Bar Practice Course - Speech
Friday 20 July 2012, 6pm
"**The Bar – Changes, Constants and Challenges**"

The Hon R W Gotterson
Court of Appeal

First, can I congratulate you all on having successfully completed the Bar Practice Course. You now have the key to a wonderful profession; one that is unique in many ways. The opportunities for public service, intellectual challenge and professional satisfaction that the Bar offers those who join it, are unsurpassed.

I expect that tonight you have feelings of joy, perhaps exhilaration, even exhaustion. I say "expect", because they are feelings I never experienced. Well, not after completing a Bar Practice Course, anyway. I did not fail it; it is just that the Course did not exist when I came to the Bar.

The Bar today is very different in many ways from when I started. The inception of this Course brought about but one difference. When Justice Muir asked me to speak to you, I hesitated. At that point, I had been a Judge just a few weeks. I had a barrister's view only of Judges and judicial life. Just possibly, my barrister's view was quite different from reality – good enough reason I thought, to leave those topics well alone.

On the other hand, I had been a barrister for many years. So my first thoughts turned to the many changes in the profession that I had witnessed over my time at the Bar. My mind began to ponder whether,

despite all those changes, there are constants. If there are, what are they? What assurance do they give that the Bar will continue, that it will grow and that it will prosper? And what challenges do these changes and constants present?

I thought that this evening I might make some observations on the rather broad topic that these questions embrace. They are mine, and to a very considerable degree, they are influenced by my own experiences. Nevertheless, it seemed to me that the impressions of someone who has just left the Bar after many years there, might be of interest to you who are about to join it. Be relaxed, I am an optimist. I am not here to dampen your celebrations or dim the footlights on your professional debuts.

I did say that my comments are influenced by personal experience. Let me give you a brief sketch of my background. Some of you may have similar backgrounds, allowing for a generational gap, or two. After 4 years of a B Com./LLB course at the University of Queensland - the only law school in the state then – I began a two year articled clerkship at Feez Ruthning and Co. I was admitted as a solicitor in March 1973 and worked at the firm in the litigation department for several years. I was admitted as a barrister in December 1975. I took silk at the end of 1988. So I was a junior barrister for 13 years, and then a silk for just over 23 years.

A little earlier, I mentioned one of the changes at the Bar during that time, the introduction of the Bar Practice Course. I will speak about some others in a moment. But before I do, can I say this, as someone who has been both a solicitor and a barrister. You have no doubt heard the

description of the legal profession as a "divided profession". The division that the description implies is essentially the formal structural division of the legal profession into two branches: the profession of barrister, and the profession of solicitor. The legal profession in Queensland, and elsewhere in Australia, is divided in that sense: but it is, by no means, a "profession divided".

Significantly, there is no oppositional dimension to the relationship between the two branches, as the term "profession divided", like the term "family divided", could imply. The relationship between both branches is a cooperative and respectful one. Cooperative because each branch focuses upon different, but complementary, tasks necessary to deliver a complete professional service to the client; and respectful because each branch gives due recognition to the different skills displayed by the members of the other branch in performing their tasks. In my view, a necessary ingredient for the continuation of good and effective relationships within the legal profession is a mutual acknowledgement that tasks performed, and legal skills possessed, by the members of the one branch are just as necessary and just as worthy as those performed and possessed by the members of the other.

At the national level, perhaps the most significant structural change in the legal profession over the last 50 years has been the adoption, in all States and Territories, of the divided profession model. Historically, separate Bars had existed in the three eastern mainland states - and before that, colonies - from the earliest times. That was not the case in Western Australia, South Australia or Tasmania. In those jurisdictions, from early settlement, advocacy was performed by legal practitioners either in partnership or sole practice, but not upon referral from other practitioners.

These practitioners might have appeared in court frequently, or rarely. They would take on the whole range of legal work, including advocacy, directly from the public. An accurate description of those who specialised in advocacy was "solicitor advocates".

