Australian Bar GAZETTE

May 2005

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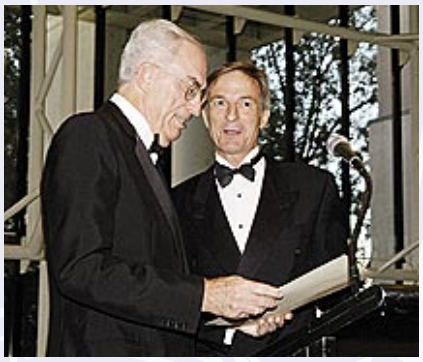
McHugh J APPOINTED LIFE MEMBER



Harrison S.C., ABA President presenting Life Membership to the Hon Justice Michael McHugh AC at the 2005 Silks Dinner.

On Monday 31 January, 2005 the Bar Council admitted the Hon Justice Michael McHugh AC as a Life Member of the Australian Bar Association in recognition of his exceptional service to justice, the law and the profession. The presentation of the Certificate of Membership took place at the Silks Dinner.

From the President...

Welcome to the Australian Bar Association's E-Gazette. The revival of the Gazette in its new format is not designed to compete with or replace any existing law journal or other professional publication. Instead, its purpose is to acquaint members of the Australian Bar with the activities of the Association, to keep members informed of matters of professional interest to them and of what they can obtain through or from the ABA. The Gazette will be published three times a year and members are invited to submit letters, articles and other items of interest.

In this, my first President's page I can say that the Australian Bar can look forward with enthusiasm to a bright future. My aim as President is to strengthen the role of the ABA as the representative body for the independent referral Bars of the States and mainland Territories. The Bar performs a vital role in the judicial system. This is because barristers are not involved in solely delivering a product in a legal market; as a profession, they also serve a deeper public interest. The Bar must be vigilant to ensure that we maintain our independence, enhance our professional standards, re-focus on the art of advocacy, strengthen the ethos of the Bar and continue our commitment to public service. The Australian Bar Council recently endorsed the establishment of a working party to develop a national framework for the delivery of advocacy training for the Australian Bar. The Bar has a rich teaching resource available to it. The Advocacy Training proposal will draw together those resources, provide a consistency of approach to the fundamentals of advocacy and the way in which it is taught and the formulation of guidelines and minimum standards. I have been encouraged by the enthusiasm which the constituent Bars have embraced the proposal. This is but one of a number of key initiatives which I hope to announced in future editions of the Gazette.

Finally, I look forward to seeing many of you at the Joint Australian and Irish Bars Conference in Dublin between 29 June and 2 July, 2005. I am delighted to say that the organising Committee, expertly chaired by Glenn Martin S.C. has managed, once again, to match contemporary topics with engaging speakers in a venue which will both delight and interest. Some of the keynote Speakers include:

- The Hon. Justice Michael McHugh AC
- The Hon. Justice Dyson Heydon
- The Hon. Dame Heather Hallett, High Court of England and Wales
- The Hon. Lady Smith, Court of Session, Scotland
- The Hon. Michael McDowell TD, Irish Minister for Justice
- The Hon. Rory Brady S.C., Attorney General of Ireland
- Professor William Binchy, Regius Professor of Law, Trinity College
- Judge John Cooke , Cour de Justice Des Communautés Européenes
- Hon. Mr Justice McMeniman, High Court of Ireland.

The overwhelming support from members of the Bar and judiciary is testimony to the Australian Bar's high standards for producing Conferences which are the envy of many other organisations. The Conference has again been sponsored by Suncorp (Principal Sponsor) and Wilson HTM. Places are still available and I would urge you to register early. I look forward to seeing you in Dublin.

ABA LAUNCHES NEW WEB SITE.

www.austbar.asn.au

The Australian Bar Council recently re-launched the ABA's website. A feature of the new site is the distinctive banner which depicts the winning entry in the 2004 High Court Centenary Art Prize - Today now ... we all got to go by same laws - a large nine-panel work depicting traditional law overlaid by contemporary law painted by 24-year-old Rosella Namok, from Lockhart River in far north Queensland.

The ABA website will provide a point of reference for members of the Bar, the Profession and the wider community. The new website contains a wide variety of information about the Australian Bar, its members and the role of the independent referral bar in Australia. The upgraded site is only the start of an ongoing process to inform the community about the Australian Bar and the important role it plays. The site can be accessed at www.austbar.asn.au Comments about the site are welcome and these should be directed to the Honorary Secretary at Honsec@austbar.asn.au.

ABA OFFICERS FOR 2005

At a meeting of the Australian Bar Council held on November, 2004 the following were elected as officers of the ABA:

President
The Hon Ian Viner AO QC (WA Bar)
Vice-President
Glenn Martin S.C. (Qld Bar)
Hon. Treasurer
Stephen Estcourt QC (Tas. Bar)
Hon. Secretary
Dan O'Connor (Qld Bar)

These people assumed office on Monday 31 January, 2005.
At the same meeting, the retiring President, Ian Harrison S.C. was thanked by members of the Australian Bar Council for his deft stewardship of the Association in 2004.

The winning team from the Hong Kong University and one of the finalists from the University of Western Australia at the presentation of the Australian Bar Association LAWASIA Moot. L to R - Ms Asa Collett (HKU), Ms Queenie Lau (HKU), The Commonwealth Attorney-General , Mr Phillip Ruddock, the Chief Justice of Australia, the Honourable Murray Gleeson, Ms Leona Cheung (HKU), Mr Chris Pearce (UWA), Mr Glenn Martin S.C., Vice President Australian Bar Association , Dr Ros Macdonald (QUT), Mr Glenn Ferguson, President Queensland Law Society and Professor Brian Fitzgerald, Head of School of Law QUT.

