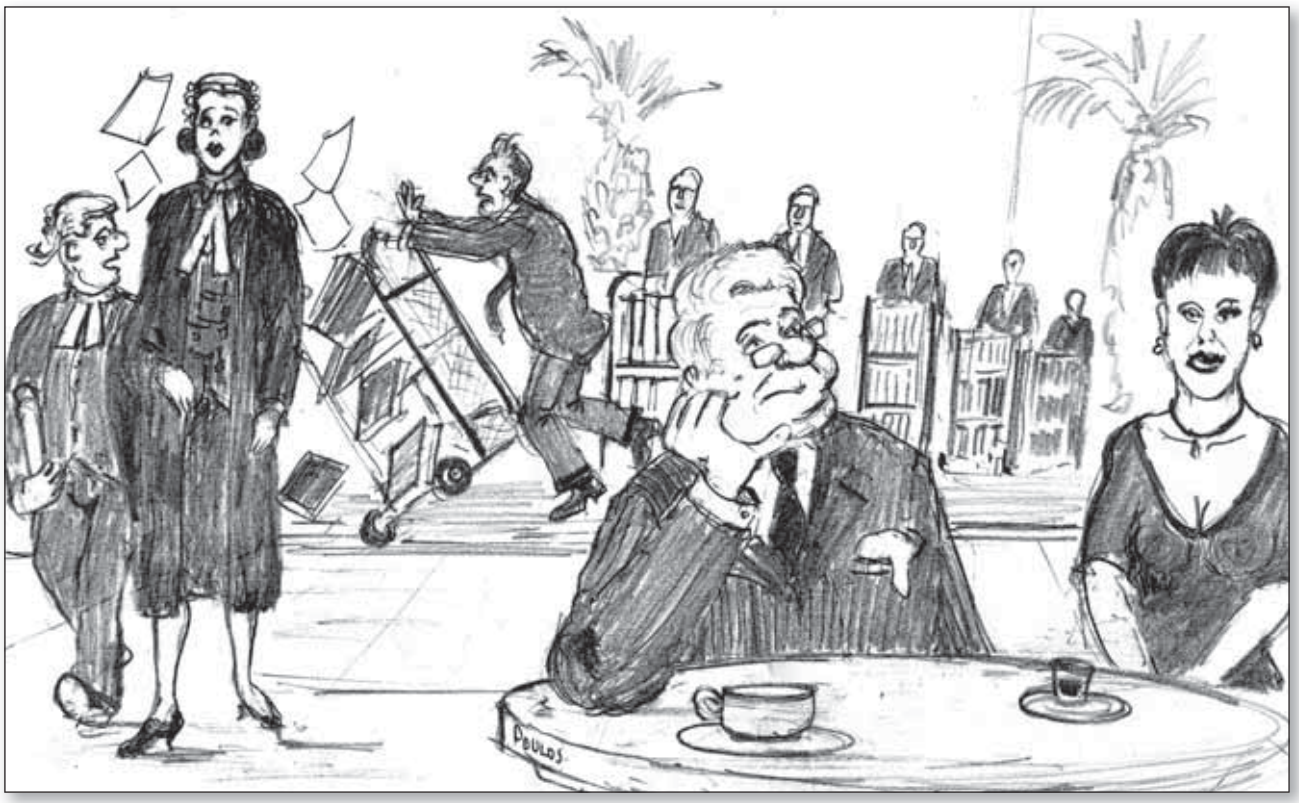
Bullfry and the cold latte

By Lee Aitken



'Was it time for him to make a full disclosure and seek the safety of the Consolidated Fund?'

The dust-laden mistral blowing down the street was cooling the latte nicely. Bullfry winced as a trolley-man lost control, sending thousands of dollars worth of useless photocopying headlong into the gutter. He remembered with pride his own skill as a junior with the trollies. (He had acquired the expertise at the fruit markets in his youth, moving palettes of bananas and pineapples – there were many similarities between the personalities at the markets and at the Sydney Bar).

In his prime he had been a two-trolley man, forcing his way over protest into the crowded lift with five minutes to go before the hearing – his famous war cry – 'Ramming speed!' – (loosely adapted from 'Ben Hur') – always cleared him a pathway. Sometimes he had gone 'over the top' via the café interchange floor to the horror of the visiting tourists; sometimes he had changed in the lift as well. Then, late in the day after a few 'refreshers', he was wont to return to the 'dead trolley' room on the ground floor of the Supreme Court which, like the elephants' graveyard, was where the cleaning staff took all those trolleys whose users had abandoned, or fled from them. He loved the democracy of the trolley. Nothing showed true character more than the way in which a driver put up with losing its entire contents down the front steps of Selborne (Bullfry had always scorned the ramp). The fact that most of a trolley's contents was irrelevant to any forensic purpose was one of the mysteries of the age – far better to introduce a 100 page rule under which a party had to tender and rely only on the vital one hundred pages.

Betimes Bullfry had come across former ace students now reduced to the manual labour of the trolleys. As he always told his classes, there were three ages of Man. First, the student – usually circumspectly respectful of Bullfry. Secondly, the same student now elevated as the associate to the judge – Bullfry now more circumspect himself while the ex-student, adopting the graces and powers (such as they were) of his judicial master, smiled benevolently while Bullfry fought a hopeless case. And then the third stage – the ex-student, ex-associate, ex-D Phil (Oxon), now trainee solicitor – pushing a trolley in the pouring rain up Phillip Street for Deacons! (Bullfry had noted with distaste the recent degenderising of trolleys so that a soubrette of 17 from a progressive floor might be found in a hernia-inducing struggle as she tried to push a trolley into court. Bullfry was no Galahad but he always had to take charge himself in such a situation – a full trolley was no task for a young or old lady – it was a task to be entrusted only to a fit and sober junior, or for choice, the two or three braw lads who were to be found on every traditional floor to carry out a range of vital banausic tasks.)

