ABA/NSW Bar Association Biennial Conference

The future of the independent Bar in Australia

James Allsop

I propose to discuss aspects of the Bar at the present time as a basis for discussing the future. The future, with all its possible changes, should still be seen as rooted in some immutable considerations.

This speech will commence by reflecting upon the place of the independent profession, and in particular the Bar. The independence of the judiciary and the judicature is premised on an independent profession, and, in particular, the Bar, in the administration of justice. This requires some comments on the Rule of Law.

The independence of both Bench and profession (and so, Bar) is an underpinning foundation of the Rule of Law. That is, in part, because the Rule of Law is a state of affairs involving a spirit of liberty and freedom that lives within a framework that has a constituent element of the subservience of all power to the law of the polity. The Rule of Law in this conception sees law not merely as the rules to be set by the powerful. It is a conception of legitimate representative and organised power, reflecting democratic and social values that make subjection to the Rule of Law an aspect of civil society's protection of the individual, not an aspect of domination by the powerful.

At the core of this conception of the Rule of Law is the irreducible character of judicial power that cannot be exercised, or required to be exercised, other than fairly, equally and justly.[1]

In an adversarial system, the protection of the citizen against the exercise of public or private power depends on the skilled and faithful propounding of the rights of the client, in a framework of an ultimate and overarching duty to the Court as the instrument and embodiment of judicial power and justice. One sees this in the very acts of day-to-day practice – in the

[1] *Kable v The Director of Public Prosecutions for New South Wales* [1996] HCA 24; 189 CLR 51; *Nicholas v The Queen* [1998] HCA 9; 193 CLR 173. See also *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* [1992] HCA 64; 176 CLR 1 at 27; *Polyukhovich v Commonwealth* [1991] HCA 32; 172 CLR 501 at 607 and 703-704; *Lowe v The Queen* [1984] HCA 46; 154 CLR 606 at 610-611, 613 and 623-624; *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295 at 301-302; *R v Green* [2010] NSWCCA 315; 207 A Crim R 148 at [3]; *Green v The Queen* [2011] HCA 49; 244 CLR 463 at 472-473 [28]; and *Kioa v West* [1985] HCA 81; 159 CLR 550 at 584-586, 601 and 612-615..

reliance of the Bench upon the Bar for skilled and scholarly advocacy; for the advocacy to be the product of the application of the duty not to propound meritless points; and for behaviour of the highest standards in bringing disputes to an early resolution with only issues genuinely in dispute being ventilated.

The place of the profession, and especially the Bar, as officers of the Court, and the relational duty and respect created by that position, can be seen at admission ceremonies. You should attend one every now and again. The ceremony will remind you of the living nature of that relationship of Bench and profession.

The importance of the Bar comes from its place in the judicial process. In *Re Nolan*,[2] Gaudron J referred to the judicial process as partaking of the same fundamental importance as the democratic process.[3] Justice Gaudron expressed the importance of the judicial process to the nature of judicial power and the resolution of controversies fairly, in the maintenance of an open, free and just society. The judicial process and its features can be seen as explained in numerous cases, especially by Gaudron J.[4] One clear expression of the matter by her Honour is in *Nicholas v The Queen*:[5]

> … the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.

One sees in this articulation a strong structure of rule and principle, but weaving in values and their indefinable texture, to create the strength of a whole conception rooted in fairness, dignity and equal treatment before and by the law, in its practical and real life application. Without independent representation informed by the fiduciary principle and the duty to the court the

[2] [1991] HCA 29; 172 CLR 460.
[3] Ibid at 496-497.
[4] *Re Nolan* 172 CLR 460 at 496; *Polyukhovich* 172 CLR 501 at 703-704; *Leeth* 174 CLR 455 at 502; *Hindmarsh Island Case* 189 CLR 1 at 22; *Kable* 189 CLR 51 at 103-104; *Nicholas* 193 CLR 173.
[5] 193 CLR 173 at 208-209 [74].

protective judicial power is stunted. So, the profession, and so the independent Bar, forms an integral part of the judicial process and so judicial power.