Hong Kong University wins 2005 ABA Lawasia Moot.

The inaugural ABA LAWASIA Moot was run in conjunction with the LAWASIA Conference at the Gold Coast from 21 – 23 March. It was supported financially by the ABA. Dr Ros Macdonald of QUT School of Law and the LAWASIA Moot Coordinator said that without the generous support of the ABA the moot would not have gone ahead. The moot in its first year was open to teams from universities in LAWASIA Member countries.

Seven teams came from China, India, Sri Lanka, Malaysia and Australia. It was won by the team from the Hong Kong University who beat the team from the University of Western Australia in the final, which was judged by Justice Santosh Hegde, of the Supreme Court of India, Justice Garry Downes, President of the AAT and Judge Michael Rackemann of the District Court of Queensland. Further details about the moot and the people who contributed can be found at www.law.qut.edu.au/about/moots/lawasia.

BAR COUNCIL SUPPORTS ZIMBABWE REPORT

The Australian Bar Council has endorsed a report based on the experience of five leaders of referral Bars from round the world, who visited Zimbabwe in 2004. These were Stephen Irwin QC, Chairman of the Bar of England and Wales; Conor Maguire S.C., Chairman of the Irish Bar; Glenn Martin S.C., Treasurer of the Australian Bar Association; Roy Martin QC, Vice-Dean of the Faculty of Advocates of Scotland and Justice Poswa S.C., Vice-Chairman of the South African Bar.

The group met with a broad range of lawyers, legal academics, students and retired judges during a very intensive visit to Harare. The lawyers included the Acting Attorney-General, Mr Bharat Patel, and lawyers who regularly act for the Zanu-PF government, as well as those who do not.

The Report, which been adopted by the International Council of Advocates and Barristers highlights the erosion of the rule of law and the independence of the judiciary, how many of the judiciary have been driven from office or have been corrupted, and how much of the legal system of Zimbabwe has been subverted, by the Zanu-PF government, in an effort to frustrate the proper working of democracy and to hold on to power.

Recently, the ABA joined with other Independent Referral Bars to sign the Edinburgh Declaration Trust which has been established to provide barristers and advocates with an opportunity to provide financial assistance to lawyers in countries where the independence of the judiciary and the rule of law is threatened. Information about the Edinburgh Declaration Trust can be obtained by contacting the ABA Secretariat.

New Silks Welcome, Canberra

On 31 January, 2005 a ceremonial sittings of the High Court was conducted so that those who had taken Silk in the preceding year could take their bows. Chief Justice Gleeson congratulated those who had been so recognised and made the following remarks:

"On behalf of all the members of the Court, I congratulate the newly appointed Senior Counsel. Your appointments are a public recognition of your professional eminence; a recognition that comes primarily from your professional colleagues.

For a long time it was customary for Senior Counsel to make formal announcements of their appointment to the Supreme Court of the State or Territory in which they have their principal practice. Making announcements of that kind in this Court at the commencement of law term came about with the development of a national bar. As in most federations, the legal profession is organised and administered primarily on a State basis, but arrangements for reciprocity of admission and recognition of status mean that there is now a high degree of mobility between jurisdictions.

Appointment as Senior Counsel has never been regarded in any Australian jurisdiction as something to which a barrister is entitled simply by reason of durability. It is a formal recognition of the professional standing of those whose learning, skill and ability have come to be regarded by their peers, and by the relevant appointing authority, as warranting such a distinction. The appointment as Senior Counsel carries with it substantial responsibilities as well as privileges. You now occupy a position of leadership in your profession, and your conduct will be taken as an example by your juniors. Solicitors, members of the public and courts will place special reliance on your ability and, as a rule, the work that you will be given to do, and the cases you will conduct, will be more onerous.

Most of you in Court today, and all of us on the Bench, have travelled to be here. Some of you have travelled a long way. Coming to the nation's capital and seat of government at the cost of considerable time and effort signifies the national character of the legal profession.

The occasion signifies something else that is equally important. It signifies the relationship between Bench and Bar, which is part of our legal and constitutional inheritance. You have all been admitted to practice as officers of a State or Territory Supreme Court. By virtue of that admission federal legislation entitles you to practice in federal courts. In whatever courts you appear, State or Federal, your overriding duty as advocates is duty to the court. The courts depend for their capacity to administer justice upon your skill and integrity.

In our legal system, most judges are appointed from the ranks of experienced legal practitioners. The professional strength and independence of spirit of the Bar sustains the strength and independence of the judiciary.

You have now reached a milestone in your professional careers. You are faced with new challenges and new opportunities. Some of you have been accompanied on this occasion by members of your family and friends. The Court is delighted to welcome their participation in this happy occasion. I trust that each of you will find personal and professional satisfaction in your new rank. Thank you for the courtesy you have shown in informing the Court of your appointments."

NEW SILKS

All those who took Silk since the commencement of 2004 are set out below.

