Competition for business

Competition between courts was characteristic of early English legal history. It continued right up until the *Judicature Act* of 1873. The common injunction, associated with the *Earl of Oxford's case (1615), saw the* courts of Chancery restraining parties from pursuing and or enforcing legal remedies granted by the king's courts. This was the forerunner of the modern anti-suit injunction which is now a well-established remedy in transnational suits. In recent times, there has been something of a resurgence in competition between courts both within Australia *and between courts internationally. Plus ça change, plus c'est la même chose.*

Within Australia, the Federal Court's Victorian Registry much-heralded 'rocket docket' may reasonably be seen as a 'play' to attract commercial litigation to Victoria and away from New South Wales. The New South Wales Registry of the Federal Court's streamlining of procedures in admiralty cases may similarly be viewed as an attempt to make that court (and that particular registry) a desirable place for filing of such suits in preference to the Admiralty Division of the Supreme Court of New South Wales with which the Federal Court shares admiralty jurisdiction. So also, Victoria's current proposals to facilitate class actions complete with US style procedures, following upon recommendations to the Victorian Government by none other than Peter Cashman, are arguably calculated to make that jurisdiction the preferred Australian venue for the commencement of class actions, a phenomenon which will only be fuelled by the recent general endorsement by the High Court of litigation funding: see *Fostif v Campbell's Cash and Carry.*

At an international level, the Law Society of England and Wales, with the evident encouragement of the English judiciary, has recently issued a glossy booklet apparently distributed to in-house counsel of all Fortune 500 companies singing the praises of litigation in the English courts or private dispute resolution by arbitration in London, under the supervision of the High Court of Justice. In the context of the promotion of the English courts, one recalls Lord Denning's famous response to charges of forum shopping. 'You may call this forum shopping, if you please, but if the forum is England, it is a good place to shop both for the quality of its goods and the speed of its service': *The Atlantic Star* [1973] 2 Lloyd's Rep.394.

With the world's economy becoming ever more global, competition between national courts, and between judicial determination and private arbitration, is likely to increase. One implication at least for commercial barristers is that there is likely to be more scope but also great competition for international practice in the years ahead. When Jonathon Sumption QC addressed the New South Wales Bar in 2006, he noted that the clerk of his set of chambers in London made two trips each year to Hong Kong and Singapore to promote the merits of the barristers in those chambers. Presumably, other London chambers do the same thing. English chambers have also led the way with the development of informative websites and associated marketing material. One of the challenges for the Australian Bar is to seek to ensure that Australian barristers are at least 'in the race' for international work. There is an important issue as to whether or not this can be achieved at an institutional level or whether it requires initiatives to be taken by individual chambers or even by individual barristers (as some have already done, through admission in the United Kingdom, Hong Kong and New Zealand, for example). This is a matter deserving of the attention of the recently elected Bar Council.

Judicial appointments

On 22 October 2007, the New South Wales Attorney General's Department issued an advertisement headed 'Positions Vacant: New South Wales District Court'. The advertisement stated that inquiries could be made to:

> The Hon Justice R O Blanch AM, chief judge, District Court of NSW, (02) 9377 5821, or Mr Laurie Glanfield, director general, Attorney General's Department of NSW, (02) 9228 7313.
>
> Expressions of interest, accompanied by a detailed curriculum vitae and the names of at least two referees, should be e-mailed to appointments@agd.nsw.gov.au by 9 November 2007. Expressions of interest may also be posted to the statutory appointments officer, Attorney General's Department of NSW, GPO Box 6, Sydney NSW 2001.

This may well be the first time a judicial appointment has been advertised in New South Wales. It has provoked debate amongst the profession and is certainly a harbinger of things to come. There is no reason to suppose that similar advertisements will not be placed for vacancies in the Supreme Court or for the positions of president of the Court of Appeal (to be filled early next year) and chief justice. Advertising judicial positions may encourage highly competent practitioners who may not otherwise have been identified (for whatever reason) as potentially interested in judicial office to indicate his or her interest. This must be a good thing. Further, it may be thought to add a level of transparency to the process. But that is where transparency ends. The recent advertisement only serves to highlight the general mystery surrounding judicial appointments, including at federal level. Questions which arise from the recent advertisement include: 'How are the "applications" to be processed?'; 'By whom?'; 'According to what criteria?'; 'Do such applications, having been called for, generate correlative administrative law rights of review for unsuccessful applicants?'; and 'What of potential candidates who do not wish to make formal application?'. Readers are invited

The recent advertisement only serves to highlight the general mystery surrounding judicial appointments, including at federal level.

to contribute their views on what is a most important topic in the next issue of *Bar News*.

This issue

At an early stage of the recent federal election campaign, the shadow foreign minister, Mr Robert McLelland, was upbraided for remarks he made about the death penalty. That brief political storm gave rise to an excellent interview on the ABC's *Lateline* of Lex Lasry QC (subsequently appointed to the Supreme Court of Victoria). Lasry QC had been the principal legal representative for Van Nguyen who was executed in Singapore in 2006, and has also had a high profile involvement in various Indonesian death penalty cases. With the ABC's permission, Tony Jones' interview of Justice Lasry is reproduced in this issue. Accompanying the Lasry interview is an article by Dr Michael Fullilove of the Lowy Institute entitled 'Capital Punishment and Australian Foreign Policy' which contains an excellent and highly informative analysis of the topic.

Another barrister who, like Lex Lasry, stood up firmly and courageously for the rights of his client in the face of considerable pressure from the Australian Government is Stephen Keim SC of the Queensland Bar. Keim SC spoke to Richard Beasley about his experience in the *Haneef* case and his long-term commitment to civil liberties.

Also featured in this issue is the first of what it is hoped will be a series of articles by David Ash focussing on the careers of High Court judges emanating from the New South Wales Bar. Naturally, Edmund Barton is the first and quite possibly the most interesting cab off the rank. There is much more, besides, in this bumper Christmas edition! Many thanks to Chris Winslow of the Bar Association and the extremely energetic and dedicated 2007 committee of *Bar News* for their assistance in this past year. Good reading and merry Christmas.

Andrew Bell SC