Bar notes

Arbitration Rules

On 11th November, 1985 the Rule Committee of the Supreme Court resolved that SCR Pt. 72 (which relates to arbitrations generally) should be repealed and re-enacted to accommodate the introduction of the Commercial Arbitration Act 1984 in the place of the Arbitration Act 1902.

The new rules will take effect on 1st January, 1986. They contain certain provisions which were strongly opposed by the Bar and of which it is considered that members should be made aware.

Notably Pt. 72 r.2(1) enables the Court, in any proceedings before it, to refer those proceedings in whole or in part for determination by an arbitrator **of its own motion** (ie regardless of the wishes of the parties). The fundamental point of the Bar's opposition to this rule lies in the principle that, absent any binding contractual constraints, a citizen is entitled to have his disputes determined in and by the courts of the land in accordance with law.

That that principle is basic to the interests of justice (and cannot yield to any supposedly pragmatic exigencies, such as matters of technical complexity perceived to be too "difficult" of resolution by judges) has been emphatically recognised in this context both in Victoria and Queensland.

The Supreme Courts of those states have held that an order for compulsory arbitration, if opposed by **any party**, should only be made in the most exceptional circumstances: *Taylor & Sons Pty Ltd v Brival Pty Ltd* (1982) VR 762; *Honeywell Pty Ltd v Austral Motors Holdings Ltd* (1980) Qd.R 355. Logically such an order should never be made where none of the parties desires it.

The Rule Committee introduced two other innovations. By Pt. 72 r.3(2) a judge may be appointed as an arbitrator either alone or with a layman or laymen.

Again the parties' consent is not prequisite. Further Pt. 39 r.2 has been amended to provide for the appointment of a court expert without consent and regardless of litigant's opposition.

The Bar Council considers these steps also represent serious threats to the proper administration of justice. Parties are entitled to have their cases heard and determined in open court and not to be the subject of deliberation by decision makers behind closed doors with relation to matters (eg the lay arbitrator's or expert's opinions) not the subject of sworn and tested evidence.

Members are urged to report any unsatisfactory use of these new rules so that, if need be, their repeal can be the subject of appropriate representation.

Reforming Criminal Justice

On 17th September 1985 the President of the Bar Council wrote to the Attorney General to inform him of the Bar's views on necessary reforms to the system of criminal justice in New South Wales. The following reforms were advocated:

- There should be no report by the Judge to the Court of Criminal Appeal, except by consent.
- In each trial there should be a complete transcript of evidence, addresses and exchanges between Judge and Counsel.
- The court reporting should be by electronic audio recording.
- No amendments should be made to transcripts except by order, in open court, after argument.
- The Judge's summing-up should be treated in the same way as the rest of the transcript. It should be available immediately and not altered or edited except in open court, after argument.
- The jury should be discharged immediately after verdict.
- There should be a criminal trial registry independent of the Solicitor for Public Prosecutions for the purpose of listing cases and allocating judges.
- There should be a fixed time table for trials whereby the Crown is required to file indictments and give to the defence statements of prospective witnesses and other material to be used at the trial, well in advance of the date fixed. Any change in the date should be by order of a Judge after hearing both sides. The practice whereby the Crown Prosecutor can manipulate the list by the expedient of declining to present an indictment should stop forthwith.
- When taking a verdict of guilty the Clerk of Arraigns should question each juror to ensure that there is in fact unanimity. The present perfunctory question addressed to the whole jury ("so says your foreman, so say you all?") is not helpful, and in view of recent events a clear question to each juror would help avoid error, and later speculation. The matter was referred to by Barwick CJ in *Milgate v The Queen* 58 ALJR 162.
- A convicted accused and the Crown should be on an equal footing so far as time to appeal is concerned. At present the accused has 10 days (Criminal Appeal Act, S.10) whereas there seems to be no limit on the time within which the Crown may appeal against sentence (s.50). The time should be 21 days.

The President also advised the Attorney General that it was the view of the Bar Council that the right of an accused person to make an unsworn statement should be retained.

Bar Policy

At its meeting on 24 October 1985, the Bar Council resolved that decisions on matters of policy should, when of general interest, be promulgated to all members of the Association.

It hoped the move would reinforce the cohesion of the Bar and enable members to 'speak with one voice' when questioned on matters of general policy.

Policy decisions of general interest made by the Council in 1985 are:

1. **Tutorship and part-time practice:** A barrister member who accepted a Tutorship within a Law Faculty was informed that the Council would have no objection to his appearing at the Kingsford Legal Centre, or interviewing clients at the Centre, as part of his duties, provided he received no payment for such activities other than his salary as a Tutor.

