Masters and Readers Dinner 1991

By popular request Bar News reproduces the speech given to the Masters and Readers dinner on 1 November 1991 by the NSW Solicitor-General, Keith Mason QC.

Some of you may be a little surprised why someone who is addressed in court as "Mr Solicitor", or simply as "Solicitor" by Mr Justice Kirby, should be invited to speak at this exclusively barristers dinner. Let me assure you of my credentials as a member of the Bar of New South Wales.

I am fortunate to occupy an ancient and honourable office of profit under the Crown. I am doubly fortunate that it is an office of profit which, since 1884, precludes the holder from membership of the Legislative Assembly.

My earliest predecessors in New South Wales were men whose qualities reflect the high constitutional importance of the office.

The first incumbent, John Stephen, who held office for one year between 1824 and 1825 went on to become a Supreme Court judge. In 1831 Governor Darling in a despatch prepared by Stephen's own nephew, James, informed the home authorities that "if I have anything to reproach myself with, it is the forbearance I have shown in not reporting his unfitness for his office".

The second appointee, James Holland, who was a former Attorney-General of Bermuda, never took up his position because the Chief Justice refused to swear him in. Apparently Holland accidentally left behind in England the despatch from the Colonial Secretary appointing him to the office. In a letter from the Colonial Secretary's Undersecretary to Holland what was described as the "inconvenience" was regretted, but it was pointed out that Holland had brought himself into the "unpleasant predicament" in which he was placed.

Keith Mason QC

Later incumbents in the nineteenth century included a man who was promoted to Attorney-General when the then Attorney Dr Kinchela was discharged from office because his deafness rendered him incapable of properly performing his functions in the Legislative Council. Governor Bourke had obvious cause for concern but it did not impede him from immediately appointing Kinchela a judge of the Supreme Court where deafness was obviously not such a problem.

A man who held office in the 1850s (Darvall) had during his time at the private bar been committed to gaol for contempt for punching his opponent in court. Alfred Lutwyche held the office for a very short time in 1856. Lutwyche initially declined an offer to serve as Solicitor-General and government leader in the Legislative Council until the Attorney-General (James Martin, later Chief Justice) was admitted to the Bar. This principled stance was costly because the government fell only 21 days after Lutwyche's delayed appointment. Lutwyche served another short term in the office the following year before being appointed Attorney-General. On his rumoured accession to that office the editor of The *Sydney Morning Herald* remarked that "no doubt Mr Lutwyche is a very learned lawyer, although circumstances have not afforded him an opportunity to display that learning" (SMH 13.11.1858 p6). He was later appointed to the Supreme Court of Moreton Bay. When the separation of Queensland was imminent he claimed a seat on the Sydney bench, to be told by the government that he could either become judge of the Supreme Court of Queensland or resign.

Yet another (Hargrave) who held office during the 1860s went on to become the first judge in divorce of the Supreme Court of New South Wales. His swearing in was boycotted by the Bar and his behaviour on the Full Court so aggravated the Chief Justice as to provoke the latter's early resignation. It was also said that Hargrave's judgeship was disastrous for women suitors because he habitually decided against them. I am sure that this slight problem in judicial balance had nothing to do with the fact that his wife had previously had him committed to a lunatic asylum for a period of time in the mid-1950s.

In 1922 the Government wanted to appoint T J Ley Solicitor-General. It was blocked in this desire when the Crown Solicitor advised that Ley would thereby vacate his office in the Legislative Assembly. This was perhaps as well for the office because Ley went on to distinguish himself as a murderer.

I trust therefore that you can see that the Solicitor-General is a card-carrying member of the Bar to which some of you have recently been admitted and at which others have toiled for upwards of seven years.

All aspiring barristers seek to emulate the greats who have gone before or who are the current leaders of the Bar. We may covet their seniority, status or disposable income but I suppose that most of all we covet the attention they get from other members of the Bar. Oscar Wilde once wrote that:

> "There is only one thing in the world worse than being talked about, and that is not being talked about."

Most of all I guess that we would like to be spoken about in the Common Room for some withering riposte, destructive cross-examination, or Houdini-like escape from an impossible corner.

Wouldn't it be wonderful to be remembered like Coombes (Janet, not John) for having had the wit to answer a judge demanding to know why she had sought "the usual order" by telling him that it was "for the usual reasons".

