The Court of Appeal needs your assistance

LATE LAST YEAR there were two occasions when the Court of Appeal felt it necessary to take extra firm steps to remind members of the profession about their duties to the court concerning compliance with Rules and the diligent preparation and presentation of appeals. Although not common, these were not the only occasions when similar problems arose.

In *Whyte* v *Brosch* (1998) 44 NSWLR, Part 3 p vi a Bench of five was specially convened to address non-compliance with Pt 51 r47 (which requires written submissions and chronologies to be filed not later than 9 (appellant) and 4 (respondent) days before the hearing date). Non-compliance led to the barrister and solicitor involved being required to show cause why disciplinary steps should not be taken against them. An apology was accepted. However, the judgment of the Chief Justice outlines the remedies available to the Court in similar cases.

On another occasion no order as to costs was made in an appeal where the preparation and presentation of submissions by (senior) counsel on each side fell short of the standard expected by the court (*Lawrence* v *Carroll*, unreported 18 December 1998).

Mastery of a brief and the capacity to inform the court as to the applicable law are the central parts of the 'first and paramount ethical rule' described by Sir Owen Dixon in *Jesting Pilate*, p131. Along with compliance with rules such as Rule 47, these obligations are designed to ensure that the court may function effectively.

Judges are not ignorant of the pressures upon counsel. Sometimes pressing events in practice or private life cause defaults. Sometimes there are unexpected problems with fees or instructions. If these or other difficulties arise, common courtesy requires the court to be informed forthwith, and not just tender an apology at the hearing if the matter is raised by the court.

However, problems are sometimes caused by a careless attitude, the acceptance of a brief too many, or a perception that modern judges are a little soft. It is timely for the profession to be reminded that this is conduct up with which...

The Honorable Justice Keith Mason,
President of the Court of Appeal

Withdraw the Bar's cooperation

MOST BARRISTERS ARE familiar with being briefed in a difficult matter. After absorbing the written material conferences are held, advice given and preparation undertaken.

After perhaps years the matter is ready for trial and is listed before a judge for the purpose of having a hearing date allocated. All too often hearing dates within the range suggested by the court are not available to counsel retained in the matter. When informed of that matter the judge will inevitably respond with the likes of 'the court doesn't list matters to suit counsel's convenience'.

The fact that counsel may have been in the matter for years, finally understood the legal and factual complexities of the matter, established a rapport with his or her client and gained the confidence of both the attorney and the litigant means nothing.

Listing a matter during a period in which counsel is available is not primarily for counsel's convenience, but to enable a litigant to be represented by counsel of their choice.

All the more galling is the fact that one may have waited years for the callover whilst an inefficient court system grinds through a backlog of matters.

In the circumstances the court treats counsel and their request for consideration and consideration of the client's position as being irrelevant.

The Bar is providing enormous assistance to and support of the State's inadequate judicial system. For that support it receives little recognition and no reciprocation.

If the Bar did not provide Arbitrators, Acting Justices/Judges, earlier neutral evaluators and the like the inadequate manning of the court would be exposed and the disposal rate of cases would plummet alarmingly. The fault for such a decline would be exposed to lie where it should, namely at the feet of a parsimonious government.

I propose that unless and until adequate, sympathetic and professional consideration is accorded to the availability of counsel in the listing of matters before the court that the Bar withdraw its support and assistance in supplying band aid solutions in lieu of permanent judges.

D A Wheelahan QC