

Voluntary membership

How national competition reform may harm the NSW Bar Association

By Ingmar Taylor



On 1 July 2004 the compulsory cost to practise as a barrister in NSW will be reduced, as a result of a legislative change that has the potential to fundamentally alter the NSW Bar Association.

The 2004 practising certificate fee will be lower and the (voluntary) membership fee for the Bar Association

correspondingly higher, reducing the guaranteed portion of the Bar Association's income.

Henceforth, what activities can continue to be undertaken by the Bar Association will depend in part upon a decision by the Attorney General as to the extent to which those activities can continue to be funded out of the compulsory practising certificate fee. The new legislation effectively provides the government with the power to shape the role of the Bar Association.

Currently the NSW Bar is a virtual closed shop. Ninety-eight per cent of barristers in NSW are members of their 'union', the NSW Bar Association. The changes on 1 July 2004, dubbed the introduction of 'voluntary membership', are likely to change that.

Strictly speaking membership of the Bar Association is already voluntary. In order to practise barristers must pay an annual practising certificate fee of up to \$4596¹, and can then elect whether to pay an additional \$2.20 to also be a member of the Bar Association. Unsurprisingly, very few choose not to be a member (of about 2100 legal practitioners with barrister practising certificates in NSW, all but about 40 are members of the NSW Bar Association).

The association uses the compulsory practising certificate fees to fund its activities. In the 2003 financial year its total income was \$5.7m, of which \$3.3m was from practising certificate fees. A further \$1.6m was from the Public Purpose Fund, to reimburse certain costs, principally the disciplinary and legal assistance referral functions. The balance came from interest and dividends, reading programme fees, and some miscellaneous income.

In the past the practising certificate fees have been set at a level sufficient to cover the costs of those activities that are not funded out of the Public Purpose Fund.

However on 1 July 1994, sec 29A of the *Legal Profession Act 1987* will come into effect. It will require practising certificate fees to be set at a level that covers only those costs associated with the 'regulatory functions' of the association. The cost of providing any other services will have to be funded from (an increased) membership fee.

The Law Society of NSW is subject to the same changes. In July 1997 it surveyed a sample of its members to find out what they would do if membership of the society was voluntary.

About 12 per cent of solicitors said they would definitely not maintain their membership of the Law Society, while a further 23 per cent were unsure².

The Bar Association has not conducted a similar survey, but it might reasonably expect a lower percentage of its members would not renew their membership. However it is hard to make any estimates without knowing how high the membership component of the overall fee will be. And that is currently unknown.

What is known are the broad parameters by which the Attorney General will determine what current activities of the association can continue to be funded out of the compulsory practising certificate fee. These are discussed below. But within those broad parameters lies a wide discretion.

The Bar Association believes it can justify in the order of 90 per cent of its current activities being funded out of the practising certificate fee. Ian Harrison SC, President of the Bar Association, says in that circumstance the change would be very modest and the association would continue to receive the moneys it needs to operate effectively.

The journalistic temptation is to overemphasise the potential for doom, but it cannot be doubted that there is at least the potential for the Attorney General to determine that a lower percentage of current activities is to be funded out of the practising certificate fee, resulting in a practising certificate fee which is substantially less of the current fee. If that were to come about, then the resultant higher membership fees may see a much higher number choose not to renew their Bar Association membership.

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To take an example, the current fee for juniors with over seven years at the Bar, is \$1994 plus a (voluntary) \$2.20 membership fee. If that became a practising certificate fee of \$1800 plus a membership fee of \$194, then presumably Bar Association membership would remain almost universal. But if, say, it became a practising certificate fee of \$1100 plus a (voluntary) membership fee of \$894, then there may well be a more substantial reduction in membership (and a consequential drop in the association's income).

In Victoria barristers pay a \$200 compulsory fee and membership fees for the Victorian Bar of up to \$3300. All but two or three barristers pay the voluntary fees to be members of the Victorian Bar. However there are good reasons why the experience in NSW might be different, as explained below.

The legislation

In April 2002 the state government succumbed to pressure for something called 'national competition reform' and introduced into parliament a Bill which, with bi-partisan support, became the *Legal Profession Amendment (National Competition Policy Review) Act 2002*.