Or consider Palmer QC, now a temporary occupant of the Supreme Court Bench, who drove the opposite party to the wall by the following devastating piece of cross-examination. A man had died intestate, leaving an ancient widow and a very run down cottage. By dint of the law of intestacy a share went to a

distant relative in Yugoslavia who had never even met the couple. The widow brought proceedings under the *Testator's Family Maintenance Act* seeking the whole estate in order to stop her eviction from the matrimonial home of over 30 years. You may be excused for thinking that her prospects were good.

Palmer had the unenviable task of acting on the instructions of the Yugoslav government to oppose the widow's claim. He must have thought that Christmas had come early when he got the old lady to repudiate the whole of the plaintiff's evidence in chief when she asserted that the signature on her affidavit was a forgery.

But Palmer feared that Master Cohen, as he then was, might disbelieve this denial. So he pressed on. The cross-examiner had one item of disentitling conduct whose detail I cannot now recollect but which he was instructed to put to this dear old lady. Again and again she misunderstood or misheard the question, or gave an entirely non-responsive answer. Finally Palmer was left with nothing but taking care that his evidence on this point was not met by *Brown v Dunn*. "Look Madam", he said with mounting exasperation "just listen to this question carefully and answer 'Yes or No'". He put the question. She nodded with apparent understanding, smiled at him, and answered "Yes or No".

She got the entire estate.

On the subject of a deft escape from a difficult question, what about Wheelahan QC who appeared for the respondent plaintiff in the High Court in April this year in *R W Miller & Co (South Australia) Pty Ltd v McKain*. A plaintiff injured in an accident in South Australia sued his employer in New South Wales in an endeavour to get around a short South Australian limitation period. The case involves the characterisation of limitation statutes in private international law. But principally it concerns the vexed meaning of the full faith and credit clause in the Constitution (s118). Judgment stands reserved in this re-run of *Breavington v Godleman*. Every Attorney-General intervened, each taking a different approach to full faith and credit, some opposed to the interests of Wheelahan's client, some entirely supportive of it, some ambiguously in the middle of the spectrum.

With his customary graciousness and self-deprecation Wheelahan QC stood back to allow all other counsel to speak before him.

In his fairly short submissions towards the end of the hearing Wheelahan addressed the conflict of laws point. But he remained strangely mute on the critical constitutional issue. As he was about to sit down McHugh J reminded him that his submissions did not deal with s118 at all. This drew the following riposte:

> "Your Honours, my submissions do not deal with 118 at all. Your Honour is your usual astute self in not finding a reference to 118 in my three pages, but may I take this cowardly approach with regard to 118, Your Honour, and say that there are those who have come to this Court to give it the benefit of their submissions far better able than we are, and in this regard, of course, we adopt those submissions which aid us."

Judicial rudeness is a major cross to be borne by the young and aspiring barrister. Some judges take far too seriously Lord Chancellor Lyndhurst's aphorism that "it is the duty of a judge to make it disagreeable to counsel to talk nonsense". Not all judges aim the bulk of their barbs at their brethren in the manner of a certain former President of this Association who is now a judge of Appeal. Usually it is counsel who cop the public rebukes. What could be more devastating than the fate of the counsel for the unsuccessful appellant in *Clement v Jones* (1909) 8 CLR 133 whose opponent was not called upon to reply. The opening words of Chief Justice Griffith's *extempore* judgment were:

> "The more the appellants' case has been argued the more hopeless has it become."

Henchman J of the Supreme Court of Queensland once recounted counsel's argument and concluded:

> "I feel myself quite unable to appreciate anything more than the subtlety of that argument." (see [1933] 48 CLR at 643).

This echoes Viscount Dunedin's comment in *Nixon v Attorney-General* [1931] AC at 190:

> "I confess that I have listened for some hours without discovering that even the ingenuity of counsel could bring forward any argument that was much worth consideration, and I think they were driven as they were in duty-bound driven, to the ultimate virtue of persistency."

But if you think this is rude, what of the American judge before whom a lawyer of Japanese extraction requested additional time to prepare a trial in the 1970s? The judge's response was:

> "How much time did you give us at Pearl Harbour?" (recounted in Pannick *Judges* p18.)

