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,