In introducing the Bill the Attorney General, the Hon Bob Debus MP, said the purpose of the amendments was:

to bring about a true separation of the regulatory and membership functions of the Law Society and the Bar Association. The resultant benefits will include more transparent cost structures of the Law Society and the Bar Association, and potential savings for consumers; and the ability for solicitors and barristers to choose whether they wish to contribute to the cost of membership activities conducted by their professional associations³.

The Hon Ian MacDonald speaking on behalf of the government in the Legislative Council mentioned another purpose, namely: 'Voluntary membership will lower the costs of legal practice, and the government expects these costs to be passed on to consumers.'

Under the Act practising certificate fees will continue to be determined by the Bar Council and approved by the Attorney General and fees can continue to be set at different levels based on length of service and location of practice. Section 29A however introduces a new requirement defining how the practising certificate fees are to be calculated, as follows :

- (4) Subject to the regulations (if any), the Bar Council is to determine the practising certificate fee on a cost recovery basis, with the fee being such amount as is required from time to time for the purpose of recovering the costs of or associated with the regulatory functions of the Bar Council or Bar Association.
- (5) The *regulatory functions* of the Bar Council or Bar Association are the functions of the Bar Council or Bar Association under this Act, and any other functions the Bar Council or Bar Association exercises that are associated with the regulation of legal practice or maintaining professional standards of legal practice.
- (6) The practising certificate fee is not to include any charge for membership of the Bar Association and is not to include any amount that is required for the purpose of recovering any costs of or associated with providing services or benefits to which barristers become entitled as members of the Bar Association.

Regulations can be made specifying the costs that may or may not be recovered by the practising certificate fees.

What will the AG consider 'regulatory'?

The Attorney General is currently considering submissions

from the Law Society and the Bar Association as to how the principles established by the Act will play out in practice. At this stage there is a high degree of uncertainty as to what activities will in the future have to be funded out of the (voluntary) membership fee.

'Voluntary membership will lower the costs of legal practice, and the government expects these costs to be passed on to consumers.'

In reply to the second reading debates the Attorney General, in the Legislative Assembly and the Hon Ian MacDonald MLC, in the Legislative Council, gave some indication of what activities might be considered 'regulatory' and which might be considered 'membership'. The Attorney General appeared to suggest that where activities are partly 'regulatory' a proportion of their cost can be claimed from the practising certificate fees (as occurs in Victoria, see below).

The Attorney General said:

The Government has not yet reached a concluded view about what activities are regulatory, and which are voluntary. However, vital services to regional and rural practitioners are unlikely to be affected by the changes. Services such as the membership department of the Law Society, which deals with the issuing of practising certificates; the Lawyers Assistance program, which provides help for practitioners who are having difficulties with their practice; and the provision of important information to practitioners about statutory and procedural changes are all unlikely to be affected by voluntary membership.

Other services comprise a mixture of regulatory and representational activities, and at least part of the cost of those services will be regulatory. These services include Law Society online, which gives all types of information to practitioners and is especially valuable for practitioners who do not practise in urban areas, and the library, which lends material to suburban and country solicitors through the DX system. I assure honourable members that I will take special care in the course of the implementation of these reforms to ensure that rural practitioners are not adversely affected by voluntary membership⁵.

The Hon Ian MacDonald in the Legislative Council in reply suggested certain activities that may be seen as 'membership' services (to be funded out of the voluntary membership fee):

...the government expects that most practitioners will elect to join the Law Society or the Bar Association because if they do not they will not receive membership benefits, such as access to the *Law Society Journal*, the members' dining room, social functions and precedent database⁶.

Before the Act was introduced the Bar Association and Law Society successfully lobbied for it to take effect on 1 July 2004, rather than in 2003, allowing them more time to prepare. In that time the Bar Council made certain changes which, coincidentally, assist the Bar Association to deal with voluntary membership. The dining room was closed, a loss-making operation which could not have been funded out of the compulsory fees. Ongoing education was made a mandatory requirement, and in that form the education is more likely to be viewed as a regulatory function. And more minor changes have been made, such as the merger of the History Committee into the Forbes Society, which means that the Bar Association can claim all of its committees do work which is in some way 'regulatory'.