Fortunately for counsel many judges reserve their strongest emotions for their colleagues. Often of course this is confined, at least on the surface, to light bantering about such matters as the right to smoke and the right not to be subjected to smoking; or the appropriate time at which to take lunch. Here in Australia it is very rare for judicial dissent about the disposition of a case to descend to personal recriminations. One might occasionally find a paragraph at the end of a judgment, obviously written after perusal of a draft judgment prepared by a judge with the opposite view. Usually there will be a mild judicial snort as the errors of the opposing view are highlighted.

David Pannick in his recent book on *Judges* suggests that the dignity and majesty of the Bench "is not necessarily incompatible with the baser preoccupations of the human mind ... illustrated by the expressions of petty irritation and anger, vanity and jealousy which have afflicted judges in their mutual relations" (pp18-19). He reminds us that American judges regularly attack the sensitivities of their colleagues, although rarely with the force or the style adopted in a 1979 judgment of the California Court of Appeal in *People v Arno* (153 Cal RPTR 624, 628 note 2 [1979]). The court had to decide whether the appellants were properly convicted of possessing obscene

films with an intent to distribute them. The majority of the judges reversed the conviction. Associate Justice Hanson dissented. In response to his dissent the majority judges said that they felt "compelled by the nature of the attack in the dissenting opinion to spell out a response" and spell it out they did, in seven numbered propositions:

" 1. Some answer is required to the dissent's charge.
2. Certainly we do not endorse "victimless crime".
3. How that question is involved escapes us.
4. Moreover, the constitutional issue is significant.
5. Ultimately it must be addressed in light of precedent.
6. Certainly the course of precedent is clear.
7. Knowing that, our result is compelled. "

The initial letters of the seven propositions spelt "Schmuck" and left the reader of the law report in no doubt as to their view of their dissenting colleague. The judgment added a reference to a German dictionary, in case anyone had missed the point.

Appellate judges have shown in the past that they can be great haters although the depths of their mutual disrepect may not always be patent. Sir Edmond Barton displayed petty envy, if not anti-semitism, when he wrote to Griffith CJ in England in 1913 saying the following about his brother justice Isaacs:

> "Isaacs used his opinion which ostensibly agrees with mine to put his own interpretations on questions so as to give some answer, and just the answer Higgins wants ... The whole affair is just a piece of manipulation however - I don't think there is the least bit of sincerity in the jewling's attitude ... It is plain to me, and I think to others, that Isaacs is building his hopes on your remaining in England and is trying to make such a big splash that he will make himself manifest as the right CJ ... His judgments are swelling to bigger proportions than ever - in fact they are very weighty - in respect of paper; and he has assumed an oracular air in Court that is quite laughable ... Isaacs of course has his jaws slavering for the devouring of some decision of yours" (quoted in Souter, *Lion and Kangaroo* pp 102-3).

Sir John Latham had a very difficult time presiding over a court in which one justice wrote letters to him referring to one colleague as a "dog" and another as a "parrot". Mr Justice Starke refused to have any consultation with his colleague Mr Justice Evatt, to exchange draft judgments with him, or even to supply him with final judgments (see Lloyd *Not Peace but a Sword - A High Court under G J Latham* [1987] 112 Adel L Rev 175).

If you turn to 42 CLR at 62 you will see Starke J commencing his judgment in *Federal Commissioner of Taxation v Hoffnung & Co Ltd* with these words:

> "This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties."

Sir Maurice Byers, surely one of the two or three greatest appellate advocates ever to practise in this Bar, was very adept at making the most of judicial disagreement and getting the judges to work for him in refining a difficult legal proposition that did not command universal respect. It is said that his constitutional advocacy in the High Court when Solicitor-General for the Commonwealth reminded one of a half-back rolling a ball into a scrum - usually behind second row. The simile was an apt description of Sir Maurice's forensic skills. However I must say that for as long as I have known Sir Maurice he has never struck me as looking like a scrum half.

In 1961 the Bar Association decreed that new members had to read with an established practitioner unless exempted by the Council. This revived and made mandatory a custom that had fallen into desuetude for nearly forty years. The system is designed to turn theoretic learning into practical application, to provide a sound experience in preparation, evidence, pleading and the conduct of cases, and to assist the observance of Bar standards and traditions. In recent years the system has been supplemented by more formal training with lectures, seminars and course work in the readers' programme. But this is no substitute for the ongoing relationship whereby the master makes and hopefully honours a commitment to assist, without fee, in the vital early training of his or her reader. In doing this the master is indirectly repaying a debt of gratitude to whomever he or she read with seven or more years earlier. Of course it is not a one way street because the pupil that is worth his or her salt will be available to assist, again without hope of reward, in mentions, devilling and the like.