AUSTRALIAN CAPITAL TERRITORY
BLOWES S.C. Robert
MEAGHER S.C. Bryan

WESTERN AUSTRALIA
BEECH S.C. Andrew
CALCUTT AM S.C. Gregory
DONALDSON S.C. Grant
RITTER S.C. Mark
SHANAHAN S.C. Christopher

TASMANIA
KERR S.C. MP The Hon Duncan
TREE S.C. Peter

NORTHERN TERRITORY
BARR QC Peter
COX QC Suzan
WEBB QC Raelene

NEW SOUTH WALES
ANGYAL S.C. Robert
BAILEY S.C. Ian
BURTON S.C. Gregory
CHAPPLE S.C. Keith
COLEFAX S.C. Andrew
DAVENPORT S.C. Carolyn
DEMPSEY S.C. Mark
DUBLER S.C. Robert
DURACK S.C. John
FREARSON S.C. David
HAESLER S.C. Andrew
HAMILL S.C. Peter
HARPER S.C. Robert
HOWARD S.C. Daniel
MAHONEY S.C. Phillip
McCULLOCH S.C. Mark
McEWAN S.C. Christopher
NEEDHAM S.C. Jane
ROBSON S.C. Jonathon
RONALDS AM S.C. Christine
SMITH S.C. Gregory
SPEAKMAN S.C. Mark
WHITE S.C. Simon
WHITFORD S.C. Peter

QUEENSLAND
CALLAGHAN S.C. Peter
CAMPBELL S.C. Douglas
DALTON S.C. Jean
DERRINGTON S.C. Roger
KEIM S.C. Stephen
MARTIN S.C. Ross
MURPHY S.C. Peter
PERRY S.C. Richard

SOUTH AUSTRALIA
PERRY QC Melissa
PYKE QC Maurine

VICTORIA
ALLEN S.C. Duncan
COLLINSON S.C. Peter
DAVIES S.C. Jennifer
ELLIOTT S.C. James
ELSTON S.C. Raymond
MACLEAN S.C. David
McGARVIE S.C. Richard
McGOWAN S.C. Glenn
PULLEN S.C. Susan
SACCARDO S.C. Francis
WHEELAHAN S.C. Michael

Hon Ian Viner AO QC

Speech Given by the Hon Ian Viner AO QC at the 2005 Silks Dinner in the Great Hall of the High Court of Australian in Canberra on Monday 31 January 2005

Your Excellency the Governor General and Mrs Jeffrey, Attorney General Phillip Ruddock and Mrs Ruddock, Chief Justice Gleeson and Mrs Gleeson, Justices of the High Court and other Courts, Fellow Silks and colleagues at the Australian Bars, Guests

The retiring President, Ian Harrison S.C., has welcomed you all here this evening. May I add my warm welcome and my warm congratulations to the new Silks who have taken their bows today.

When Ian Harrison rose to speak I was worried he would leave us bewildered by a speech in Italian just to show us that his magnificent Italian oration in the Palazzo Vecchio in Florence last July was no fluke.

Thankfully, tonight, we could understand every word!

As English is the lingua franca of this evening I will take the opportunity to speak in a dialect which should be well understood by this audience - plain english.

I am not sure what I am going to do in Dublin for the June 2005 ABA / Irish Bar Conference. I will have to take advice from the master of linguistics himself.

I will also have to take other advice to ward off disruptive influences.

I shall have to seek that advice with trepidation from Chief Justice Gleeson about his colleague – or colleagues – who will also be travelling to Dublin – whether their interests will be in antiques in Francis Street; or the bookshops of Grafton Street; or the pubs of Temple Bar or a Jamieson Whisky tasting.

Armed with this intimate information I will have no fear in confronting any stringer the Australian Newspaper sends to Dublin.

Your Excellency and Mrs Jeffrey – thank you for joining us tonight – we regard it as a special privilege that you have done so this year and last year.

You can feel at home tonight amongst some fellow Western Australians who have travelled to this foreign place to take their bows as new Silks – shepherded so well by Western Australia's first female Bar Association President, Gillian Braddock, S.C. – whom I am so pleased has taken that position.

I remember well the leadership, when Governor of Western Australia, your Excellency gave to the Aboriginal Reconciliation movement and I have noted, on the eve of Australia Day your continuing acknowledgement and support of reconciliation.

From the Head of State, if I may say so, it was a timely reminder, at the heart of Australia, Uluru, that reconciliation should still be a significant national social policy objective.

At Western Australian universities there are now 54 Aboriginal law students which reflects a sea-change in indigenous tertiary education.

It is a far-cry since 1976 when, as Minister for Aboriginal Affairs, I was acutely aware that the late Charlie Perkins was the only Aboriginal university graduate; yet his influence on public affairs was great.

Senator Neville Bonner was the lone Aboriginal politician in the Commonwealth Parliament in my time. A wonderful man. A person of immense influence on the whole Parliament, not only his Prime Minister and Party.

I look forward to the time when there will be many indigenous barristers representing their peoples and arguing their causes before the Australian Courts. It will, I am sure, bring about a transformation of public and, I suspect, judicial thinking which will extend beyond the contemporary influence of native title law.

Encouragement of indigenous barristers deserves the support of the Australian Bar Association and all the individual bars. I hope it is something we can all take an increasing interest in.

In 2003 the Centenary of the High Court of Australia was celebrated. As part of the celebration the High Court, together with the Australian Bar Association, sponsored the 2003 High Court Art Prize. The results hang in this Great Hall.

The winning painting hangs on the East Wall. It is a profoundly expressive piece by Lockhart River Art Gang artist Rosella Namok symbolising the coming together of traditional law and Australian law.

Namok's painting is therefore an inspired choice of banner for the Association's new website which I am pleased to announce tonight.