Ian Harrison SC expects the Attorney General to take a broad view as to what is 'regulatory'. He said that the Bar Association has done a significant analysis of its expenditure, examining what is properly characterised as membership functions as against regulatory functions.

We are not a social club anymore. Most of our activities are related to our statutory role. While it is difficult to be precise because of the overlap of certain activities, in excess of 90 per cent of expenditure would fall into the regulatory function category. If that is accepted the practising certificate fee will be substantially similar to the current fee. I am confident that when the government sees the analysis that we have done it will agree with our costings. In that circumstance we will continue to receive the moneys we need to operate effectively.

The association is no doubt hoping its relationship with the Attorney General, and the reputation of its hard-working Executive Director, Philip Selth, will stand it in good stead. Ian Harrison SC said: 'the Bar Association has a very good relationship with the Attorney General. One of the great achievements of the last two presidents has been the

development of a close working relationship with the Attorney General to the significant benefit of members.'

This relationship is based in large part on the association's approach of providing high quality advice on proposed legislation. This is not well known because the association's efforts are not well publicised, even to the Bar's own members, as the advice is sought - and given - on a confidential basis⁷.

Yet, however highly the Attorney General regards the Bar Association, the approach that he takes (and the regulations that are made) will have to be broadly consistent with the approach he takes in respect of the (much larger) Law Society.

What has occurred elsewhere

Victoria has had voluntary membership, in theory at least, since 1996. However, there are certain practical factors unique to the Victorian Bar which mean that virtually every barrister in Victoria is a member of their professional association.

A certificate to practice in Victoria costs \$160 in the first year and \$200 thereafter. On top of that are the 'voluntary' subscription (membership) fees for the Victorian Bar. The fees for 2003 in Victoria are compared with those in NSW in the following chart⁸:

As David Bremner, Executive Director of the Victorian Bar, explained to me, there are some important structural reasons why, notwithstanding that membership is theoretically voluntary, virtually 100 per cent of barristers in Victoria 'elect' to pay the subscription fees on top of their practising certificate fee. Indeed of about 1500 practising barristers, there are only two or three barristers in Victoria who are not members of the Victorian Bar.

First, the Victorian Bar, via Barristers' Chambers Limited, owns or leases most of the accommodation used by barristers. In order to rent from BCL one must be a member of the Victorian Bar. About 80 per cent of barristers in Victoria rent from BCL.

Years of practice	NSW		Victoria	
	Membership fee	Prac.certificate fee	Membership fee	Prac. certificate fee
Reader	\$2.20	\$100	\$161	\$160
1-2yrs	\$2.20	\$231	\$590	\$200
2-5yrs	\$2.20	\$745	\$640 - \$800	\$200
5-7yrs	\$2.20	\$1043	\$860 - \$960	\$200
7yrs +	\$2.20	\$1994	\$1020 - \$1980	\$200
Silk	\$2.20	\$4596	\$3320	\$200

Second, almost every barrister in Melbourne uses the services of one of 12 clerks who are licensed to act as barrister's clerks by the Victorian Bar. To obtain the services of one of those clerks a barrister must be a member of the Victorian Bar. There are those who practice without a clerk, but they are few in number.

Third, those who are commencing practice as a barrister in Victoria (unless they have experience as a barrister in another common law jurisdiction) must complete the Bar readers course in order to obtain a practising certificate issued by the Victorian Bar, and in order to be accepted into the course they must undertake to become a member of the Victorian Bar.

Fourth, about 95 per cent of the Victorian Bar practise from within the court precinct in Melbourne, and so have immediate access to all the facilities that the Victorian Bar can offer, including an internet service, a library and an internal telephone system. The NSW and Queensland Bars, by contrast, have many barristers who are not located within a five minute walk of their association's facilities, and so might have less reason to be members.