The symbiotic relationship of master and reader reflects much of what is good about life at the Bar.

Although the relationship between master and reader is both unique and personal it must be acknowledged that each may have a different perspective of the same events.

It was said (I think) of Johnson's biographer Boswell that his father was a very close and bookish man. The father was a busy barrister who was appointed a Lord of Session in Scotland in 1754 when Boswell was 14. Throughout his life, Boswell had a particularly fond memory of a day spent fishing with his father when he was a small boy. We would now term this "quality time" in a parent-child relationship. For Boswell it must have been a rare event but the happy memory remained with him into adulthood. After the father's death Boswell came upon his diary and was able to turn up the entry for the day spent fishing. Sadly the father's note read something like: "Unable to do any reading. Day wholly wasted fishing with son."

This sad little episode, which may be a little close to the bone for those of us who are parents, reflects the differing perspectives of master and reader. The reader craves that which the master lacks: time. Unfortunately the reader often needs it most when the master has it least. If a friend in need is a pest, there is little that will try a master's patience more than the reader who wants 10 minutes' time, preferably at 9.45 am as the master is making that last phone call, signing the last letter, and thinking of the first question in cross-examination. Yet in the overall scheme of things who is to say which is the greater need: the one who needs to know the answer to unwritten questions such as whether to robe in the District Court motion list; or the one who finds it difficult to honour the commitment to the reader because of later over-commitments to his or her own practice.

Sometimes the pupil's persistence at 9.45 is of mutual benefit. My secretary today reminded me of an occasion when I was pushing my pupil Annabelle Bennett into the lift to go off and do a 9.30 mention that I had overlooked until 9.44. I had spat out my instructions and turned back to a last-minute conference. As the lift door closed, Annabelle's voice called out: "But do you act for the plaintiff or the defendant?"

When Sandy Street and Tim Robertson sought admission to the Bar of Queensland one of the constitutional battering rams levelled at the dingo fence was s92 and this raised the question whether the Bar was "trade" or "commerce". Bennett QC who represented Street was at first reluctant to invoke s92, preferring to rest his case on the ultimately successful s117.

Qualms about s92 were based, in part, upon quite realistic concerns that success on this ground could expose the Bar's flanks to the tender mercies of the Trade Practices Commission. Perhaps someone out there had read Professor Michael Zander's work called *Legal Ethics: A Study in Restrictive Trade Practices*. Or perhaps the concern lay (with less justification) in exposure to remedies under Part V of the Trade Practices Act. After all, not everyone in Australia likes barristers. Our spouses get angry at our absences; our children at our neglect; our solicitors at our delays; our clients at our fees; our judges at our obtuse tediousness. Come to think about it, there's probably only our mothers left who continue to give unconditional love and who listen with appropriate admiration about our latest exploits.

Certainly in Australia it is open season on lawyers generally. In the Australian classic *Such is Life* Collins described one of his characters thus:

> "Educated for the law, his innate honesty shrank from the practice of his profession."

Regrettably there are many who continue to hold such unworthy views of lawyers as a group.

The sad fact is that we will each be judged by the public by reference to its perception of the Bar as a whole. But if the public think that all barristers charge at the rate of those who get written up in feature articles in the *Good Weekend* that is not a reason why all barristers should act as if they were the Greg Norman of the Bar. The modern practice of some barristers who charge what the market will bear or at a fixed hourly rate regardless of the client or the type of work involved is, in my view, a regrettable departure from the proper standards of the Bar. A member of the Bar (of whatever seniority) that takes the opportunity of stinging a client that has the capacity to pay, regardless of the barrister's seniority or the complexity of the case at hand is really sending out the message that the notion of service is confined to the legally aided client. If you think that I am alone in concern about daily or hourly rates read the judgment of the Chief Justice in *New South Wales Crime Commission v Fleming* when it comes out shortly in the New South Wales Law Reports.

Overcharging, with or without the concurrence of the solicitor involved, can amount to professional misconduct. It certainly has the tendency to lower the Bar as a whole in the esteem of an increasingly critical public. And the limitations on the legal aid purse will mean that if the cost of services continues to rise fewer litigants will share in those services.