If anyone is interested in looking at the history of the High Court on display in the Great Hall they will see a picture of the opening of the High Court building by Her Majesty Queen Elizabeth II on 26 May 1980. If they look closely they will see a young Ian Viner there, accompanied by his young and beautiful wife, Ngaire; Ian with a vigorous full head of hair.

That is as long ago as the Attorney and I were Parliamentary colleagues. He is now Father of the House. I am only grandfather of 14 children. He is the one who now has the fine head of silvery hair.

Nevertheless, it is a personal pleasure that the Attorney's continuing parliamentary career and my professional life should have crossed again and that Phillip and Heather should be here tonight. Thank you for coming.

I look forward to a fruitful relationship as matters arise on which you will need to consult the Association or you may wish to seek its counsel or assistance.

I will have an open door and our members will be ready to respond.

The Australian Bar Association is a very important part of the Australian legal profession, representing 5,000 barristers. The Australian Bar is, today, a truly national profession as Chief Justice Gleeson remarked this afternoon when welcoming the new Silks.

On 8 September 2004 Sir Francis Burt the 11th Chief Justice of Western Australia died. He was my Principal. I was his last Articled Clerk. He was the founder of the Western Australian Bar.

On 1 March 1961 he announced to the Supreme Court of Western Australia he would henceforth practice solely as a barrister. That is still the public statement made by members of the Western Australian Bar to mark their independence as barristers.

When Sir Francis established the Bar it was called "the Independent Bar." Somewhat of an anachronism many would think. But the Bar was created out of a fused profession. It was deliberately described in that way because "independence" is the hallmark of a Bar and the fundamental attribute of a barrister.

In recent years The Common Law Bars have been under pressure around the world by regulators and governments. It is strange, I think, that this should be so, when the rule of law is included as a fundamental of democracy by those who express a desire to extend democracy to the world in place of tyranny and terrorism. Because the independence of a group of advocates before the Courts who are prepared by training, profession and history to fearlessly stand up for the rights of citizens and to stand between the State and the individual lies at the very heart, like Uluru is to the Australian continent, of the rule of law.

No democratic government should be afraid of the independence of the Bar or of the independence of the Judiciary; they go hand in hand.

Democracy survives and prospers when the two survive and prosper.

The Australian Bar Association is a member of The Forum for Barristers and Advocates whose members are independent Common Law Bars including South Africa and Zimbabwe.

The Forum's Second World Conference was held in Cape Town in April 2004.

On the eve of the 10th anniversary of the new South Africa it was a moving and remarkable experience to listen to and rub shoulders with barristers who suffered under apartheid because of their professional independence and political association; were jailed, ostracized and exiled and some whom even an apartheid government were afraid to attack; and those who have survived and carry, not bitterness, but an abiding belief in the strength of the independence of the Bar and the superiority of the rule of law.

It was no surprise then that the session which commanded great interest was that of the young barristers and what they saw as the future of the Common Law Bars.

Sam Hay of the Victorian Bar was one of the four speakers.

Independence was the common nomination of what was fundamental to their futures and the threats to that independence were a common experience.

Sam Hay summarized common themes (including the slowness of solicitors to pay!) in this way:

> *"It was interesting to learn that such diverse bars all have similar challenges. It seems that no matter which part of the world you practice in,… government competition authorities have the bar in their sights, and the executive government is trying to limit the scope of judicial intervention in the name of "national security".*

The Australian Bar Association will be vigilant, I can assure you, to protect the independence of the Australian Bars and active at the international level to help other Bars under challenge.

The additional threat which the young barristers identified was the problem of attracting and retaining the "best and brightest" of the younger generation – competing with "high flying" careers elsewhere and the attraction for many top young professionals to choose roles which allowed them to work overseas. All Bars identified ongoing professional training as a must in order both to maintain the attraction of the Bar as a professional career and the highest skill levels and competitive edge of barristers as advocates and advisors.

Recognising this the Australian Bar Council has resolved to establish an Australian Bar Advocacy Training Council to strengthen this objective on a national basis.

Ladies and gentlemen, at the start of another legal year when many national and private legal issues will hit the headlines; in which, I expect, many here tonight will be involved may I wish you all an engrossing year of professional life and, I hope for all the new Silks, a rewarding experience.

Take time off, if you are able, to join us at the Dublin Conference in June this year and look ahead also to the 3rd World Conference of the Forum for Barristers and Advocates to be held in Hong Kong in 2006.

For the remainder of this evening - as we heard it said so often in Cape Town – please enjoy. Or when in Florence, (divirtirsi – dee-ver-teer-see - enjoy).

Ian Viner, AO QC

President, Australian Bar Association

Michael McHugh AC

The Governor-General being greeted by Harrison S.C.

Harrison S.C.

"Junior Silk" Jane Needham S.C.

At the Silks Dinner in Canberra the Hon Justice Michael McHugh AC proposed the toast to the new Silks. The following is an extract from the speech given by McHugh J.

Thank you Mr President.

Your Excellencies, Chief Justice, Mr Attorney, ladies and gentlemen, on behalf of the Justices of the High Court, I welcome you to this dinner, given by the Australian Bar Association, to mark the appointment of the Nation's new silks.

Being appointed silk means becoming part of a tradition dating back 400 years. Over the past decade, significant changes to this tradition have occurred. Various jurisdictions have replaced the title of Queen's Counsel with Senior Counsel, discontinued the issuing of a Queen's Commission and removed the powers of the Executive in the appointment process. The significance of the institution of silk, however, has not diminished, and the values it embodies remain just as important in the 21st century as at any time in its history.