What is the independence of which I speak? I cannot be exhaustive. I wish to explore the notion. There are some obvious considerations. For both Bar and Bench, it involves the financial independence not to be beholden to a master who will control or influence independent judgment. For both, it also involves skill, expertise and scholarship, which permit and foster the confident independence of mind necessary for the difficult tasks involved. For any institution of skill, integrity and independence, one of the greatest challenges to its independence is the entry into, or appointment to, its ranks of less than qualified and less than competent people. Independence can be undermined by incompetence as much as by venality.

The notion of the independence of the Bar requires a constant appreciation that it is a profession not a business. The difference is impossible to define; but the distinction arises in everyday activity. There is, however, a difference, not hard to recognise upon granular examination. At the risk of over-simplification, the profession of law is marked by scholarship, a service to the public, and the daily recognition that the professional is bound, in **everything** he or she does, to or for his or her client by the fiduciary duty so compellingly encapsulated by Cardozo CJ ninety years ago:[6]

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.
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> (Citations omitted.)

Cardozo had a gift with words and ideas. So did Holmes. In 1898, Holmes (then a judge on the Massachusetts Supreme Judicial Court) gave a speech to Boston law students. He spoke of

[6] *Meinhard v Salmon* 249 NY 458 (1928) at 464.

professionalism and money in a characteristically pointed and illuminating way. The speech is a classic of jurisprudence, legal philosophy and advice to the young. It is an insight into life, the law, and the Bar. It survives in his collected works, as "The Path of the Law." In the speech he was prescient. He began with a lament, and proceeded to the truly human:[7]

> The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to wake people out of a fool's paradise. But, as Hegel says, "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. … Read the works of the great German jurists and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success.

The practice of barristers as the practice of a profession cannot be reduced to any statement of propositions or a checklist or a list of boxes that might be ticked. The practice of a profession is much more complex than that. Properly practising in the profession of being a barrister is very much an attitude of mind, a state of being, a way of behaving towards the problems and people presented that is reflective of a greater set of values rather than purely the conduct of a business. A business is different.

That professional character of the Bar is well-illustrated by the important consideration of collegiality as binding the Bar together as a college which binds its members through mutual support and recognition of a mutual responsibility to each other, and a corporate responsibility of the group to uphold the fundamentals of independence, skill, scholarship, fiduciary service, and the duty to the Court. This is strengthened if there is a strong notion of the collegiality of chambers, not as commercial enterprises, but as mutually supportive individuals.

[7] O W Holmes, 'The Path of the Law' in *Collected Legal Papers* (Constable & Co London 1920) at 201-202.

There are fundamental values underlying the notion of the independence of the Bar. Independence of mind is one of those values. Yet independence of mind does not mean being dogmatic. It involves the mind in its widest sense. It involves being human and recognising the human elements at play in a dispute. It involves recognition and appreciation of the whole. It involves bringing wisdom to resolution of the dispute. It involves wisdom in presentation of the case. It involves integrity, respect and civility. These involve and comprise decent human behaviour. They involve insight into one's self. The dispute is not about you. The case is not about you. Independence (and the degree of abstraction within it) involves the recognition of the significance of the dispute to the lives of the humans involved. Every advocate (and every judge) should be conscious that what might seem a routine or banal case may represent the most significant and potentially catastrophic event in the lives of the people involved. The judicial process ought impress this upon one on a daily basis.

The next reflection on the present concerns Australia's significant diversity, brought by reason of the realities of a Continental federation, and particular State and Territory histories. The reality of State and major capital city practice is to be recognised. There are differences and features of culture and approach that are impossible to define, but easy to sense and appreciate, at least for an Australian. This is not a matter for regret or for agonising. It should be embraced as enhancing the richness of our legal culture, as long as a national perspective is not lost. This is not a call to provincialism. Any such tendency should be objected to and firmly rejected. Rather, it is to recognise that it is important that there be a sound relationship between local Bench and local profession especially the Bar, in the administration of justice. But, we have a national judicature framed in the Constitution. There is an underpinning assumption in Ch III of the Constitution of an integrated national judicature. That informs the Constitutional responsibility of the courts to cooperate and deal with each other in a way that supports that national judicature, not undermines it.[8]

This aspect of the federal structure of the judicature is historical, framed in our Colonial past. But it is, if one thinks about it, an aspect of diversity of this country. Whilst the differences between the characteristics and social milieus of the State and Territory Bars may seem imperceptible to the outsider, they are real and meaningful to Australians. Yet Australia's historical diversity, of a Colonial character, should be set alongside at least three other

[8] *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143.

importance perspectives of diversity: that of Indigenous Australia; that of the international and multicultural society that we have become; and that of necessary gender diversity and equality. All of these defining characteristics of Australia are vital for the administration of justice (including, by that phrase, the Bar) to understand, reflect upon, and incorporate in their respective visions for the future, which are, in one sense, their respective senses of corporate self – of Bench and Bar.