On this more sombre note I will draw my remarks to a close. Sir Keith Aickin once told me that the difference between a Melbourne client and a Sydney client was that the former took counsel's advice and then sued whereas the latter sued first and then took counsel's advice. This may perhaps explain why Sydney barristers tend to charge higher fees for court work than for advice work. It certainly means that the stream of clients, big and small, is not likely to dry up so long as barristers remember that, in the last resort, they need the stream as much as the stream needs them. ❑

Unappealing

The price paid for appealing once too often was graphically illustrated in *In re Chunbidya & Ors* (1934) 62 L.R. Ind App 36. The appellants and others had been convicted by the Additional Sessions Judge of Cawnpore at Banda under s.148 and s.302 of the Penal Code of rioting armed with deadly weapons and with murder and had been sentenced to transportation for life. They appealed to the High Court of Allahabad when, after hearing the arguments, the judges dismissed the appeals and enhanced their sentences to death! ❑

Restaurant Review

Chinese Chic

In Help Street in Central Chatswood is a restaurant called the "Fook Yuen". It has relatives in Hong Kong, San Francisco and Singapore. Its clientele is very predominantly Asian. Recently, my family were literally the only occidentals present, and one of us is an Aborigine!

The place is eclectic and classy, with attractive decor, nicely turned out waiting staff and courteous, efficient service.

The food is the most authentic in Sydney and of the highest quality. Steamed dim sum, vegetarian spring rolls, and the usuals, are there, but the delicious pork shank, cold and thinly sliced in its own jelly and served with a thin tangy sauce, was true to its name; the stewed tripe with blackbean, chilli and ginger equally delicious, and both took me back to Beijing. A mudcrab with chilli, blackbean, shallots and ginger was delicately spiced and very traditional.

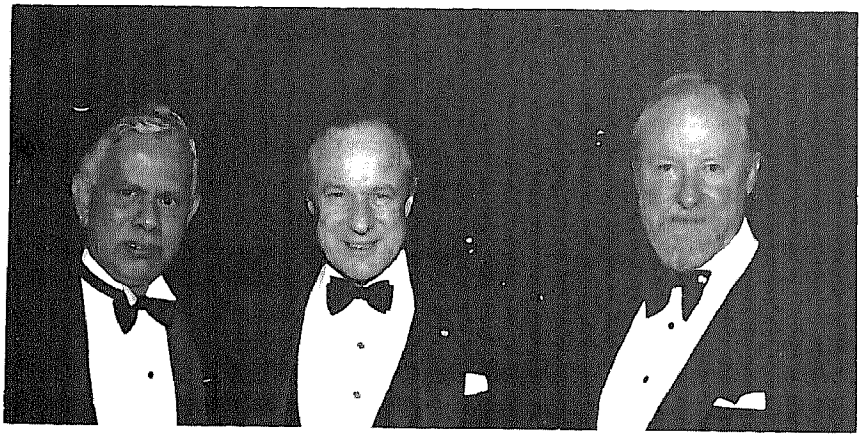
The vegetarian dish chosen was stewed vegetables with bamboo fungus, which, again, is authentic and rare in Australia. The dish was superb, the fungus setting off crisp hot broccoli, Chinese broccoli, shallots and asparagus, stewed in chicken stock and vegetable juices.

Washed down with beer and Beaujolais, this meal was superb.

Book early for Friday and Saturday nights, but GO!

❑ John Coombs

Bench and Bar Dinner 1991



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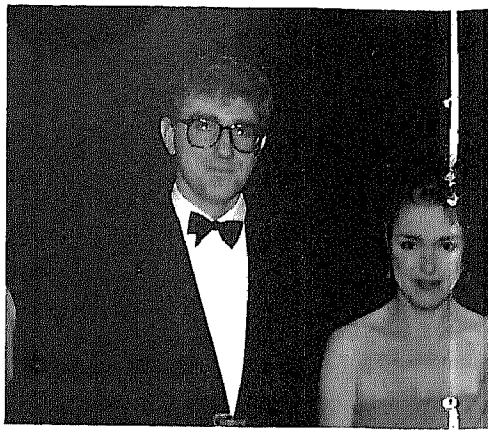

