No mere mouthpiece: Servants of all yet of none

It has been more than three decades since the publication of Dr Bennett's *A History of the New South Wales Bar* in 1969. In the intervening years, there have been profound changes to litigation and the administration of justice generally, and to the Bar in particular. In many ways they reflect the radical economic changes that have done so much to reshape most other aspects of modern Australia.

In 2002 the New South Wales Bar Association celebrates the centenary of its foundation as a voluntary association with public interest functions – a suitable milestone for the publication of a new collection of essays examining 'the state of the Bar' at the beginning of a new century.

To mark this important and historic occasion the Association, in cooperation with Butterworths, will be publishing a collection of essays entitled, *No mere mouthpiece: Servants of all, yet of none*. The title is an adaptation of the Bar Association's logo used by one of the essayists, the Hon Chief Justice AM Gleeson AC, to convey a central concept of the Bar: that 'a barrister is not a mere mouthpiece for his or her client'.

The essays, edited by Geoff Lindsay SC and Carol Webster, examine such topics as the relations between Bench and Bar, public barristers, alternative dispute and law reporting. Included among the essayists are the Hon Chief Justice Murray Gleeson AC, Laurie Glanfield AM, Michael Sexton SC, the Hon Justice Keith Mason and Dr J M Bennett. Not surprisingly, contributors such as these add a flavour of primary authority to the publication and provide information not otherwise conveniently available.

The essays are also entertaining – perhaps exemplified by 'The role of the equity Bar in the judicature era', by the Hon Justice J D Heydon. *Bar News* has obtained permission to reproduce some excerpts, written in His Honour's typically piercing style.

The role of the equity Bar in the judicature era

... The problems which Lord Selborne LC and Lord Cairns LC, and their Australian political equivalents, had long laboured to cure by fusing the administration of law and equity were real. However, they were radically different from, and much less harmful than, those which were to face judges applying equity in the Supreme Court of New South Wales, and later the Federal Court, in the post fusion period. These problems flowed from contemporary business, professional and legal developments.

An enormous proliferation took place in the quantity of documents which citizens, particularly corporate citizens, used to conduct their affairs. This flowed from the widespread use of the photocopier, the ubiquity of composition by dictating to tape recorders rather than by handwriting, the development of speedy electronic methods of communication, the use of computers for many purposes, and the capacity to compose documents by retrieving their elements from computer records.

Simultaneously there took place the rise of very large firms of solicitors, largely by taking over small firms containing one or two solicitors with special expertise in either the attraction or the servicing of clients. These large firms eschewed the shabby, uncomfortable but cheap and durable offices characteristic of the late Victorian city which

The Hon Justice JD Heydon

to some extent survived the destruction of the 1960s. They sought more lavish pomps and trappings. They wanted the gauds with which sumptuous commercial wealth began to surround itself. They moved to high rise suites which were Babylonian in their splendour. They thought it necessary to acquire increasingly sophisticated business machines permitting speedy documentary reproduction, speedy communication with other branches or agents, and speedy retrieval. Large staffs of salaried lawyers and non-lawyers were seen as essential. The character of relations between the firms and those who consulted them changed. Less and less was the relationship one between professionals and clients in which the overriding goal was the collaborative performance of a task in a skilful and ethical way. More and more it was relationship between businesses and customers in which the overriding goal on both sides was the making of profits. The consequential rent and wage bills of the large firms, the avarice of their partners and the leveraging of the income earning capacity of their employees all made the generation of hitherto unheard of fees an economic imperative. Legal costs, and in particular those legal costs which could be charged in the preparation of litigation, grew in an unexampled way. For the large firms, as for Dorothy Parker, the sweetest phrase in the English language was 'cheque enclosed'. This had two consequences for the conduct of equity litigation.

The first was that, damagingly for both the Bar and the clients, the large firms tried very hard to 'internalise' the profits to be made. Ill-tempered and pointless paper wars about mutual deficiencies in discovery were commonplace. The size of general discovery in modern conditions rendered the process burdensome for the client and lucrative for the solicitor. Every document inspected tended to be photocopied, without any process of discrimination, many times. The same applied to pleadings, affidavits,

witness statements and analyses of particulars. The prodigious quantity of photocopying that resulted was often carried out by companies owned by the wives of partners. The charges were way above cost, and significantly above what independent firms would charge. It is not clear whether it was felt that the resulting conflict of interest was something of which clients needed to be informed, and it is not clear how far the wives learned of the amounts and sources of the profits made in their name. Encyclopaedic volumes of interrogatories were compiled, and extreme ingenuity was dedicated to the process of objecting to them. As McHugh J said one day, observing a seedy, shabby and depressed person of middle years shuffling along Phillip Street: 'He once had a golden practice as an equity junior, but he made a fatal mistake: he answered some interrogatories'. Constant *agitprop* from solicitors and academic lawyers attacking the non-existent monopoly of advocacy by the Bar, abetted by attorneys-general, law reform commissions, the Trade Practices Commission, the Australian Competition and Consumer Commission and the like, accustomed clients to the view that litigation was run best when counsel were briefed as late as possible. The result was that the key tactical decisions in litigation tended to be made without the restraining influence of counsel.