Why are these perspectives of our society important for the Bar? The answer lies in why they are important for the Bench. Law and society must be intertwined and view each as part of the other, if both are to be healthy. If law, the legal system and justice are seen as abstracted from the values, societal expectations and deep notions of justice that inform human society, they will lose or have weakened their ultimate power and force – acceptance and consent. Law and the Rule of Law gain societal acceptance and consent by their reflecting underlying values of society and by how the law and the administrative of justice serve society. To quote Holmes again in the same oration to those Boston students:[9]

> The law has the final title to respect that it exists, that it is not a Hegelian dream, but part of the lives of men.

The Bench and the profession, including especially the Bar, are entrusted with the task of maintaining the consent and trust of their community in the fair, equal and just exercise of judicial power. It is a heavy and daily responsibility which should never be undermined by a sense of entitlement or inappropriate self-interest. Those considerations should be carefully attended to if the profession or the Bar seeks to engage in what can be reasonably seen as partisan political debate, or the promotion of self-interest, beyond what is appropriate. (The same, in somewhat modified language, can be said about the Bench.)

Turning from the Australian community to Australia's place in the world. This is relevant to reflect upon because Australia is placed in one of the fastest developing regions in the world, a region of great human diversity in social, economic and legal systems, of many different stages of development. It is no exaggeration to say that the Asia-Pacific Region is an area with a developing justice system. I use the singular because the volume of trade and interconnected social interactions is creating both the need for and the reality of an international commercial

[9] Holmes, *Collected Legal Papers* at 194.

justice system. This is comprised of national and international commercial courts, arbitration institutions, arbitrators, related dispute resolution professional such as mediators, and the profession which engages in these tasks. The growth of this manifestation of the Rule of Law in the region in this respect, and its importance, cannot be exaggerated. It is an international social and economic development of the highest importance. I doubt whether it is fully appreciated by government, the public or the profession generally. Today is not the time to dwell on the detail of this interconnected network of judicial and arbitral dispute resolution centres: Hong Kong, Singapore, the Middle East, Malaysia, Korea, Japan, and Australia. I wish at this stage only to place it as an aspect of the present to reflect upon if one is lifting one's eyes to the future.

Let me look to the future then with these things in mind. I will commence with the core considerations to which I have referred. The maintenance and enhancement of the independent Bar's place in the administration of justice requires a focus on building the natural and necessary features of a **national** independent Bar. I see the central role of the ABA in this, not to the exclusion of the State Bars, but *with* them to create a self-identifying Australian Bar that reflects and underpins the integrated national judicature. This is to be achieved as much by reflecting on the proper attitude of mind to a national profession as by anything else. It should not be seen as giving up local sovereignty, but developing a related and intertwined national sovereignty of the Bar, as an independent part of the profession, particularly related by its advocacy to the effective functioning of the court system. The interrelationship of Bench and Bar is with Commonwealth courts, not just State and Territory courts, a feature and realisation often overlooked, if I may respectfully comment. There is often (except among practitioners who practice exclusively in federal courts) a sense that the federal courts are an outsider or foreign to, the relationship between (State) Bench and (State) Bar. This is not said critically, but observationally. If fault lies, it perhaps lies as much with the Bench as with the Bar.

But it is important, I think, in a federation not only for the courts to work cooperatively, but for the Bar to engage with the courts (State, Territory, and Commonwealth) to enhance a nationally focused relationship. This relationship and its enhancement can be achieved by the Commonwealth courts being drawn into the life of the Bar in the same way and with the same sense of "ownership" as underpins the relationship between the Bars and respective State courts.