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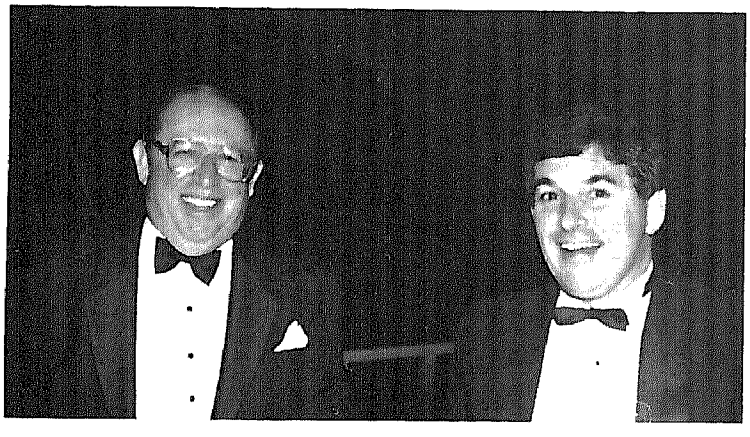
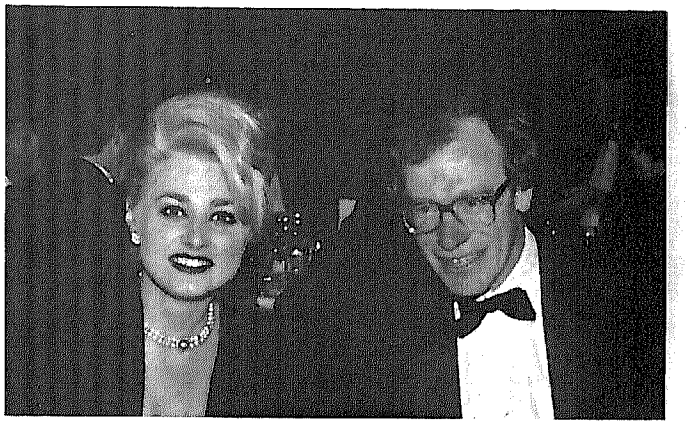
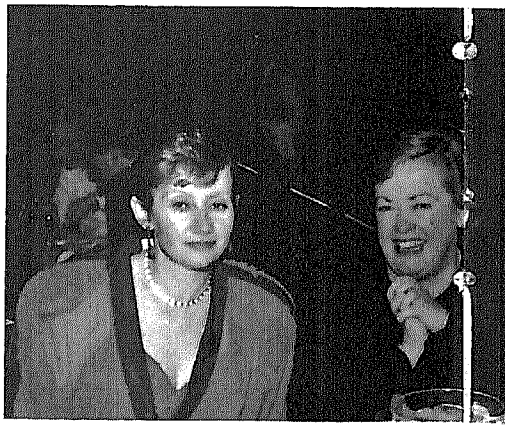


Brian Murray QC and Clive Steirn



Chrissa Loukas and Bernie Coles

Chief Justice Gleeson AO, Sir Nigel Bowen KBE (Guest of Honour) and Barry O'Keefe AM QC



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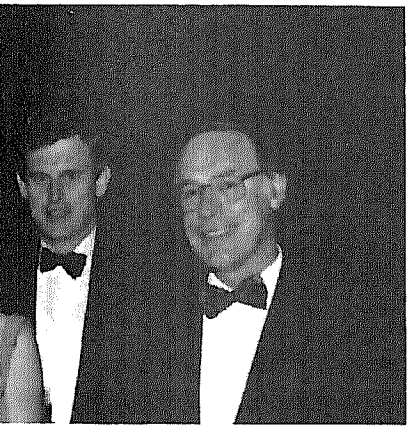

