

Officers of the Court



A person whose knowledge of courtroom advocates is derived from American TV would find the reality of the Sydney bar confounding.

Not just because we do not routinely pause our cases while we investigate the facts.

We try our hardest to win cases against our opponents, but we do not cheat or mislead them. We may be competitors, but we share offices and go out of our way to give assistance to other barristers.

Walter Sofronoff's Maurice Byers annual lecture (*The constitutional significance of the Australian Bar*) ends with a reflection from an American judge on the difference between barristers in the English legal system and trial lawyers in America. The

judge describes the American open bar as being dominated by lawyers whom Judges do not trust. "*American lawyers are called 'officers of the Court', but this is said with a smile (or a sneer). [In contrast] Barristers are officers of the Court*".

It reminded me of an observation made an American legal academic who visited a silk at the Sydney Bar. The academic was fascinated by the fact that his friend shared a floor with barristers who were commonly his opponents. He was taken aback that there were no locks on the doors. "*There is nothing to stop your opponent just walking into your room when you are not there and reading your brief?*" he asked. The part of that story that I like best was the reaction

of the silk. He was no less surprised (and amused) at the thought that a floor member would contemplate such a thing.

While honesty and straight dealing remain a core element of practice as a barrister, other aspects of practice are changing. Undoubtedly in some ways these are changes for the better: the bar is becoming more diverse and increasingly embraces the efficiencies that technology can provide. However, as a number of authors in this edition identify, not all the change is positive.

For a start, while the number of practising barristers continues to increase (now 2412 in 2018/19, a 7.5% increase over the last 5 years) the number of cases that are commenced is decreasing. Farid Assaf and Penny Thew (*Are there implications of NSW Court filing trends*) report on the decline in court filings over the last 13 years: filings in all State Courts are down by almost 45% in total, which can only have been partly offset by a 13% increase in Federal court filings and the increasing uptake of Alternative Dispute Resolution.

Working at the Bar as a sole practitioner carries with it financial challenges and risk.

Anthony Cheshire (*The bar needs to fight for its future*) discusses some of these changes in barrister practice. He focusses on a worrying trend of viewing barristers as merely an additional lawyer (and cost). In what he identifies as a possible reaction to the reduction in the number of cases, solicitors increasingly do the work they previously sent to counsel. As Cheshire identifies, the bar needs to continue to take steps to inform the public that not only is it often less expensive to brief junior counsel to draft pleadings and prepare evidence, briefing at an early stage will often assist to identify the real issues in a case and to provide advice on prospects that can lead to early settlements.

Kavita Balendra (*There is a future in the Bar – a response*) identifies the phenomenon of barristers appearing without a solicitor present, which occurs before the Workers Compensation Commission.

Another change that has been well documented is the increasing reliance on written submissions. *Advocatus* describes how the modern written submission is written: in rainbow colours, each colour representing the input of the many solicitors and client officers who 'assist' to finalise a submission, more often than not in the hours before it is due to be filed.

This being the summer edition, it has a number of interesting pieces to read during the annual shut down. Sean O'Brien's *A message from the Free State of Prussia to Hong Kong* examines how legal systems can be used to give legitimacy to 'law by decree'. It was how the German Government deposed the democratically elected government of Prussia in 1932, and he draws a comparison with the Bill introduced in Hong Kong to allow the Chief Executive to make *ad hoc* extradition orders to mainland China, which has led to more than 6 months of protests.

For those who want to do some reading on the beach, there is a practical article on how to electronically borrow a vast range of articles and books from the library. Of particular interest is the new service that allows members to borrow a large number of popular looseleaves, including Ritchies, as an e-book.

Kevin Tang has again penned some wonderful pieces in appointments, retirements and obituaries. In particular, for those who were not able to be present, I highly recommend the obituary for Jane Matthews AO, which draws on the words spoken at the State memorial, in particular by our Governor, Her Excellency Margaret Beazley AO.

I have a particular soft spot for good historical pieces, and this edition carries two. Michael Kirby's piece, *Australian Racism: The story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith* tells the fascinating tale of the third Premier and fourth Chief Justice of Tasmania, whose mother was of African descent, and succeeded due to his great talent, despite the outrage that 'a coloured person is sitting in judgment upon the Anglican race'.

John Bryson QC (*Debtors Prison and the Rules of the Prison*) describes a period of our history when debtors were imprisoned. To deal with the practical problem of a small gaol, in 1834 the NSW Supreme Court deemed a small part of what is now the CBD near Circular Quay to constitute the boundaries of the 'prison'. This area, which came to be known as 'the Rules', after the Supreme Court Rules that determined the boundaries, was a place where debtors could walk and live, if they could find the means to do so. Bryson ends by asking the reader to spare a thought, next time you drive over the Harbour Bridge, for the judgment debtors of the distant past who were required to live in the streets below the Southern pylon.

There are a number of book reviews that are well worth reading, ranging from *The Constitution and Government of Australia 1788 to 1919* by William Pitt Cobbett, edited by Anne Twomey with Amanda Sapienza to *Fleishman is in trouble* by Taffy Brodesser-Anker. The latter is a novel about a professional man's experience of marriage, estrangement and single parenthood. In addition, there are two short but illuminating extracts from Nicholas Cowdroy's new book *Frank & Fearless* (with Rachael Jane Chin).

Whether you are a fan of a book review or not, you must read Justice Andrew Bell's highly learned and very funny speech given at the launch of *Heydon on Contract*. It picks out gems from the book like sixpences from a Christmas pudding. Bell cites Heydon's concern as to excessive use of extrinsic evidence as *clogging the arteries of commercial litigation*. He pulls out delicious quotes, such as "*The cost pressures affecting large firms of solicitors operating under their expensive business models are notorious. In those circumstances a cynic might say that greater love hath no managing partner than this – the eruption of large-scale commercial litigation against a loyal and valued client.*"

Bell has no compunction about teasing the author: noting that "*Modern' is not a term of approbation in the Heydon lexicon*"; and identifying that the book's strong Australian focus (and its criticism of English law where it has departed from orthodoxy) does not derive from any republican tendencies.

So as we head to the beach at the end of a busy year (on our Vespas) let's try not to think too much about how the work of barristers might ultimately be replaced by artificial intelligence (Farid Assaf: *A brief meditation on artificial intelligence, adjudication and the judiciary*).

Rather, focus on the proposition underpinning Walter Sofronoff's Maurice Byers annual lecture: namely that the continued existence of the bar, in its fundamental respects, is "*constitutionally guaranteed*".

With that reassurance enjoy the break and come back recharged in 2020.

From all of us at Bar News,
happy holidays!