The institution of silk formally dates back to 1604[1]. Initially, Kings Counsel were bound by oath not to accept briefs against the Crown. By the 18th century the institution had evolved to a class of counsel simply given precedence and a rank superior to that of ordinary counsel.

Today, the appointment of Senior Counsel provides a clear and public identification of those barristers whose skills, legal experience, and personal qualities mark them out as being the best within the legal profession. As the Chief Justice pointed out today, it is a recognition of professional eminence, with those achieving the rank being identified by their peers as leaders in the field of advocacy. For the public, it is a mark of excellence and of a continuing expectation that an individual will consistently perform to the highest standards. These expectations are not limited to the exercise of legal skills.

Furthermore an advocate, as an officer of the court, is central in assisting in the administration of justice according to law and in upholding the rule of law. As the Chief Justice also pointed out, there is a significant level of trust placed by judges in the advocates appearing before them, and it is vital to our justice system that judges are able, without question, to hold the utmost confidence in the integrity and character of each advocate appearing before the courts. As such, each advocate carries a significant burden. This burden is then magnified for those advocates achieving the rank of silk, who are expected to lead by example and to discharge these responsibilities to the fullest possible extent.

Being granted the status of silk is certainly a considerable personal achievement and cause for celebration. At the same time however it is more than just a personal accolade and reward. It brings with it responsibility for maintaining the distinguished tradition and expectation of both service and leadership that has been central to the institution for hundreds of years.

It is particularly encouraging to see increasing numbers of women now being appointed to the ranks of Senior Counsel. Nine of the 48 silks who took their bows today were women. Such appointments were simply unthinkable for a long period of time. It was not until 1949 – nearly 350 years after the institution was first established – that a woman was appointed as a King's Counsel at the English Bar[2]. It was not until 1962 that Dame Roma Mitchell was appointed as the first female Queen's Counsel in Australia. Two years then passed before Joan Rosanove was appointed Queen's Counsel in 1964, 46 years after she had signed the Roll of Counsel of the Victorian Bar and eleven years after her first application for silk.

The very idea of women practising at the Bar initially met great resistance. Fortunately, much progress has been achieved since the 1870s when the Wisconsin Supreme Court rejected Miss Lavinia Goodell's application for admission to the Bar, saying:

"Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things."[3]

Still, the appointment of women as Senior Counsel remains the exception not the rule. While over half the students graduating from Australian law schools and approximately half of those entering the legal profession each year are women[4], numerous studies and articles show that females continue to be under-represented in the senior echelons of the Australian legal profession[5]. For example, in my home State of New South Wales only 14.7% of

Their Excellencies with Chief Justice and Mrs Gleeson, The Attorney-General and Mrs Ruddock and members of the Australian Bar Council.

Silks Dinner 2005

barristers, and 3% of the senior Bar, are women[6]. Similarly, research conducted by the Law Society of New South Wales in 2002 found that approximately 13% of partners in law firms were women and that the salaries of female solicitors were, on average, 82% of the salaries earned by male solicitors[7].

This under-representation is clearly apparent when we look at counsel appearing before the High Court. No female advocate actually had a "speaking part" before the High Court until Joan Rosanove appeared in 1938 in the well-known case of Briginshaw[8]. Justice Kirby has noted that in his first eighteen months on the High Court bench he heard over two hundred barristers argue their cases, but heard only six women advocates[9]. While the number of women advocates appearing before the High Court is increasing, it is occurring at an extremely slow pace. For example, in the year 2002-2003 the percentage of women with "speaking parts" before the Full Court (including special leave applications) was less than 9% of all advocates with "speaking parts" over that period. A quick examination of the High Court Register of Practitioners demonstrates that this trend looks set to continue in the near future, with less than 7% of senior counsel on the Register being female.

The under-representation of women within senior legal ranks is also reflected within the judiciary. The most obvious example is the lack of any female representation on the High Court bench following the retirement of Justice Gaudron and the fact that since its establishment in 1903 she remains the only female appointed to the High Court. This contrasts with other jurisdictions such as the United States, Canada, New Zealand, India, Singapore, Ireland and England, all of whom currently have one or more women appointed to their final appeal courts.

Is this something that we should be concerned about? After all, it is commonly asserted that the best person for the job should be appointed without any regard being given to factors such as gender. The argument that appointments should be based purely upon merit becomes problematic however when systemic and structural discrimination places female lawyers competing on "merit" at a disadvantage[10].

In considering the question of judicial appointments it is important to keep in mind that the legitimacy of the judiciary rests upon the support and confidence of the Australian people. The continued failure to appoint a qualified female to our highest court runs the risk of slowly eroding that support. Over time a court that does not reflect the diversity of society at large, that is denied the potentially distinctive perspective that a female Justice may bring to the law and that is socially and culturally homogenous in its male membership may not retain public confidence[11].

This is one of the reasons why it is so important to encourage women to embark upon a career at the Bar and to apply for appointment as Senior Counsel. The Bar in general, and Senior Counsel in particular, have traditionally been the source of judicial appointments. Necessarily, as long as they remain the principal sources of judicial appointments, a limited number of female Senior Counsel is likely to mean a limited number of female judges and Justices. Female silks are also important role models for other women in the legal profession. This can be seen in the clear influence that women such as Dame Roma Mitchell and Joan Rosanove have had on the women who followed in their paths.

Mr President, as the then President of the Australian Bar Association, I presided over the first dinner given by the Association to mark the appointment of the nation's new silks. It therefore gives me especial pleasure, in attending this dinner for the last time as a Justice of the High Court, to propose the toast to this year's new silks.