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The second consequence which the large firms had on the conduct of equity litigation was that the intense servicing, or over-servicing, characteristic of pre-trial activity carried over into the trial itself. The volume and complexity of the court's task increased greatly. The activities of the large firms in this process were accentuated by general changes in legal culture and in the external legal order.

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As a result of the changes in commercial habits, the structure of solicitors' firms, the substantive law affecting contracts, and the laws of evidence and procedure described above, documentary tenders in litigation came often to assume ludicrous proportions: vast quantities of material in the form of agreed or non-agreed bundles were tendered, often apparently unread by those who had compiled them, and only sparingly brought to the attention of the court. Witness statements became correspondingly bulky. Written submissions became much more common, and much longer than the corresponding oral submissions would have been. The capacity of a single judicial mind to absorb all this was threatened.

Two other background changes took place in this period.

The first was that many more judges were appointed, and from more diverse backgrounds. In 1972 there were three judges administering equity in New South Wales: Street CJ in Eq, Hope J and Helsham J. The first two had enormous practices in equity at the Bar; though that was less true of the third, he had acquired a unique reputation, not won without many sacrifices, for being the favoured child of victory in any tussle before Myers J. Now there are ten judges sitting in the Equity Division. To these must be added the Federal Court judges sitting in Sydney, who administer a substantial equity jurisdiction. The predictability with which legal principle is applied, whether it rests on the application of rules or the administration of discretions, is in inverse proportion to the numbers of judicial officers applying it. That predictability is further diminished in proportion to the diversity of judicial backgrounds. A generation after fusion, a significant number of judges lacked intense practical experience at the Bar in equity; several had spent most of their working lives as solicitors or academic lawyers or both.

The second background change was that judicial style imperceptibly but unmistakably altered. A century ago, fifty years ago, even thirty years ago, the typical judgment was short, nude of all but essential reference to authority, and delivered *ex tempore* after hearing oral argument – or, as Bryce said of Sir George Jessel, at the conclusion 'of so much of the arguments as he allowed counsel to deliver'.[1] But the law has become more complex and uncertain. The materials to be considered in arriving at factual conclusions have usually increased to a substantial extent. Many more cases are reported, in specialised series of reports and otherwise. Many judges, in deciding each new case, tend to examine all earlier cases on the point. Even before computers permitted the easy retrieval of unreported cases, their citation in argument and in reasons for judgment was common. Now that computers permit easy retrieval, and now that services based on the accessing of unreported decisions contribute a significant part of law publishers' incomes, heavy citation of unreported cases is routine, and not from New South Wales alone. Like solicitors, advocates and jurists, some modern courts appear to live in fear of failure through leaving something out. Lacking the time to write short judgments, they write long ones. It seems harder to concentrate on the decisive and the crucial than it is to include the marginal. Throughout the period under consideration, the trend towards incoherence was accentuated by the increasing irrelevance of English decisions. Quite apart from their loss of binding status and thus their loss of any claim to consideration beyond the inherent merit of their reasoning, to an increasing extent their reasoning, however meritorious, came to be irrelevant because they came to be dominated by the need of English courts to conform to the laws of the European Union or to laws derived from those laws, like the *Human Rights Act 1998*. The bulk of the evidence and the move towards lengthy written submissions have

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increased the extent to which judgments are reserved, and hence the extent of overall delay in litigation.

In the year when law and equity as separately administered jurisdictions were fused, the leading counsel who practised wholly or significantly at the equity Bar were N H Bowen (for some years absent on ministerial duties), A B Kerrigan, D A Staff, M H Byers (shortly to depart for federal responsibilities in place of R J Ellicott), D L Mahoney, Forbes Officer, W P Deane, F C Hutley, G D Needham, R J Bainton and P E Powell. They were about to be rejoined by T E F Hughes, who had ceased to be attorney-general at the fall of the Gorton government. Among the juniors who were, or were to be, prominent in the conduct of litigation was W J Sheppard, in his 57th year of call, a local equivalent to the legendary Wilfrid Hunt in England. Others included J B Kearney, A J Rogers, T Simos, L J Priestley, K R Handley, R P Meagher, D H Hodgson, A M Gleeson, P W Young, M H McClelland, J M N Rolfe, J P Bryson, M G Gaudron and P G Hely. There were very able solicitors in practice then who were soon to come to the equity Bar with considerable success, such as A R Emmett.