In Western Australia first, several solicitor advocates – then prominent senior partners in legal firms – set up as referral practitioners in advocacy, sowing the seeds for a separate Bar in that state. That was in the early 1960s. Others followed, and now there is a substantial Bar in Perth. Similar patterns followed in Adelaide, Darwin, and, in the last 20 years, in Tasmania. In those jurisdictions, the ranks of the solicitor advocates have continued to be something of a recruitment base for the separate Bars. That has had the consequence that mature-age entry to the Bar tends to be higher there than in the eastern states. But what is really significant is that this important development allows us to say that now, throughout Australia, there are firmly-established State and Territory-based independent referral Bars.

I have become careful to use the term "independent referral Bar". The word "referral" is important. It serves to explain that the work barristers do is primarily upon referral from the members of the solicitors' branch. Years ago, the term "independent Bar" was commonly used. It was a handy expression, but it failed to convey the "referral" connotation. I remember once asking a Canadian Judge if there was an "independent Bar" anywhere in Canada. The Judge looked astonished. Upon reflection, I realised that her understanding of an independent Bar was one that was free from political or bureaucratic command. So we were at cross purposes. As there is no independent referral Bar anywhere in Canada, the Judge did not recognise what I was talking about. The horror

that I might think that Ottawa is some place north on the Korean Peninsula, probably struck her. She was too polite to correct me; maybe she thought she would be wasting her time.

Turning to the Queensland Bar, let me sketch just a few of the changes that have happened over my time. When I joined, there were about 170 barristers in practice in this state. Almost all were in Brisbane; just a handful in Townsville and Rockhampton. In Brisbane, most were in the Inns of Court, not the modern 20-storey building you see now; but a 3-storey red brick building on the same site on North Quay. It had been built as a boot factory. Other sets of chambers had sprung up, sprinkled around the court vicinity. They were inhabited largely by newcomers to the Bar since the Inns – like the one at Bethlehem at Christmas – had become full. Now, of course, the number of barristers in full-time practice in Queensland is between 4 and 5 times 170. There are sizeable numbers in other cities too, notably Cairns and the Gold Coast.

Numbers aside, I have also seen very significant changes in the types of work done by the Bar. In my early years, I cut my teeth in court on what were called "crash and bash" cases; may be 2 or 3 a week in the Magistrates Court. They were over car crashes where the vehicles had different insurers, or one of them was uninsured. That work diminished as insurers entered into what were called "knock for knock" agreements, enabling them to settle claims between each other without involving lawyers. Another very active area of "on your feet" civil work for young barristers was damages cases for personal injuries suffered in accidents on the road or at work. However, the development of mediation and the enactment of personal injury litigation procedural reforms have seen a big drop in the number of those cases which run to trial.

Of course, as some doors closed, other new ones have opened. Litigation was stimulated by legislative enactment in other fields. The *Family Law Act* and the *Administrative Decisions (Judicial Review) Act* were passed, and the Administrative Appeals Tribunal was established, in my early years of practice. At that point, too, the *Trade Practices Act* was quite new on the scene. Whole legal topics, notably in the administrative law field, were simplified and made more accessible.

Happily, for many barristers, some trusted old doors remained well and truly open. Crime and estate work stand out. They have remained constants, reflecting perhaps, the grim inevitability of both criminal conduct and death.

In terms of admission to, and of regulation of the profession, there have been massive changes as well. As I said earlier, the course you have just completed did not exist when I joined the Bar. There was no equivalent. Beyond having a law degree, an aspirant for admission to the Bar had to be enrolled as a "Student at law" for a mere 15 months to be eligible for admission. There were no lectures. The student at law was required to attend and write-up reports for a dozen cases – several criminal and civil trials, and some applications and appeals. That was all. Mind you, pupilage did exist, once you had started at the Bar. I had the benefit of an excellent Master – now Justice Ian Gzell of the Equity Division of the Supreme Court of New South Wales. At the time, he practised in Brisbane. As his pupil, he gave me briefs to devil, introduced me to solicitors, and answered my many questions. For me, that was a very encouraging start to practice.

These days you require a Practising Certificate to practise as a barrister. You must renew it annually. When I commenced practice, Practising Certificates did not exist. Once you were admitted as a barrister, that was it, in terms of entitlement to practise. The advent of Practising Certificates conferred a statutory role on the Bar Association of Queensland. It is the issuer of them.