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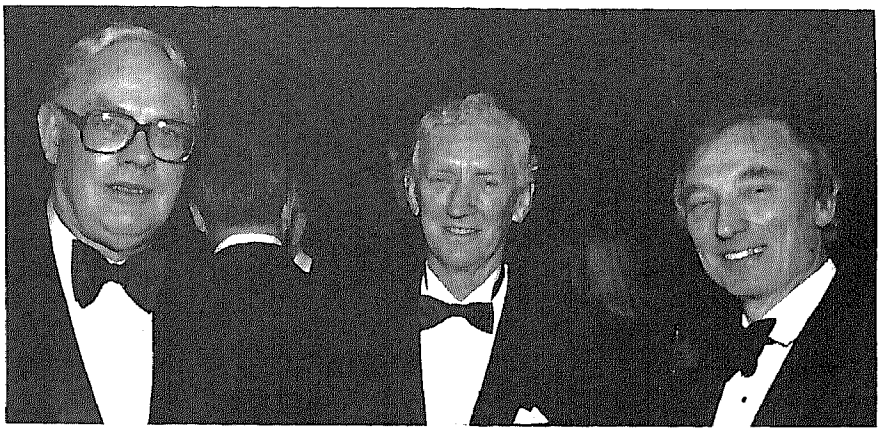
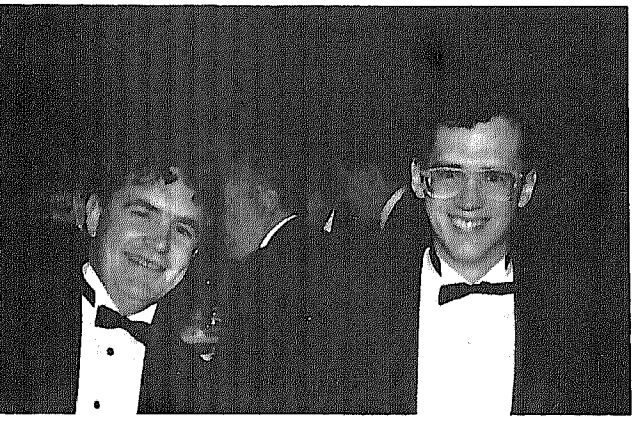


Justice Lockhart, Justice Kearney and Justice Wilcox



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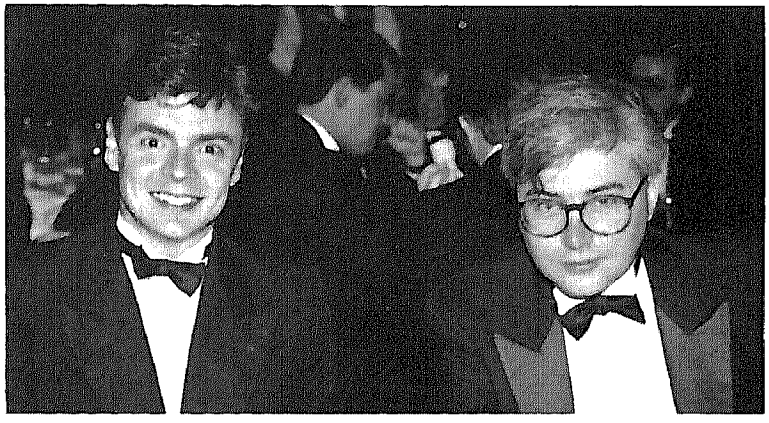

Tom Blackburn and Bruce Connell

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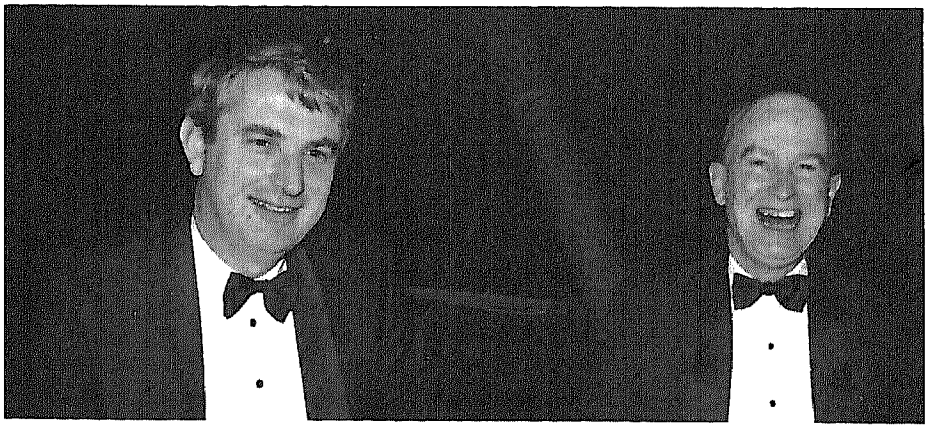

Geoff Lindsay, Judge Flannery QC