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In this enterprise Bench and Bar were assisted by one particular event. That it occurred anywhere was remarkable. Perhaps the conditions for its development were unique to New South Wales. Certainly nothing like it has occurred anywhere else in modern times. 1975 saw the first publication of R P Meagher, W M C Gummow and J R F Lehane's *Equity: Doctrines and remedies*. When preparation of that work began, the first-named author was in his late 30s, though perpetually ageless at heart; the other two were in their late 20s - to adopt Coke's words in another context, 'in their youth, (which is their seed time)': *Ipswich Tailors'* case (1614) 11 Co Rep 53a at 53b; 77 ER 1218 at 1219. By 1975 the first had been at the equity Bar for fifteen years and was to be there another fifteen. The second, a commercial solicitor with deep and intense experience of important work, was to go to the Bar the following year for a decade. The third was an extremely distinguished solicitor for most of his professional life until his lamentably short career on the Federal Court amply showed, even if it had not been made plain many times earlier, a power of clear analysis approaching genius. Each had been teaching at the University of Sydney Law School – 'part time' according to the descriptions of their posts, but in some years approaching full time by conventional academic standards. Each taught equity, but they had taught and were to teach other subjects as well over most of the next three decades.

Equity: Doctrines and remedies had crucial importance in two respects. First, it arrested the decay of equity in university law schools. These grew rapidly in number and in population from the late 1960s on throughout the country. In the law schools there was massive pressure to reduce or keep compulsory courses to a minimum in order to accommodate a greater number of optional courses conforming to contemporary *quarante-huitard* tastes. Equity was a prime candidate for jettison or dismemberment. In places where equity was compulsory, *Equity: Doctrines and remedies* caused it to remain compulsory; in places where it was optional, its status did not decline further. To some extent the subject was restored as a field of wide interest among academic lawyers, this being assisted by the writings of P D Finn, particularly *Fiduciary obligations* (1977).

The second great achievement of the work was to reduce the damage which the trends of the age threatened to cause to equitable doctrine in the courts. The courts at the start of the 1970s, and for a little while thereafter, were tempted to follow English decisions by Lord Denning MR and Lord Diplock of a doctrinally loose kind: to these succeeded even laxer allurements from Canada and New Zealand. There were similar Indigenous tendencies. Parliamentary legislators can be voted from office, but it is less easy to stop or control judicial legislation if judicial legislators are sufficiently determined. *Equity: Doctrines and remedies* did as much as any book could do to guide judicial legislators towards legitimacy in the process of judicial legislation. Not the least of its achievements in the age of fusion was its explanation of the true character of 'fusion' and its exposure of fallacies on that subject.

By 1975 most of the leading English works had become mannered if not genteel to the point of being moribund. There were no useful non-English equivalents in the field. The book burst into this torpid atmosphere like a southerly buster on a humid February day – it was refreshing and caused a noisy banging of loose objects. In places it displayed a sparkling wit. In places it showed a brutal irreverence characteristic of the New South Wales Bar. In places it employed a style similar to that of Disraeli's philippics in 1846 reviling Peel for his betrayal of the gentlemen of England. In places it attained a gloomy effect of sombre magnificence. It was infused with a Tacitean contempt for the unsatisfactory tendencies of the time. It employed a variety of 18th century methods of argument. In cases where pure reason might fail, ridicule was employed. If a pistol misfired, the enemy was knocked down with the butt end. It tossed and gored numerous persons, many being both alive and of high rank. But its success was not based simply on style, or on its total lack of respect for reputations. It was not just something sensational to read on the train. It was the product of massive scholarly labour. It offered a precise analysis of older authorities. It ventured into fields not commonly, and in some instances not at all, analysed in modern works. It located common elements underlying superficially disparate doctrines.

No Australian legal work has ever been more influential in England. It is beyond question that no greater legal work has been written by Australians. It is probable that no greater legal work has been written in the British Commonwealth, with the possible exception of works of jurisprudence and legal history, since the death of Maitland. It has extremely strong claims to be placed on, and indeed at the top of, a short list of the greatest legal works written in the English language in the 20th century. It has the merits of the early editions of the great American treatises – Wigmore, Scott, Williston and Corbin – without their incipient ponderousness. But individual talent can only flourish within a tradition, and the talents of the authors were nourished in large measure by the intellectual tradition of the New South Wales Bar in which they had been brought up...

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1 *Studies in Contemporary Biography* (London, Macmillan & Co Ltd, 1903) p. 180