The vibrancy, health and independence of the Bar must come from its social, legal and economic relevance. The Bar's relationship with the balance of the legal profession is crucial

in this regard. This topic engages important considerations as to modes of practice and the relationship between professionalism and commercialism in the practice (or in the eyes of some, business) of the law. My comments now should not be seen as anti-solicitor or pro-barrister. My comments may also be open to the criticism as made from the other side of the glass window that separates us metaphorically. Also, my comments should not be seen as an atavistic pining for better days when the cheques were made out to me. There have always been issues of the kind upon which I wish to remark. My point is only that if the Bar is to flourish in the future, as I am sure it will, it needs to recognise the dangers to its proper functioning and mark itself out by an unwavering and consistent devotion to skill, scholarship, fiduciary trust, and the duty to the Court. Whilst these are motherhood statements, they are always under threat by the daily exigencies of practice.

The maintenance of the skill and scholarship of the Bar is a constant challenge. The sheer volume of law graduates and the proliferation of law schools presents a challenge for legal education and legal practice. It is a challenge not restricted to the Bar; but it is a challenge that extends to the Bar. The Bar's courses for entry and practice must be of the highest standard, not as a barrier to entry for the sake of keeping numbers low, but as a driver of expected skill and scholarship. In this the courts have a role, which I think has not been fully recognised in the past. It should be. The Bench should be viewed as a partner with the Bar in the education not only of readers but of the Bar more generally, and vice versa. Judges often assist, but I do not perceive (perhaps I am wrong) that this is viewed as a standing partnership of responsibility. It should be. Judges cannot complain about perceived shortcomings in the profession's practice if they are not prepared to engage with the Bar to help advocates deliver what judges want to see.

The notion of fiduciary trust and its intertwining with the duty to the Court are at the heart of the efficient functioning of the administration of justice. They are therefore at the heart of the Rule of Law. These are not theoretical or abstract considerations. They lie at the heart of daily practice, especially with how litigation and dispute resolution is viewed, organised, approached and executed. We all know the over-arching principles "just, quick and cheap". (Care with punctuation required.)

Most disputes do not go to trial; that is because most should not, and do not, need to. The growth over the last few decades of so-called alternative dispute resolution (perhaps better called "usual dispute resolution") has been very healthy. The structured skills of mediation, conciliation, facilitation, and arbitration have become essential aspects of someone who, in

years gone by, would have been called a litigation or trial lawyer. There are real skills in this spectrum of processes. They are often very different skills from those of court craft that marked out the great advocate of the past. The Bar should embrace and recognise these skills as part of practice and, very importantly, not just to be done by those who lack the desire or aptitude for the trial process. It is an impression, and no more than that, that the Bar has ceded these skills to others, which, if so, I think is a mistake. I am not intending to enter a debate as to whether someone whose only practice is mediation is an advocate. My point is that the modern advocate should have the skills to participate fully in this broad range of dispute resolution processes.

Ceding work to other parts of the profession leads me back to Cardozo's punctilio of an honour the most sensitive, back to a world in which the relationship between the professional and the client is the "undivided loyalty [that] is relentless and supreme".[10] Let me take an example away from the law. How could a trustee justify painting a house for $100 when he could have had the house painted (to equal standard) for $50 by a sub-contractor? The answer: only by fully and openly disclosing to the beneficiary, with no false distinctions or embellishments, the relevant circumstances. The sub-contractor knows what is going on. Perhaps the sub-contractor or its trade association might educate the market about how houses can be painted and for what price. This aspect of the fiduciary duty can be seen in a pointed but valid paragraphs in the judgment of White J in the New South Wales Supreme Court.[11]

It is essential to the Bar's future that its cost structure for the value it gives makes it necessary for others with a higher cost structure for the same work to brief the Bar in order to conform with the rigours of fiduciary service. This is vital, especially for the junior Bar.

It is also vital for the future of the independent Bar, and indeed for the proper administration of justice and the Rule of Law, that the Bar exercises its constructive skill in developing leaner and more cost-effective modalities and structures of running litigation. What do I mean? I mean that most litigation can be run on the model of a stick skeleton; but more often than not one

[10] *Meinhard v Salmon* 249 NY 458 (1928) at 468.
[11] *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867; 75 NSWLR 619 at 625 [26] where his Honour said: "In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise."

sees litigation run on the model of a phalanx. I do not propose to elaborate on the metaphors of the stick skeleton and phalanx. The meaning is, I hope, sufficiently clear. More thought, and more public debate, should be given to how litigation is run, and that question not being disguised by budgets. Instead of cost per person, the discussion should be about how many, who, and who is doing what. If a budget is to be prepared for litigation, it should be accompanied by an organisational chart, with necessary justifications. The Bar should be at the forefront of that discussion. It should be a central consideration of the Law Council. The cost of justice is not analysed just by looking at charge out rates; more fundamentally it is analysed by looking at what is being done, by whom, in what organisational structure and at what cost. The prudential controls in running litigation are often absent. Advices on liability and on evidence by counsel responsible for the conduct of litigation should not be seen as relics of the past. They were, and are, important methods of prudential control of issues and cost.