2. **Areas of Preferred Practice:** It was decided against expanding information available to solicitors in the document 'Areas of Preferred Practice' to include barristers' qualifications in non-legal disciplines.

   The principle underlying this decision is that Counsel should be briefed on the basis of their perceived 'cost-effectiveness' as advocates and that expert witnesses to cover non-legal matters should be summoned as necessary.

3. **'Bulk-Fees':** The Council resolved that it had no objection to a member being paid a 'bulk-fee' for a week's work — or other period.

4. **Darling Harbour:** The Council opposed a Bill in relation to land at Pagewood which amounted to Parliament legislating for the result of a particular piece of litigation and the costs associated with it.

   The more recent Darling Harbour Authority (Amendment) Bill and Blue Mountains Land Development (Special Provisions) Bill have had a similar effect and formed the subject of a press release registering the Council's opposition to this type of legislation.

5. **'Verbals':** The Council wrote to the Attorney-General and issued a press release condemning the practice of Police 'verbals'.

   The release also strongly supported the recommendation of the Criminal Law Review Division of the Attorney-General's Department that the questioning of suspected persons by police officers should whenever possible be recorded on video.

6. **Ethics procedures:** The existing two Ethics Committees were expanded by the addition of a distinguished non-Council member in each case. The Committees themselves were renamed 'Complaints Committees #1 and #2'.

   Additionally, complaints may be referred to a Disciplinary Tribunal. These procedures are explained fully and promulgated in the 'Bar Rules' section of the 1985 Annual Report, and the President comments upon them in his 'President's Report' in the same publication. The new Bar Council (1985-86) has three complaints committees.

7. **The 'Silk-List':** It was decided that the list of applicants for Silk should in future be made accessible, on request to the Registrar, to all members and barristers' Clerks.

The Half Century Ball

The incorporated Bar Association of New South Wales will be 50 years old in late 1986.

The Bar Council will host a Ball on Saturday 1 November 1986 to mark this Golden Event.

The venue has been laid at the University of Sydney and in particular the Front Lawn, the Great Hall, the Ante Room and the Quadrangle.

The Palm Court Orchestra will entertain ballers in the Great Hall during drinks and in marquees in the Quadrangle during dinner.

Members of Circus Oz will provide occasional diversions.

Dance Bands yet to be nominated will play in the Great Hall and on the Front Lawn later in the night.

Non-members and their guests will be most welcome. Tables of any size can be accommodated and early plans should be made for the formation of tables.

Further details will be available in the New Year but the appropriate diary entry should be made now.

A plea for Jewish women

Dear Editor,

We would be most grateful if you would be able to bring to the attention of your readers a problem which female Jewish clients may encounter in the family law situation, and of which your readers may not be aware.

Even though a woman may have a divorce decree pronounced by the Family Court of Australia, under Jewish religious law, she is unable to remarry unless she also has a Jewish divorce decree, which is called a "Get", and which is obtained through the "Beth Din", which is the Jewish ecclesiastical court.

Such a religious divorce may only be granted by the husband.

The problem is that on occasions a man will refuse to give his ex-wife a religious divorce, thus preventing her from having any remarriage recognised under Jewish law, and this can have drastic consequences for the status of any children of such remarriage.

One solution to this problem appears to be to include in any section 87 agreement a provision, where applicable, that the husband will forthwith apply for and take all necessary steps and use his best endeavours to grant a Jewish Get, and that the wife will consent to the receipt of the same and will cooperate with the husband in taking such necessary steps.

A further solution appears to be to seek in any application to the Family Court an order that the husband grant the Get.

The Family Court has attempted to facilitate the granting of a Get.

We would refer you to *Steinmetz and Steinmetz* (1980) FLC 90-801 and *Steinmetz and Steinmetz (No.2)* (1981) FLC 91-079, where it was held that the husband pay the wife lump sum maintenance within three months, but that if within that period the husband had caused the wife to be granted a Get, the lump sum maintenance would be reduced.

This followed the English Court of Appeal decision in *Brett v Brett* (1969) 1 All ER 1007.

Unless the above is borne in mind by the wife's legal representatives, the wife will be in the unhappy situation of being unable to obtain a religious divorce from an unwilling husband, although already divorced in the Family Court.

Lysbeth Cohen
Status of Women in Jewish Law
Chairman
The National Council of Jewish Women Of Australia
Woollahra NSW