A fifth factor, not mentioned by David Bremner, may be the existence of a misconception amongst barristers in Victoria that they *must* be a member of the Victorian Bar in order to obtain a practising certificate. I spoke to three Victorian juniors in preparing this article, one of whom had been an honorary official of the Victorian Bar, and all told me that they had to be a member of the Victorian Bar in order to obtain a practising certificate, and that the only other option was to be a member of the Law Institute (and so practice as a solicitor-advocate, in the tradition of the great criminal solicitor-advocates, such as Frank Galbally). This misconception arises, it appears, from the fact that every legal practitioner in Victoria must apply either to the Victorian Bar or the Law Institute to obtain a practising certificate. Contrary to the misconception, those bodies (like the New South Wales Bar Association) are required to issue such a practising certificate to non-members who hold the relevant qualifications (and indeed David Bremner says about 15 per cent to 20 per cent of solicitors in Victoria are not members of the Law Institute).

The misconception is probably fostered by the fact that, unlike in NSW, there are two renewal forms, one for the practising certificate and one for subscription fees for the Victorian Bar. This means that, unlike the current NSW form, there is no need to highlight the fact that part of the fee is voluntary.

How much of the Bar Association's activities are 'regulatory functions'?

How much of the current practising certificate fee will henceforth become voluntary depends on how much of the Bar Association's current activities the Attorney General believes are associated with the regulatory functions of the association.

As noted above, the Bar Association's submission to the Attorney General is that in the order of 90 per cent of its expenditure would fall into the regulatory function category. If that is accepted the practising certificate fee will be substantially similar to the current fee and there would be little change to the current system.

Certainly, there is no doubt that there are a range of core activities that are purely regulatory. They include:

- a) the issuing of practising certificates, including maintaining a register of practitioners and providing that information to the public (including by way of a web-site);
- b) identifying professional indemnity insurance providers, negotiating appropriate policy terms and recommending to the Attorney General policies that can be approved;
- c) investigating and determining disciplinary matters involving barristers (this is funded by the Public Purpose Fund);
- d) providing annual reports to the Attorney General as to the activities of the Bar Council and its committees, as required by sec 49 of the Legal Profession Act; and
- e) drafting and revision of the *New South Wales Barristers' Rules*.

Of course those functions are in part done by people who also undertake other functions, which requires various costs to be apportioned.

There are other functions which are clearly non-regulatory, such as: social functions (Bench and Bar Dinner, 15 bobbars, liquor bar etc); the provision of assistance to barristers who are in financial or personal need; the fee recovery service; Bar Council elections; and its charity work (Barrister's Benevolent Fund and the Mum Shirl Fund).

The balance of the activities of the Bar Association, however, are not so easy to categorise, as they incorporate a mixture of regulatory and membership benefits. Some of those activities are discussed below. Many of these are, at least in part, 'regulatory functions' because that expression is defined to include activities that 'maintain professional standards of legal practice'. That definition, combined with the fact that sec 29A refers not just to the 'regulatory functions' but also to activities that are 'associated with the regulatory functions', allows the Bar Association to argue that the practising certificate fee can recover costs in respect of a wide range of its current activities, even if they are partly non-regulatory.

Education

The Bar Association conducts a readers course, which provides five weeks full-time training, principally in advocacy, but also in practice management, ethics, etiquette and court procedure. This could be viewed as regulatory (completion of the course is regulatory requirement and the course assists the public by



maintaining professional standards). It could also be characterised as at least in part as a membership service (in this case a service to its newest members, providing them with advocacy skills). Readers pay a \$600 fee to sit the three compulsory exams which they must pass to gain entry to the course, and a further fee of \$3000 to do the course. The reading programme generated an income of \$240,000 in the 2003 financial year, and so may not need much input from practising certificate fee income in order to continue unaffected.

The Bar Association also provides (an expanding) continuing legal education programme for barristers. This too could be said to both maintain professional standards in accordance with the requirements mandated to obtain a practising certificate, and also provide a service to members. As noted above, in Victoria their programme is partially funded out of the Public Purpose Fund. In NSW the Public Purpose Fund does not fund continuing legal education, and that is not likely to change. Given that 'regulatory functions' are defined to include activities that 'maintain professional standards of legal practice', the Bar Association may be right to claim that all of the cost of providing continuing legal education should be funded out of the compulsory practising certificate fee, but it is an example of an area where much has been left to the discretion of the Attorney General.

