argument against barristers' immunity would be extremely powerful, but their Lordships do not contemplate that the Bar's standards in those respects will be affected. The confidence which their Lordships place in the ability of barristers to adhere to traditional ethical standards – standards which are essential to the maintenance of the rule of law and the administration of justice – even though the traditional safeguard of immunity be withdrawn is a tribute to the English Bar.

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

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

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

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

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

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

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

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

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

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

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

Indeed, the Bar is right to honour his memory.

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1 *The Age*, 27 January 1999
2 Speech at the Attorney-General's dinner in honour of Byers 8 February 1984
3 (1988) 193 CLR vi
4 *The Australian*, 26 January 1999
5 Jacqueline Gleeson *NSW Bar News* Spring/Summer 1994 p 19
6 McHugh QC (as he then was) at the Attorney-General's Dinner in honour of Byers 8 February 1984
7 73 *Australian Law Journal* 380, 382.
8 *NSW Bar News* Spring/Summer 1994 p 18
9 Ibid.
10 Gummow J 73 ALJ 382
11 Sir Anthony Mason 73 ALJ 382
12 Attorney-General's Dinner in honour of Byers 8 February 1984, p17.
13 10 *UNSW Law Journal* 179, 180
14 *Encounters with the Australian Constitution* p 195.
15 73 ALJ 382
16 Attorney-General's Dinner in honour of Byers 8 February 1984, p 7.
17 Compare *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* (1991) Qd R 558 and *Bolkiah* v *KPMG* (1999) 2 AC 222 with *Australian Commercial Research and Development Limited v Hampson* (1991) 1 Qd R 508;
18 Cf the position of 'in house' counsel discussed in *Law Society of the Australian Capital Territory v Lardner and Andrews* [1998] ACTSC 24.
19 Reported as a note in *Ex parte Elsee* (1830) Mont. 69,70n at72.
20 *Bar News* Spring/summer 1994 p.23
21 Hereafter LCA/MDP
22 Appendix to Report, section C(1).
23 LCA/MDP p 10 quoting *Business Review Weekly* 18 February 2000 p 76
24 (1988) 165 CLR 543
25 (2000) UKHL 38; (2000) 3 WLR 543.