Ladies and gentlemen, I propose the toast – the new silks.

(Footnotes)

1 Merralls, "Some Marginal Notes about Queen's Counsel", (Winter 1994) 89 Victorian Bar News 51.

2 Mrs Helen Normanton and Mrs Rose Heilbron were the first two women to be appointed King's Counsel at the English Bar. Both were appointed in 1949. See Derriman, Pageantry of the Law, (1955) at 59.

3 In the Matter of the Motion to Admit Miss Lavinia Goodell to the Bar 39 Wis 232 (1875).

4 Davis and Williams, "A century of appointments but only one woman", (2003) 28(2) Alternative Law Journal 54; Law Council of Australia, 2010: A Discussion Paper: Challenges for the Legal Profession, (2001) at 18, 132; Law Society of New South Wales, After Ada: A New Precedent for Women in Law, (2002) at 7.

5 See, for example, Law Council of Australia, 2010: A Discussion Paper: Challenges for the Legal Profession, (2001); Law Society of New South Wales, After Ada: A New Precedent for Women in Law, (2002); Taylor and Winslow, "A statistical analysis of gender at the NSW Bar", (Winter 2004) Bar News 20 at 20; Victorian Bar Council, Equal Opportunity for Women at the Victorian Bar, (1998).

6 Taylor and Winslow, "A statistical analysis of gender at the NSW Bar", (Winter 2004) Bar News at 20.

7 Law Society of New South Wales, After Ada: A New Precedent for Women in Law, (2002) at 6, 35.

8 Joan Rosanove appeared as junior counsel in Briginshaw v Briginshaw (1938) 60 CLR 336, and was recorded as having addressed the High Court, although only briefly. See Blackshield, Coper and Williams, The Oxford Companion to the High Court of Australia, (2001) at 722.

9 Kirby, "Women Lawyers – Making a Difference", speech delivered to the Women Lawyers' Association of New South Wales, 18 June 1997.

10 McHugh, "Women Justices for the High Court", speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004.

11 McHugh, "Women Justices for the High Court", speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004.

Tracing Civil Society and the Rule of Law in Australia

T.D. Castle and Bruce Kercher[1]

Australia embodies one of the great modern historical contradictions. How did a society which began as a jail and dumping ground for British criminals, transform itself into a modern, sophisticated, free society fundamentally based upon the rule of law? And exactly what role did lawyers and the Courts play in assisting this transformation? The answers to some of these questions may be found in a volume published in March, Dowling's Select Cases 1828 to 1844.

If you would like a copy please contact: The Francis Forbes Society for Australian Legal History, Ph: (02) 9232 4055.

Sir James Dowling was the third judge to be appointed to the New South Wales Supreme Court in 1828, and became its second Chief Justice in 1837. Born in humble circumstances in Dublin, he owed his appointment to his merit as a barrister and accomplished law reporter in London, rather than wealth or family connections. Initially trained as a journalist and parliamentary reporter, Dowling had the keen eye of a judicial naturalist for observing and recording the differences between life and the law as it existed in New South Wales – which then comprised most of mainland Australia – in contrast to that which he knew at Westminster Hall.

But Dowling, and his fellow judges were not merely observers, but actively participated in the process of shaping a distinct Australian common law. One of their primary "duties", identified by Blackstone and confirmed in s.24 of the Australian Courts Act 1828, 9 Geo. 4 c. 83, was to determine which parts of English law should be accepted and which rejected to suit the conditions of the colony.

Reproduced in a single volume, Dowling's Select Cases 1828-1844 contains 465 cases selected by Dowling (from the many thousands of cases that he heard during his sixteen years on the bench) for publication as Australia's first set of law reports. These cases were contained in nine manuscript notebooks that have remained virtually untouched, in state archives, for the past 161 years. What these cases illustrate is the way in which a distinct Australian common law was developed by the judges, as they adapted English law to the reality of the customs and expectations of daily life as it was lived in colonial Australia.

Over three-quarters of the cases selected by Dowling involve civil matters, and span the full spectrum of legal issues. We have arranged these cases into twenty-two broad subject classes from Aboriginals to Wills, Probate & Administration. We have also verified the authorities cited, and included references to the English Reports, which were published after Dowling's death. The Table of Statutes, for example, shows the extent to which early law received in Australia dates back in some cases to laws passed in the reign of Edward I in 1285. We have also provided, in the Introduction, a description of the operation of the colonial courts and a brief biography of the judges to provide further context to the cases contained in the volume.

Many of Dowling's cases have contemporary significance, particularly in such areas as the restraint of executive and judicial power by the use of prerogative writs and damages claims, the development of jury law in Australia, or the application of libel law and its effect upon newspapers and the right to free speech. Other cases have an intrinsic historical value in showing how the Supreme Court established the rule of law in Australia from such diverse areas as negligence in relation to carriage accidents and warranties of soundness in relation to the sale of horses, to the regulation of bills of exchange and the administration of early insolvency law. And other cases provide an insight into the workings of colonial society and the convict system. The latter led to a particularly rich stream of independent legal thinking.

In his Foreword to the volume, Spigelman CJ has written: "The cases reported here apply legal principles and manifest a style of reasoning of which we are the direct inheritors today. Many of the principles have not changed at all. Many of the cases would be decided in exactly the same way. The cases manifest, however, one abiding theme: the omnipresence of continuity and change." The continuing relevance of the inherent jurisdiction of the Supreme Court, dating back to its establishment in 1824, was confirmed by the High Court last year in A Solicitor v The Council of the Law Society of New South Wales [2004] HCA 1.