Another statutory role it now has relates to handling disciplinary matters which are referred to it by the Legal Services Commission. Since its inception, the Bar Association had been a voluntary body with no statutory powers or functions. Complaints could be made to it about the conduct of barristers who were members. As a member of the council of the Bar Association, I had the responsibility, for a number of years, of assessing complaints and making recommendations to the council about how they should be handled. But in the end, the gravest sanction that the Association itself could mete out was to expel the barrister from membership of the Association – a quite counterproductive outcome in terms of monitoring adherence to professional standards.

Of course, in an appropriate case, the Bar Association was able to move the Full Court to strike a barrister's name from the roll; but that was a cumbersome and expensive process. Nowadays, the Bar Association has a range of sanctions it can by law impose for transgressions that do not warrant a strike-off. For example, where professional counselling by a senior barrister is appropriate, that can be directed. Importantly, these types of sanctions keep the transgressor within the fold.

Speaking of professional standards, I would single out the adoption of a Continuing Professional Development Program as a major achievement

of the Bar in my time. As you probably know, you must complete the Program's requirements annually in order to qualify for renewal of your Practising Certificate. In times past, with a much smaller Bar centred in 1 or 2 buildings, the sharing of knowledge and experience was easier. At the Queensland Bar an "open door" culture has always prevailed. Senior barristers readily and willingly fielded calls for guidance from the juniors and their peers. It did provide an environment for practical professional education of a kind. However, it had some of the shortcomings of an *ad hoc* arrangement. To my mind, the Bar's current program provides necessary elements of formality and structure. Fittingly, the "open door" culture remains very much alive and aligns comfortably with the Program.

All these changes I have mentioned have evolved within a framework of certain constants. One of them is the framework of duties to the Court, to the client, and to the profession that underpins the legal and ethical standards regulating professional conduct at the Bar. I expect that from this course and other studies, you have a good understanding of those duties and standards. For that reason, I do not intend to elaborate upon them this evening. Needless to say, in practice, you need to be ever mindful of them. But there is one other constant which, perhaps, is not as apparent and certainly, is less discussed. I wish to say something about it.

Lawyers have tended to resist analysis of the profession in economic terms. With a touch of resentment, some would sniffily say that we practise a noble profession of service; we are not mere marketers of professional services. It is true, of course, that the concurrent duties I mentioned do serve to differentiate the Bar but, to my mind, they do not make economic analysis of it out of place. On the contrary, a review of

the Bar from that perspective tends to highlight some of its strengths that might otherwise be underrated.

Like it or not, barristers do work in a marketplace. The market is a simple one: one in which barristers' services are supplied and acquired – sold and bought, if you will pardon the coarseness of commerce. It is a market that has existed in the same form for centuries. It has clear parallels with the "cottage industry" markets that have been known to mankind since the days of Babylon.

On the one side, there are many single-entity suppliers, the barristers; and on the other, many acquirers, traditionally at two levels. There are the intermediary acquirers, the briefing solicitors; and the consumer acquirers, their clients. Recent developments have seen some blurring of the traditional levels. For one – and I must say the jury's still out on how well it works generally – the Bar has been opened up to direct briefs from lay members of the public. For another, the combined operation of litigation funding and the relaxation of the laws against maintenance and champerty has expanded the range of entities who are financially interested in the outcome of litigation. But despite these developments, the simple market structure I described, fundamentally endures.

Why has it endured? I think that a major reason is that it is a low-cost model, at least low-cost in relative terms. I do not suggest that barristers' fees are cheap, but I do believe that they are relatively moderate, and I also believe that they are moderate because the costs of practice are moderate. In the argot of economics, the barriers to entry to the Bar are quite low. Some of you might challenge that. You have just finished a gruelling entry course. You had to pass a qualifying exam to do it, and

the course is not free. But there is no quota on Bar entry; and the start-up costs of entering practice are not steep. As well, if you are prudent, the costs of running a barrister's practice can be kept comfortably within check. Certainly, the start-up and running costs are less for the sole practitioner barrister than they are for a sole practitioner solicitor.

These favourable cost advantages have had at least 2 clearly observable consequences. One is that many lawyers who are attracted to the Bar, can manage financially to begin practice. The other is that, in the market interaction in which fees are negotiated and agreed, the barrister can agree to affordable fee rates. Fees are not forced beyond the affordable by high fixed and recurrent practice costs.