He turned back to his coffee and reread the advertisement very slowly. Was it time for him to make a full disclosure, and seek the safety of the Consolidated Fund? Unfortunately, of course, any application from him would be out of temper with the times. Editorialists from all sides called constantly for greater 'diversity' – usually, this was code for the appointment of more women, notwithstanding that very few women counsel indeed were long in silk.

There was no revolving mass of female senior counsel, all in their late fifties, all of whom bore the ravages of endless and unsuccessful forensic battles – to the contrary, a female silk was assured of an offer (which was almost a command) from the attorney to take a judicial appointment as soon as she decently would. That was why all talk by the editorialists and academics of the need for 'diversity' and 'merit' was nonsense.

It did not matter that half the law graduates were women, and they were better students than the men. The key question was: how many of the top-level female graduates would put up with twenty to thirty years of sleepless nights, lost weekends, barrister's impotence, wig-induced baldness, just for the chance to be a judge? How many female barristers were to be found leading a six trolley team deep into Indian territory before a full court in Melbourne? Nary a one. A successful male applicant would come from a pool of maybe twenty fifty-seven year old former thrusters; a female appointee would be one of the three new female silks appointed in any given year. Those figures said it all.

And Bullfry knew well the very large personal sacrifices in terms of hearth and home that any female jurist had made. The reason there were so few senior female silk was not a question of competence but of a lack of desire to satisfy a system which demanded that every waking moment be spent on avals, or manslaughter, or drains. What woman of fifty with a grown family would want to waste her time on those inquiries – women's egos were far stronger than those of men – they did not depend on the supposititious glamour of wandering toothless and balding up Phillip Street in an ill-fitting grey suit with a gaggle of juniors in tow – much nicer to have a cup of coffee at the Double Bay shops before attending a prize-giving. So, unless the goal posts were uprooted entirely there would always be far fewer women than men available for appointment.

The old Halsburyian system – 'Merit be damned, I'm appointing my nephew' – has always worked tolerably well. The sad need of modern society for accountability and accreditation on every side did not fit in well with the process of judicial appointment. Indeed, the very notion that some sort of quota arrangement should operate so that every part of society was 'represented' on the Bench would only make sense if you were then able to choose your judge. (Or did it perhaps imply that a judge from a different 'background' would administer a different sort of law? That was not how things were meant to work).

Now Bullfry, in his youth, was well-known for judge-shopping, within limits. It was, for example, common knowledge in a certain division, that if a particular judicial officer indicated his availability to take on extra cases to assist the duty judge, matters would begin to settle with alacrity. This always gave Bullfry his chance – he would leap headlong into the fray – ready to chance his arm with an obscure equity, or a revitalised affidavit while lesser spirits compromised claims promptly and headed for the comfort of chambers. But the notion that – to take an extreme example – Bullfry should be able to 'choose' as his judge someone who conformed to his own prejudices – say a reformed alcoholic, who enjoyed reading works published by the Selden Society, dozing, and watching the Waratahs – was so bizarre as to be instantly dismissed. (Of course critics of the current system would say that Bullfry stood a good chance of drawing a jurist of that type at present purely by luck).

The problem of appointment was insoluble – God forbid that it should come to require some formal application. That would inevitably mean failed applicants were entitled to review and to reasons – far better to leave it in the situation as it was years ago when Hayden Starke asked Leo Cussen why Sir Leo could not get on the High Court and proposed some solution: 'Mr Justice Cussen found on the whole proposal that there were all sorts of difficulties in it – but most of all that they had asked Starke and not Cussen'. That is the way it still should be. It cannot be said of many advocates that their appointment was 'not only inevitable but belated'. And looking with modern eyes, would the same thing be said now about an older, European male appointed to the High Court as it once was by Sir Harry Gibbs about Sir Keith Aickin – Bullfry thought probably not because of the modern temper of the times. And if a latter-day Piddington slipped through the net, the uproar in a lower house would soon remedy the situation and a chastened attorney would have learnt her lesson.

As usual, the call for a 'diversity' of interests simply disguised the desire of certain players to get onto the Consolidated Fund without undergoing the stresses and work required of others to get there. In England, as a distinguished editorialist had pointed out, there was now the offer of a judicial 'roadshow' so that the 'customers' of the courts could be sure of the validity of the selection process. This seemed to Bullfry a very dangerous path to follow. How would the new system differ from the old - in the end someone needed to make a choice – would it be any better if a failed contracts lecturer was also putatively in the running.

There were two prerequistes of appointment to judicial office – an absolute absence of moral hazard (on which ground Bullfry was manifestly out of the running) and an ability to synthesise the essence of a heap of statements in a simple sentence, as Dickens once said of Serjeant Stryver. While many aspirants satisfied the first condition, the second was more problematical. On an appellate court, the inability of any individual judge to put pen to paper consistently over sixty cogent paragraphs delayed the whole system and meant that any timetabling for judgment delivery was consigned to the scrapheap. No doubt for this unexpressed reason, the present policy seemed to be to allow the prospect of judicial promotion from the trial court to the appellate for those judges who demonstrated an aptitude for judgment writing.

For himself Bullfry would have loved nothing more than a permanent appointment as duty judge. Where was the balance of convenience? What was the equity? When was morning tea? Or perhaps without disrespect to the current office-holders he should aim a little lower – 'First access to the plaintiff!' – that about summed up the range of his unvaunting ambition.

He turned back to the advertisement – the latte was cold but he did not repine – it gave him yet another excuse to engage in innocent banter with the backpacker from Slovenia.