The publication of this volume is the latest in a series of projects of The Francis Forbes Society for Australian Legal History, founded in 2001, and has been carried out in conjunction with The Council of Law Reporting for New South Wales and Macquarie University. Order forms to purchase a copy of Dowling's Select Cases 1828-1844 can be obtained from the website of the Forbes Society at www.forbessociety.org.au. We particularly commend this volume to practitioners interested in understanding more about how the rule of law evolved in Australia, as well as to students of Australian colonial history and legal history generally.

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For the enjoyment of all readers, we have set out on the following pages, one of the decisions, which concerned a challenge to the reasonableness of Counsel's fees. We suspect that there would be few barristers in 2005 who would disagree with the sentiments expressed by Dowling CJ, Burton and Stephen JJ in 1844 in the case of Clarke v Fitzhardinge, cited as (1844) NSW Sel. Cas. (Dowling) 866, on a cost assessment in relation to the reasonableness of counsel's fees.

Thomas Clarke v. W.G.A. Fitzhardinge

An attorney is vested with a sound discretion as to the fitness of counsel to be retained and the measure of the fee to be given, which ought not be struck off his bill of costs unless it is outrageous or plainly extravagant.*

This was an application to the Court to order the Prothonotary to receive his taxation of Mr Fitzhardinge's bill of costs against Mr Thomas Clarke, as between attorney and client in and about divers matters in which he was employed professionally. The Prothonotary having reported to the Judges the principle on which his taxation was founded, the motion for a review was discussed at great length in the early part of the term, when the Court reserved its decision and now Sir James Dowling C.J. delivered judgment.

The Court. We have fully considered the matter of this application and are of opinion that the rule must be made absolute for referring it to the Prothonotary to review his taxation. The main objection to the Prothonotary's taxing the bill submitted to him, was that he had disallowed large sums of money actually paid out of Mt Fitzhardinge's pocket to counsel as fees, on the ground that they were not sanctioned by the client and it was broadly contended that this was an unjust principle, for that an attorney has an unbounded discretion in determining what amount of fees he will or will not give to counsel for the conduct of his client's case, and that he has in the taxation as between himself and his client a right to be allowed them as costs out of pocket, unless it be made to appear that there has been fraud or collusion. It is difficult to lay down any precise rule upon a matter of this kind. An attorney is no doubt an agent for his client for the faithful, honest and zealous protection of his rights and interests, and being more competent from his professional knowledge to judge of the merits of his client's case than the client himself, he must be vested with a sound discretion as to the fitness of the counsel to be retained and the measure of the fee to be given, not merely with reference to the standing of the advocate, but the difficulty and importance of the interests committed to his charge.

The Court cannot however, recognize the broad principle that there is to be no limit to the discretion to be exercised by the attorney in the amount of fees to be given, because it might be carried to an injurious if not ruinous extent and it would be impossible to say where it must stop. The safer rule to guide him is the discretion which he would exercise were the case his own, having regard to the magnitude of the interest at stake, the weight and standing of the advocate and the probable difficulty and labour to be imposed in the effective advocacy of the matter in issue. If an attorney has with reference to these considerations paid bona fide out of his own pocket fees to counsel to an amount perhaps startling to a successful client in the fair protection of that client's interests, whether savouring of safety against ignominious punishment, or loss of character or privation of property, we cannot but think that it would be the height of injustice to suffer him to be at the loss. It is, we think, a sound principle to lay down, that payments so made by an attorney on his client's account ought not to be struck off his bill of costs, unless they are outrageous or plainly extravagant. With this limit, that he is to be left to the exercise of such liberal discretion as would guide him in his own case, we think he ought not to be fettered by a niggard review of his bill at the instance of a client, who is perhaps from his own habits of life and pursuits, incapable of appreciating the learning, the ability and zeal and labour of his advocate. There may indeed be cases in which it would be prudent for an attorney to take the express directions of his client when an unusually large fee is proposed to be given, but in ordinary cases no man of honor and character fit to hold the important office of an attorney could be expected to consult his client upon a nice calculation of pounds, shillings or pence, what fee ought to be given to his counsel in the progress of a suit, whether civil or criminal.

There has been no impeachment of the integrity and good sense of the learned Prothonotary, but it was not unfairly urged that he is new in office and was not in the Colony during the criminal trials in which Mr Clarke and the other parties prosecuted with him, were involved. Two members of the Court have judicial knowledge of the length, difficulty and fatigue of those trials and it is possible that if our learned officer had been a spectator of the talent, learning and untiring zeal of those who brought the proceedings to a favourable issue for Mr Clarke and the other gentlemen implicated, he might have been disposed to relax the stringency of taxation of a bill placed before him for cold calculation without a leaving impression of the substantial merits of the work done and performed or the vital importance of that work to the client. We cannot help thinking therefore that with this intimation his taxation of the bill may be reviewed in a more liberal spirit without violating the conscientious desire of doing right, which it is conceded on all hands it has been his disposition to manifest. Unless therefore the fees bona fide paid out of pocket to counsel by Mr Fitzhardinge be outrageous or extravagant, we think this part of his taxation may with justice be reformed.

Having then disposed of the prominent objection to the principle of the Prothonotary's taxation, we are now to advert to smaller matters. We perceive that the Prothonotary has disallowed a fee of £5.10 paid by Mr Fitzhardinge to a gentleman at the bar, for attending a meeting of creditors to advocate the interests of Mr Fitzhardinge's clients, but which he did not attend.