The dynamic of supplier and acquirer interaction in fee setting operates for much of the work that the Bar does. The interaction can be on an individual or a collective basis. At the so-called "high end", premiums are paid for exceptional skill. That almost always results from interaction on an individual basis.

In contrast, for a long time now, barristers have been used to the fact that some acquirers have offered fixed fee scales for their work. Often these have been acquirers who have a quasi monopolist advantage. Governments, government agencies and insurers come to mind. For this work, market interactions at the individual level do not set the fees for individual cases. The interaction has been at a collective level. The Bar Association, on behalf of barristers, has played a successful role in negotiating fee levels that are fair.

Mind you, there is a separate and recent trend that has tended to distort market interaction. Some acquirers – government agencies for certain criminal work for example, have started offering a single fixed lump sum fee for the work. The lump sum does not contain a designated component for a barrister's fee. The risk in this for the Bar is that the single lump sum "pie" is not big enough for fair remuneration for both barrister and solicitor. In ignoring the traditional division of functions within the legal profession, the single lump sum poses a real threat for barristers. It threatens to cut them out of the action in both senses of the word. Arguably, an appropriate response is for members of the Bar to become single whole-of-service suppliers for this work. I understand that the Bar Association presently has this issue under active consideration.

There is no doubt, in my view, that the historical and current market structure does work overall. It will continue to work for the Bar so long as barristers protect and exploit the cost advantage they have. To a very large degree, the Bar does have control over costs of practice. It is fortunate in this respect. Maintaining this advantage is a Bar challenge: a challenge which I see as central both to individual financial wellbeing within the shorter term and to long-term institutional survival.

At another level, there is a particular aspect to the services barristers provide which favours the current market structure. To put it bluntly, it is a market for talent; not raw "glamour" talent (generally, anyway); but skilled professional talent. Those on the acquisition side are looking for skill whether it be for the courtroom or for opinion work in chambers. The market structure allows them to identify, engage and support individual "talent" directly. Acquirers like that.

True it is that the sheer numbers of supplier-barristers and the ultimate limits upon demand for their services do produce a competitive dynamic within the supply side. Happily, in my experience at least, the competition is of a broad and generalised kind; never descending to personal rivalry from which ill-feeling might develop. My experience, I believe, is typical of the Queensland Bar.

I hope that this reassures you that the Bar is not a place where Darwinian theory is crudely applied. It is not a predatory environment of survival of the fittest. But one thing is sure. The Bar owes none of its members a living. There is no entitlement to a rewarding practice for all who would desire it; and no guarantee of success. It is a truth now, as I suspect it is always been, that just as there is a movement to the Bar, so there is a movement from it. People come; people go, and probably more so in the early years of practice.

So how might you best place yourself for a successful start at the Bar? I mentioned containing costs of practice. Another tip is to have an open mind to the work you will do at the Bar. Be prepared to take whatever is offered when you start. Remember that what you might think you are cut out for might not be what others see you as best suited to. Do not foreclose on opportunities by excluding yourself from areas of practice too early on.

An acquaintance of mine went to the Bar in Sydney at a mature age. He had been a very senior officer at the Australian Taxation Office and had a prodigious knowledge of tax law. His first offer of a brief at the Bar was to do a coronial inquest. He took it, did it, and liked it. His briefer must have been impressed. Briefs for other inquests followed and that is pretty

well all he does now. He is busy. He has not touched the *Tax Act* since beginning practice, and what is more, he does not mind.

There is one more tip from me and this is more for later on. Do not expect your progress at the Bar to be on a straight line projection with each new case being slightly more complex, challenging or interesting than the last one. It is not like that at all. In my experience, it is more like moving from plateau to plateau. You find yourself doing a certain mix of work for a number of years and then that work starts to drop off a little. You become concerned, but then other work starts coming and then more of it, and gradually you realise you have a different mix of work. You have moved to a different plateau. That continues for some years; and so on. What is happening is that the market is working you out: what, in its eyes, you are best suited to, and what you do best. And is it not better to be doing that, than craving for something else?

Well, I know the folly of standing too long between barristers and a celebration. May I conclude by wishing you all the very best for your careers at the Bar.

Enjoy the evening.