

**AUSTRALIAN BAR ASSOCIATION  
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**THE FUTURE AND RELEVANCE OF THE BAR**

By

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## **INTRODUCTION**

1. Let me at once divulge an unshakeable view I hold. No amount of persuasion will lead me to a contrary view. It is this – the Bar will always be relevant because it provides the greatest assistance to courts and litigants. Its future is very bright.

## **WHAT MAKES THE BAR RELEVANT?**

2. To my mind, three reasons exist for the Bar's continued relevance –
  - a) independence;
  - b) cost effectiveness; and
  - c) depth of talent that is available to all who brief the Bar.
3. Let me take each in turn.

### **Independence**

4. Rarely will the barrister have long-term associations with clients, save for institutional litigants. As a result, the barrister and the litigants for whom they appear seldom find themselves in situations when the barrister is unable or unwilling to provide independent advice on account of a close personal or professional relationship that is too close for objectivity.
5. Barristers rarely find themselves in a position where they are conflicted, having previously appeared against the person for whom they appear on a different later occasion.
6. Nor do they usually acquire confidential information in the course of representing one client only to find that they are deploying that confidential information against the party who imparted it.
7. Barristers usually have no trouble giving their clients the bad news that the client simply must settle the case. Barristers do not have partners watching over them, surveying the potential profit lost if the case is settled early.

## **Cost effectiveness**

8. Barristers do not have billable hours per day against which they must charge.
9. Barristers have no mandated fees targets.
10. Barristers have few overheads which are factored into their daily fees.
11. For most barristers, hourly and daily fees are negotiable.
12. When a barrister is briefed, he or she does not come with a team that attends hearings, conferences and trials, all of whose fees are recorded and are extracted from the client.
13. When paying barristers fees, clients are not contributing indirectly to rent, paralegals, secretaries, superannuation and marketing expenses.
14. Usually, barristers render a fee for a discrete activity, for example the drafting of a pleading, the provision of written advice or a court appearance. Rarely do barristers charge for telephone calls, a trip to the library to find a case or a discussion with the solicitor for updating purposes.
15. Frequently, a particular activity in court has a prescribed fee according to a scale of costs that the barrister is generally required to charge.
16. Even in more complex cases, the hourly charge-out rate of counsel is almost certainly less than the charge-out rate of a partner of a medium to large firm.
17. The barrister's written work will be correct in the final form that reaches the solicitor. The draft does not pass through an array of intermediate solicitors before reaching the partner for the partner's final approval.
18. Even in document-intensive cases, the charge-out rate for juniors to be sifting through discovery will generally be less than the rate charged by a solicitor at the firm that instructs the barrister.
19. In certain cases, direct briefing has enabled clients to go directly to barristers thereby avoiding duplication of effort.

## **Depth of talent available to anyone**

20. This is possibly the biggest reason for the ongoing relevance of the Bar. Any litigant can gain access to any barrister, subject only to the fee, the barrister's availability and the potential of a conflict.
21. This gives litigants incredible choices. They can select a barrister with expertise in all areas of the law of all seniority and of all price ranges. None of these barristers are tied to any particular client or firm of solicitors. The unsophisticated or impoverished client can get access to the best the Bar offers. This access fundamentally levels the playing field and gives clients access to justice in a meaningful way. For those clients, the big firms of solicitors present no obstacle.
22. To my way of thinking, those three things guarantee the Bar's relevance – independence, cost effectiveness and a limitless pool of talent.

## **THE BAR'S FUTURE**

23. The Bar most definitely has a bright future but it needs to adjust.
24. In its current size and composition, life at the Bar in the short and long term will be more electronically focused. In most common law countries, courts are moving to e-filing and paperless trials. That is the case for Federal courts and many State courts within the Commonwealth of Australia. Legal practitioners need to adjust.
25. That will probably mean that cross-examination will be conducted from iPads or mobile phones.
26. The speed at which barristers are required to react will also change. No longer is it tolerated for barristers to sit on a brief for weeks or months before providing the paperwork. Clients demand almost instant turnover of their legal needs and solicitors, when they do instruct barristers, demand nothing less. Judges also are required to determine cases with much greater rapidity than was the case even as recently as, say, 10 years ago.

27. That will add pressure to performance. The need for accuracy is exquisite and the need for high quality results in seemingly record time is also heightened.

### **Who will be briefing the Bar?**

28. The Bar has always been relevant to medium to small firms. That will continue unabated.
29. But what about the Bar's relevance to bigger firms? At one level, it is entirely conceivable that the fused legal system of the United States will be the way of the future in the Australian legal system in all but a handful of complex cases. Whether the Bar is included in the business plan of the big firms is a moot point. But even if the big firms do all the advising, even if they prepare pleadings and prepare written submissions and even if their solicitors appear in robes on the return of consent orders or simple interlocutory applications, they will always retain the Bar for cases involving cross-examination or those involving the presentation of complex legal argument.

### **Will standards drop?**

30. More and more, I expect that courts will become increasingly desensitised to the strict adherence of rules of evidence and of Bar protocols. As more and more solicitors appear at trial, the standards of the norm will lower and courts will be increasingly forced to accept that diminution in quality as the norm.
31. Naturally, judges appointed from the Bar are generally tougher on substandard performances from non-Bar advocates, especially in the applications of rules of evidence to evidence-in-chief, cross-examination or in evidence-focused submissions. However, with increasingly frequency judges, especially in intermediate courts, are appointed from the ranks of solicitors who have little to no understanding of rules of evidence, still less of proper court craft. More and more, clients hear evidentiary rulings on the lines "*I'll let the evidence in, but it goes to weight*". Sadly, that approach is all too common nowadays.

## **Maintaining some hand in the future**

32. It seems to me that the Bar must jealously guard its patch. When opposed to solicitors, the barrister must exhibit a higher quality performance. The fight must be fair but the fight must be hard. The solicitor-advocate is highly unlikely to brief the barrister to whom he or she was opposed merely because the barrister was unfailingly polite or he or she assisted the solicitor-advocate plug holes in the solicitor-advocate's case.
33. Pursuing higher academic qualifications is another way to secure a measure of supremacy on the opposition.
34. Writing learned journal pieces or giving peer-reviewed lectures or discussions also assists in maintaining the barrister's profile.
35. The days of the long lunch to form friendships among the briefing solicitors are over. Pure skill and talent must prevail.