The courts have a role to play here. Too often, case management becomes process-driven in its character, feeding the monster of phalanx preparation. Case management should be the guidance of intelligent problem-solving between the Bench and the profession. If the Bar is to be the most skilled group of dispute resolution problem-solvers and not just trial mechanics, it will lead this process of problem-solving, which I might add can only be done by people intimately familiar with the dispute. Problems are not solved by phalanxes of troops.

Thus, the Bar's future should be not only in developing the practical skill and scholarship that gives it a lean cost structure for advice, mediation, conciliation, facilitation, arbitration and trial practice, but also it must exercise its corporate influence in the community, including but not limited to the commercial community, to bring about a better appreciation of viewing dispute resolution as problem-solving, not process-driven warfare, and an appreciation in the community as to how litigation can be, and should be, organised and run, maximising skilled application of intellectual talent and minimising unnecessary leveraged costs.

Let me put it this way. Dispute resolution should be organised in a professional model by the minimum, but adequate, application of the most appropriately skilled people to the task, driven by (and only by) a recognition of the fiduciary duty to the client. The discussion in any particular case should be about the professional fiduciary model or modality of running the litigation and solving the problem, not the business model of running the litigation. The Bar's future lies in vindicating these issues.

Within these notions there lies a necessary recognition of the appropriate culture of dispute resolution. An adversarial system requires, ultimately, a process of advocacy by parties putting their own cases. Modern case management has not ended that reality, but it has modified it. Problem-solving and adherence to the over-arching principles embedded in modern court statutes require a culture of appropriate co-operation. I have elsewhere used the expression "good faith litigation" to stimulate discussion. By the phrase I do not mean the sacrifice of the client's interests. I mean the running of cases, and especially the identification of issues, that is honest, reasonable and proportionate to the nature of the dispute. Such an approach facilitates the client's interests in a spirit of problem-solving in the most cost-effective way. It also requires, as far as possible, the end of aggressive confrontational style presentation of self and of the client's case. The courtroom is no longer, if it ever was, the place for aggression, rudeness, bombast and bullying. It is the place for the civil presentation, economically and efficiently, of the true issues in dispute. Judges should recognise their responsibility in this as well. But the day of the Bar table being the preserve of the Alpha male should be seen as over, if it ever existed. For many, often women, it very much seems that it did or does exist from time to time.

Further, there is the challenge of AI. This is a topic in itself. But once again there is considerable room for cooperation between courts and the profession in using artificial intelligence and technology generally to enhance dispute resolution outcomes, and not to be an engine of increasing cost and complexity.

Perhaps there should be considered a judicial chapter or section of the ABA as there is in the American Bar Association. That section has been the driver of significant reform in the United States.

Let me turn to diversity. It is a topic often used as a synonym for gender diversity. It is broader than that. It is a word (in its adjectival form) which describes the nature and character of our society. It is the feature that gives this society energy, richness and depth of human character. Australia was built on, and its modern character is to be explained by, its relationship first with Indigenous Australia. That must be honestly confronted. A useful starting point for contemplation is a regular reading and re-reading of the judgments of the High Court of 1991

and 1992 in *Mabo (No 2)*.[12] The importance of that judgment is epitomised in the literary power of the reasons of Justices Deane and Gaudron, especially the section on dispossession at p 104-109 of volume 175 of the Commonwealth Law Reports. The words there used should not be relegated to a discourse on the past, but should provide an honest foundation for a just, modern society. One can then begin to see and foster the gifts of the common law, representative democracy, and the social and cultural heritage we now have from all parts of the world, in the construction of a unique community and nation. The administration of justice, and so Bench and Bar, take their place in that national task.

May I once again suggest that you go to an admission ceremony and see the young men and women – many of whose parents and forbears come from all over the world – solemnly and meaningfully enter a noble profession. Their faces reflect an appreciation of (perhaps not fully formed) and pride in their place in their community's legal system.

