From the President

Those who are elected to high office are usually permitted 100 days when they can do no wrong: everything runs smoothly and without angst. I wish I could say that had been my experience. Regrettably, it has been a period of considerable turmoil caused by the continued pressure upon the legal profession to restructure.

When I was elected President, the *Legal Profession Reform Act* 1993 had just been passed. So far so good. Then the hard work commenced with the review of our rules as required by the Act. This revision is now advanced to the point that I am satisfied the New South Wales Bar Rules will not only be found to meet the provisions of the *Trade Practices Act*, but will also satisfy any test of public interest or competition which the Advisory Council may apply under the Reform Act. That result could not have been achieved without the hard work and sacrifices made by Bret Walker SC who, practically single-handedly, undertook the task of rewriting our rules.

Since January, however, three other related issues have also required our attention. The first was the publication of the final report of the Trade Practices Commission (TPC). Generally consistent with the discussion paper which was published last year, the report expressed concern at the Bar's sole practitioner rule and what is referred to as "the solicitor's rule", that is, the rule that requires barristers to accept briefs only on referral from solicitors with certain well-defined exceptions. Reading between the lines, however, it seems that the TPC accepts that even if the Bar maintains these two rules this would not involve any breach either by individual members, the Bar Council and/or Association of the provisions of the *Trade Practices Act*.

The second new issue is the agreement of COAG at the Hobart conference in February last to set up a Working Group on Micro-economic Reform to report by the August 1994 meeting of COAG.* The group is required to produce detailed proposals for the further reform of the legal profession. It is anticipated that these proposals would go beyond the powers of the TPC and notwithstanding that such reforms could not be a consequence of any rules and/or conduct which could be attacked under the provisions of the *Trade Practices Act*. It is rumoured that some members of this group wish to transfer the control and regulation of the profession from the States to the Commonwealth. It would appear that the Minister for Justice, Mr Duncan Kerr MP and the Assistant Treasurer, Mr George Gear MP may support this approach.

The third new issue arose from papers delivered by the President of the Law Society, Mr David Fairlie, and the Chief Executive Officer, Mr Frank Riley, at a symposium entitled "Australian Lawyers, National Practice and Competition Conference", on 11 March last. They appeared to support a legal profession controlled and regulated from Canberra. Fortunately, the idea was not taken up by the other Law Societies and Bar Associations across the country. The constituent bodies of the Law Council of Australia, including our own Council, unanimously passed the following resolutions at the Council meeting on 26 March:

"1. That the LCA should support the proposition that the profession should operate in a national market for legal services in the sense that uniform or harmonious rules regarding its conduct and practice should exist in all States and Territories, so that a practitioner in one State or Territory may practise in another State or Territory under rules which are substantially common.

2. That the LCA support the following concepts:

(i) a right to practise as a lawyer conferred by the laws of a State or Territory (State) should be recognised as conferring a corresponding right to practise in all States, without any requirement for admission by the Courts of those States, or other formality, including the issue of a separate practising certificate except for a requirement to register in such States the lawyer's practising certificate upon payment of a fee, if required;

(ii) a lawyer who exercises the right referred to in (i) should, in relation to its interstate exercise, be subject to the disciplinary control of the State in which the right is exercised;

(iii) full faith and credit should be given by all States to any determination by the home State, or of any State referred to in (ii) as to the lawyer's entitlement to practise.

3. That the LCA is opposed to the concept:

(i) that regulation of the legal profession should pass from the States to the Commonwealth, or some Commonwealth instrumentality;

(ii) of the creation of a federal bureaucracy to 'regulate' the legal profession."

Following the above, the Law Council established working parties to clarify common conduct and ethical rules relating to lawyers, including rules relating to categories of work (such as advocacy), disciplinary processes and a number of other areas. The New South Wales Bar hopes to play an important role in a number of these. We are already liaising with our sister Bars in the other States and Territories seeking agreement that the proposed new Barristers' Rules for New South Wales should become the standard rules for all Bars in Australia. This alone would make a substantial contribution to achieving what the Federal Attorney-General, Mr Michael Lavarch MP, has defined as a national profession, namely, one which is State-regulated but in respect of which there is general commonality of rules of conduct, structure and regulation. The NSW Bar Council, as well as the Law Council, supports the Attorney's approach.

The Law Council took another significant decision at its meeting on 26 March. Some constituent bodies sought to increase individual membership of the Council. The Law Council's funding is limited and inadequate for its important work and a recruitment drive for individual membership of the Council from the members of the constituent bodies could be supported as a fund-raising exercise for the Law Council. Another view, however, held that such a drive for individual membership could be a precursor to changing the constitution of the Law Council so the votes of individual members would ultimately replace voting by constituent body, a development which would not be in the interests of the Bars, whose membership is far outnumbered by the Law Societies, especially the main eastern seaboard Law Societies.

With the support of the Law Institute of Victoria, the New South Wales Bar moved for the abolition of individual membership in the context of the following motion which was adopted unanimously:

> "That the Law Council resolve in principle to authorise the implementation from 1 July 1995 of membership of LCA Sections under which individual membership of the LCA would be abolished but all members of constituent bodies will, so long as they remain such members, be eligible to join LCA Sections upon payment of appropriate fees."

The New South Wales Bar supports the purpose of this resolution which is to encourage members of the constituent bodies to join LCA Sections. By doing so they will enable more people to participate in the valuable work of the Sections. They will make the Sections more financially self-sufficient and, since part of the fee will pass to the Law Council, could assist its financial position and avoid increasing capitation fees.

Another matter of recent concern to me and to the Bar Council has been the draft protocol of the New South Wales Attorney-General on judicial appointments. The New South Wales Bar contributed to the Law Council's submission to the discussion paper released by the Federal Attorney-General's Department on this matter, as well as to the original New South Wales draft protocol. On 10 March the New South Wales Attorney issued a new draft protocol which eliminated many of the aspects of the original to which the Bar had objected. However, the current draft maintains the concept of calling for "expressions of interest" about which both the Chief Justice and I have provided further submissions to the Attorney opposing the idea. The problem with calling for expressions of interest and keeping a list of those who respond is first, it is unlikely to remain confidential and secondly, the mere existence of such a list will raise expectations which will be disappointed when persons are appointed who are not on it. As the Chief Justice has pointed out, and I agree, the existence of the list will "result in practical pressure to make appointments from the list of applicants and it will also lay the ground for public challenges to appointments".

I should, however, emphasise that I believe members of the Bar who aspire to judicial office should be encouraged to inform the President of the day. I would certainly find it helpful to learn, either formally or informally, who would accept appointment to the Bench. Such information would, of course, be kept entirely confidential but I would be assisted by the information when making a recommendation of suitable appointees to the Attorney-General.

We thus still live in interesting times and the controversy on structural reform is regrettably not yet behind us. However, I am confident that whatever the further reforms may be, they will, if properly thought through and understood, not unduly affect the Bar: To the contrary, I consider the independent Bar will continue and thrive, stronger and more united than ever. ❑

M H Tobias QC

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* Council of Australian Governments - ed.