The library

The library performs an invaluable service to the Bar generally, and in particular to those practitioners who do not otherwise have access to extensive library facilities. That category includes those new to the Bar and many barristers who practise in the regions.

The library also provides research assistance in relation to disciplinary matters. It provides research to assist with preparing law reform submissions and with lobbying. It also assists in the continuing professional development programme.

Currently the library services are only available to members of the Bar Association, notwithstanding the fact that it is run

using income generated by the compulsory practising certificate fees.

That would have to change if the Bar Council were successful in convincing the Attorney General that all of the library costs are to be recovered from the compulsory practising certificate fee. However, like for education, the situation will be more complex if the Attorney General allows only a proportion of the costs of the library to be funded out of the practising certificate fee. Certainly some level of funding is likely to come from the practising certificate fee, given the statements of the Attorney General made in the reply speech on the second reading of the Bill (set out above) as to the important role the Law Society library plays for regional solicitors.

The library is an expensive (and much loved) operation. If the Bar Association were not able to have most or all of its costs covered by the practising certificate fee, then some difficult decisions may have to be made if increased membership fee income did not make up the lost practising certificate fees.



Disciplinary functions

Currently the direct costs of the association's disciplinary functions (including legal fees and cost of employing the Professional Conduct Division staff) are recovered from the Public Purpose Fund. That will not change. However there are indirect infrastructure costs that the association currently covers from its general revenue. Such costs include administration and management costs, IT support, providing reception services and library services. Issues relating to whether to issue or cancel a practising certificate for example can involve extensive time and effort on the part of the Executive Director and Bar Council (who in turn require administrative support), and those costs are also currently borne by the practising certificate fee.

The Bar Association expects that the Attorney General will accept that some proportion of the overall administrative costs

of running the association should be payable out of the practising certificate fee, in proportion to that level of the overall activity that can be said to be associated with the regulatory functions, including its disciplinary functions.

Legal assistance

The Bar provides a legal assistance referral scheme. It runs two duty advocate schemes, and assists in providing pro bono services by barristers. The administrative support cost is funded out of the Public Purpose Fund (and they would continue to be so funded). However, like the disciplinary functions, the Public Purpose Fund does not cover the cost of administrative and managerial overheads.

Publications

The Bar has three principal publications, *Bar News*, *Bar Brief* and its web site. The web site includes regulatory information, including access to the register of practitioners, information as to disciplinary matters, information for the public as to how to access legal services, information for those interested in coming to the Bar and information for members regarding regulatory requirements. It also, of course, provides members with information about services (including hybrid services, such as education). As noted above, in the reply to the second reading speech the Attorney General said that the Law Society's service 'Law Society Online' comprised a mixture of regulatory and representational activities.

Similarly *Bar News* and *Bar Brief* could be said provide both regulatory and membership services. For those reasons it might be expected that some part of the cost of providing these publications will be funded out of the compulsory practising certificate fee, with the balance to be funded out of the membership fee.

Policy formulation and submissions

A somewhat hidden but significant activity of the Bar Association is its role in developing policies and submissions relevant to legal reform. 'Lobbying' by the Bar Association for the benefit of its members would clearly not be a 'regulatory' function. However where the Bar Association is participating in debate about legal regulation of the Bar and the legal system more generally, it is fulfilling a role that the Act recognises and expects it to play⁹. Further, many of its contributions to law reform in areas unrelated to the pecuniary advantages of its members could be said to be for the public good. These activities include the work of most of the association's 17 committees. Again, the Attorney General may well take an approach where part of the cost of this function is funded out of the compulsory practising certificate fee.

The Bar Association's ability to influence policy debate in the future is related to its ability to maintain a significant membership base. If the Bar Association were not able to claim

to speak for virtually all barristers, it would no doubt lose some of its credibility, as the Hon Helen Sham-Ho stated in debate on the Bill in the Legislative Council¹⁰.