The Bar must harness this. That harnessing begins with five words: low cost barriers to entry. It is vital that all Bars ensure that they can ensure this feature of practice. It is a greater challenge for some than others. But it would be a great mistake to view cost barriers to entry as just an economic reality about which nothing can be done.

In a diverse polity such as Australia, the law and the administration of justice face the challenge of acceptance and adherence out of loyalty by all in the community. In any worthwhile society, there must be a sense that the law and the system of justice are owned by all in the community. That is a challenge for Bench and Bar. It is a challenge for the development of legal principle in which the Bar plays a crucial role. I am not talking of political correctness. Development in legal principle that reflects and meets the deep expectations of a diverse society is a challenge. Law as simple rule, of command, as the mechanical application of assertion without the underlying bonds of deep societal values of fairness and justice, will be an inadequate mechanism to bind diverse groups, by loyalty, to a legal system and to an administration of justice that is so fundamental to our society. The Bar has a crucial responsibility in the growth, development and articulation of legal principle reflecting these qualities.

One area in which the Bar assists in that process is the willingness always shown for pro bono work, especially when requested by the Court for assistance. May I take this opportunity

[12] *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1.

publicly to acknowledge the Australian Bar for its work in this regard. It is at the foundation of the service of the Bar to the community.

What of the place of the Australian Bar in the Asia-Pacific region? This is not just (though it includes) the participation in the burgeoning commercial arbitration life of the region. The strength and depth of the Singaporean and Hong Kong courts and professions in dealing with vast bodies of commercial work in the region has not been appreciated by many Australian barristers. The reality may perhaps become that if you wish to be a commercial litigator, to paraphrase Paul Keating, "In the future, if you are not engaged in international arbitration, you will be camping out"; even if that "camping out" seems, at the moment, to involve reaping lucrative fees in a local lake. That lake will, however, over time, become shallower. The place of the Australian Bar in Asia in the future does not just lie in this commercial work. The region is one whose polities do not all reflect the dedication to freedom and justice that this country has, or should have. The Australian Bar should take a leadership role in the region. From a practical point of view, this may require the marshalling of capital to spend on entry into, and development of, that professional market. I am not sure how this can be done in the sole practitioner model. It may require some thinking and imagination on professional structure for off-shore practice. It may carry with it the seeds of tension between professionalism and commercialism; but there is no reason to think that any such tension cannot be managed. The Bar must compete and take its place in an international legal environment dominated by global law firms with their models of practice.

May I conclude by paraphrasing Holmes yet again? Since the most far-reaching form of power is the command of ideas, the Bar, if it is to be the pre-eminent leader of the profession, should be the home of ideas about law, about legal principle, and especially about the remoter and more general aspects of the law which give it its universal interest. The joy of being at the Bar does not come from the comfort of material success, which, of its own, if a single goal, can only drain the soul. In the end, it is not the appetite, but the opinion, which has to be satisfied. This is not done through fortune, but through the command of ideas, and through that, the shaping of the world around you.

The Bar has the privilege to serve the law. In a speech to Harvard undergraduates in 1886, Holmes asked the question:[13] How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflict over often sordid interest, make out a life? He answered eloquently over a page. If I may seek to capture his answer by a short paraphrase from that page: If you have the soul and insight of ideas and ideals, you will see ideas and ideals in your daily life. The law is a calling of thinkers. Your business as thinkers at the Bar is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe.

The Bar's skill and scholarship and service can be seen in the faces of the graduates at admission and readers signing the rolls. They may not have read any Holmes, but most can feel an unarticulated truth that he expressed so well in "The Path of the Law".[14] Your calling is practical and human and real, but it is through thinking about the law in its most general aspects of theory and the relationship of those general aspects of theory with the daily tasks of life that give the law its universal interest. From that appreciation of the human and the thoughtful, you become a master of your calling. You connect your subject to the universe and glimpse its worth and enduring importance, and human value.

That is why the future of the independent Bar is its skill, scholarship, and unremitting recognition of fiduciary service to the client and duty to the Court, as part of the exercise of the protective judicial power. These are not aspirations. They are features of survival.

Sydney

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[13] Holmes, *Collected Legal Papers* at 29.
[14] Holmes, *Collected Legal Papers* at 201-202.