Bar Notes

Commercial Division Timetables

The Chief Judge of the Commercial Division, Justice Andrew Rogers, has drawn the profession's attention to the undesirable practice of practitioners agreeing between themselves to extend times for compliance with orders of the Court. Although his reminder is principally addressed to solicitors, members of the Bar should be aware of these concerns. His Honour points out that when interlocutory orders for the preparation of a case are made in the Commercial Division they are designed to achieve fairness not only between the parties but also serve to satisfy the public interest in the orderly conduct of commercial litigation. Insofar as arrangements inter partes to extend times serve to impede the efficient preparation for the hearing of disputes they are unacceptable to the proper administration of justice. The Court strongly discourages practitioners from making such arrangements and urges them to bring matters before the Court if there is non-compliance with the timetables laid down. The Judges recognise and regret that restoring matters to the list in such circumstances occasions unnecessary additional expense, nonetheless point out that it is unacceptable that for whatever reason there should be a risk that when a matter is called on for hearing it is not ready. In a recent case a matter was unable to proceed for the first two days allotted to it due to non-compliance with the timetable in circumstances where the hearing had been expedited due to the illness of one of the parties to the litigation. Members of the Bar should take heed of the Court's concern and, whenever appropriate, dissuade their instructing solicitors from private adjustment of Court directed timetables. ❑

The Evidence Bill 1991

The Evidence Bill 1991 was introduced into Parliament on 20 March 1991. According to the explanatory note, its objects are to reform, and provide a comprehensive statement of, the law of evidence to be applied in New South Wales courts and in some legal and administrative proceedings. If enacted, it would replace the Evidence Act 1898* and the Evidence (Reproductions) Act 1967 and exclude the operation of most principles and rules of the common law and equity relating to evidence.

The Bill is 108 pages long and contains 195 sections and a dictionary of terms used in the Bill. It is largely based on the Bill contained in the Australian Law Reform Commission's Report "Evidence" (1987) on the laws of evidence in Federal and Territory courts (ALRC 38).

The Attorney General's second reading speech makes it clear that he seeks comments on the substance of the Bill. Members are urged to read the Bill and consider its provisions. The Bar Council's Law Reform Committee, headed by Beazley QC, is scrutinising the Bill with a view to preparing a submission to the Attorney General, and will welcome comments from members.

The Bill appears to contain at least one provision which would produce undesirable results. Headed "Exclusion of evidence of settlement negotiations", s.117(1) of the Bill, in general terms, prevents the admission into evidence of communications made in connection with an attempt to negotiate a settlement of a dispute. But s.117(2)(d) states that the general rule does not apply if:

> *"The communication or document relates to an issue in dispute and the dispute, so far as it relates to that issue, has been settled;"*

Were this exception enacted, it apparently would reinstate the holding of the English Court of Appeal's decision in *Rush & Tompkins Ltd V Greater London Council* [1988] 1 All ER 549. That decision was reversed on appeal by the House of Lords in a unanimous decision reported at [1989] AC 1280.

If enacted, the exception would seem to have the effect that nothing said in a successful negotiation (one that resulted in a settlement of the dispute) would be privileged from discovery and admission in later court proceedings. This result would be most unfortunate. One could without difficulty think of cases where parties would be most concerned at the possibility of subsequent disclosure of communications made during the course of their negotiations. ❑ Robert Angyal

Flicking

Of more recent times the Bar Council has become aware of an increase in complaints by both Attorneys and Clients in relation to the incidence of the flicking of briefs at a late stage of proceedings. The increase is noted both in volume and in terms of the percentage of complaints generally received.

The Bar Rules clearly require that a brief involving the hearing of a serious criminal offence shall not be returned except in the most compelling circumstances and Bar Rules C 8 and 9 refer. Members should bear in mind three important considerations where they find themselves in a position where two briefs may or will clash in point of time.

(a) The complexity of the brief.
(b) The time remaining within which that complexity may be mastered.
(c) The experience and practice of the barrister to whom it is intended to pass the brief.

Members will be familiar with the other requirements of Rules C 10 and 11 in relation to the express consent of the solicitor involved and the over-riding consideration of any adverse effect upon the interests of the client.

It may be that the Bar Council will need to adopt a more severe outlook in regard to breaches of these rules.

It is important that members keep abreast of the contents of their diaries more than just a couple of days ahead and when a problem is likely to arise it is best to deal with it when it first becomes apparent rather than waiting in the fond hope that it will resolve itself. It is the last minute situations created by the belief that matters will solve themselves that has led to the increase in complaints. Above all always ensure that the recipient of a brief is of sufficient competence and standing in relation to the matter as will ensure that the client or solicitor is not left with the impression that an apprentice is being thrown in over his head at the last minute.

Failure to adhere to what after all are simply rules of common sense may from now on result in more serious penalty especially for some of the more flagrant breaches.

Identify any problem at an early stage and solve it then and there, and not later. ❑ T.J. Christie