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That matter has been satisfactorily explained to the Court. It appears that a brief with the fee in question was left with the barrister, who distinctly told Mr Fitzhardinge that if he left it he must do so at the peril of his being unable to attend during the sittings of the Supreme Court then going on; but that he would prepare himself to attend the meeting of creditors and would attend if he could. It so happened that he could not attend and another gentleman appeared, but the attorney took the chance of the other barrister being able to attend. The brief had been read and the counsel had prepared himself to attend if he could. Under such circumstances we are not aware of any professional rule which required the fee to be returned and therefore we think this disbursement ought to have been allowed on taxation; but at the same time we cannot forbear strongly discommending the principle of leaving a brief and paying a fee on the contingency of the barrister being unable to attend. It is not only injurious to the client but unfair towards other gentlemen at the bar.

The Prothonotary has disallowed several fees for consultations with counsel, on the ground of being unnecessary in his judgment, having been held on matters of minor import or on points where the knowledge of a skilful practitioner ought to have been sufficient. The Court goes along with the principle laid down by the Prothonotary that it is a highly important part of the duty of an attorney to save his client every possible expense; yet if consultation fees have been bona fide paid (and are not exorbitant) in the progress of a pending case of deep importance to a client charged with fraud and conspiracy, it may be difficult after the proceedings are ended to determine whether such consultations were really necessary or judicious. The client entrusts his interests to his attorney and if the attorney bona fide thinks it expedient to consult counsel, and has in fact paid money out of pocket, it would indeed be paid upon him to be at the loss. In reviewing this part of the bill, the Prothonotary will be guided by a more liberal view, and endeavour if he can to avoid exception on the score of strict severity of taxation. With the remaining parts of the Prothonotary's report we can find no fault.

The charge for costs made by Mr Fitzhardinge in the cases of Mrs Campbell, Mr W.P. Gordon, Mr Lockyer and Mr Scrutton have been disallowed on the ground that they were incurred without retainer and contrary to instructions from Mr Clarke. Retainer or no retainer in these cases (in the absence of any proof before the Prothonotary) is a question of fact to be determined by trial. It is no doubt a question within the province of the Prothonotary to determine, but in case of doubt like the present, we think Mr Fitzhardinge ought to be left to his action to establish Mr Clarke's liability under these heads. It was suggested that in taking his taxation the Prothonotary had by mere miscalculation disallowed or overcharged Mr Fitzhardinge with £20. If this be so, it will be a matter of easy adjustment when the bill comes again before that officer.

With these observations the Prothonotary will review his taxation, the costs of which will abide his final report.

SUNCORP SPONSORSHIP BOOSTS NATIONAL CONFERENCE

Attending the $55,000 Suncorp cheque handover were (from left) – Glenn Martin S.C., ABA Vice President and Conference Chair; Peter Steele, Suncorp Senior Consultant; and Steve Mitchell, Suncorp Business Development Manager.

A host of leading international speakers have been secured for the Joint Irish and Australian Bars Conference thanks to a $55,000 sponsorship from SUNCORP.

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"Thanks to the SUNCORP sponsorship we can bring a high calibre of speakers to the Conference and develop a programme which will make this an extremely valuable event for all participants."

Apart from Justices McHugh and Heydon from the High Court, speakers will include the Hon. Dame Heather Hallett, from the High Court of England and Wales; the Hon Lady Smith, of the Court of Session, Scotland, Michael McDowell TD, Irish Minister for Justice, the Attorney General of Ireland, Rory Brady S.C., Professor William Binchy, Regius Professor of Law, Trinity College, Judge John Cooke (Cour de Justice Des Communautés Européenes) and the Hon. Mr Justice McMeniman, High Court of Ireland.

"It provides an excellent opportunity for our members to hear from people who are at the cutting edge of our profession and to cement relationships with international barristers," Mr Martin said.

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World Conference of Advocates and Barristers

Hong Kong and Shanghai • 15 – 19 April 2006

The International Council of Advocates and Barristers will be holding its third world conference in Hong Kong and Shanghai from 15 to 19 April 2006.

The International Council of Advocates and Barristers is an organisation formed by the Bar Associations in jurisdictions where there is a separate profession of an independent referral Bar. Its members are currently the Bar Associations of Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Northern Ireland, Scotland, South Africa and Zimbabwe. The objects of the Council include the promotion and maintenance of the rule of law and the effective administration of justice. Its focus falls on matters particularly important to the Bar worldwide, including: regulatory issues, better training for the profession, and strengthening the independent Bar as a prerequisite to an independent Bench.

Very successful conferences have already been held in Edinburgh and Cape Town. Those who have attended have had the benefit of hearing from a wide range of speakers such as Mary Robinson UN Commissioner for Human Rights, the Hon. Anthony Gubbay (the former Chief Justice of Zimbabwe), Param Cumaraswamy, UN Special Rapporteur on the Independence of the Judiciary, Justice Ian Callinan (High Court of Australia), and Justice Dikgang Moseneke (Constitutional Court of South Africa). Speakers of similar calibre will participate in next year's conference.

DETAILS:

Date 15 to 17 April, 2006
Place Hong Kong
Venue Island Shangri-La Hotel, Hong Kong
Date 19 April, 2006
Place Shanghai
Venue Pudong Shangri-La Hotel, Shanghai

When further conference details are available they will be posted at www.worldbaronline.com

Should you wish to receive a registration brochure before they are generally released please send your contact details (including an e-mail address) to:

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