Appointment to silk

One further role of the Bar Association is the appointment of new senior counsel. It is unlikely that the Bar Association would seek to identify that as part of its 'regulatory role'.

Currently the Senior Counsel Protocol stipulates that there is no requirement to be a member of the Bar Association to be considered for appointment to senior counsel, and one could not imagine that changing. Indeed, in recent years a barrister who was not a member of the Bar Association was appointed senior counsel.

The Senior Counsel Protocol provides for the Senior Counsel Selection Committee to comprise the president, senior vice-president and three other senior counsel nominated by the president and approved by the Bar Council, not more than one of whom may be a member of the Bar Council.

If the Bar Council was elected from a membership base that did not represent (virtually) all barristers, then the legitimacy of a selection made by those appointed by the Bar Council would be capable of being questioned. And if there was to be any antagonism in the future between those who maintain their (more expensive) membership and those who choose to refrain from being members, there may arise a perception that non-members will find it harder to obtain silk.

Encouraging membership post July 2004

One would hope barristers will remain members in the new 'voluntary' era because they recognise the importance of being a member of the association which represents their interests, and recognise the great range of activities successfully carried out by the Bar Association.

However, unlike in Victoria, there are currently no structural reasons why high membership would be ensured in circumstances where there is a substantial financial disincentive to maintain Bar Association membership.

Ian Harrison SC is confident that most current members will retain their membership under the new regime. He points to the fact that year after year voter turnout in Bar Council elections is over 50 per cent, which is high compared to equivalent elections in other places where voting is not compulsory. 'That is a good indicator that there is likely to be an insignificant drop in members when so-called voluntary membership comes in. We are the biggest independent referral Bar in Australia, and one of the top three or four in the world. Our proud history is not lost on our members when they give consideration to being a member of a professional body such as ours.'

Inevitably the change will place pressure on the Bar Council to come up with ways to encourage membership in the way that other voluntary organisations, like the AMA, do. The relatively small membership base however will make it harder to offer significant discounts on products such as insurance, banking, hotel, hire car, and other services, which such organisations offer to encourage membership.

Mark Richardson, Chief Executive of the Law Society of New South Wales, wrote in the society's last annual report:

The Law Society will be offering packages of benefits, services and products on an exclusive basis to solicitors who wish to remain members of the Law Society. Non-members may be able to access a few Law Society products, but that access will be available only on a commercial basis without the discounts members will enjoy.

Currently the Bar's continuing education programme is free for members and non-members. Of course, if the cost of providing continuing legal education were in the future to be partly or entirely funded out of the membership fees, the Bar Association may feel justified charging non-members to attend the courses. In circumstances where, coincidentally, continuing legal education has just become mandatory for the NSW Bar, this might provide a strong incentive for barristers to remain members (although there is no requirement that barristers must obtain their continuing legal education from the Bar Association's programme). The Bar Council has not suggested that it will charge non-members for providing education. If it did the Attorney General would have to consider whether the charges for non-members were appropriate given the extent to which the education services were funded out of the compulsory fee.

Similarly, if the library was not to be substantially funded by the compulsory practising certificate fees, then possibly the current policy of limiting access to members may be continued, or non-members may be charged a fee to use the library.

Such measures might encourage continuing membership, but would not of themselves ensure a continuation of the closed shop. There is however the potential for a change which would encourage almost universal membership. It is the potential for the association to enter into a scheme to cap the professional liability of its members.

The Bar Association is in the process of making an application to the Professional Standards Board of NSW to register a scheme under the *Professional Standards Act 1994* (NSW). Such a scheme would, if accepted, limit the civil liability of the association's members to a pre-set cap. The cap however would not apply to damages for personal injury (although the Bar Council is pressing for this anomaly to be removed), and would not protect a professional from claims made under federal legislation, such as the *Trade Practices Act 1974*.

'The new system provides an increased potential for a future attorney general , if so minded, to influence the activities of the Bar Association. In that way the legislation could make it harder for a future Bar Association to actively and publicly oppose the government of the day.'

Importantly, because of the nature of the legislation, if the scheme were approved the cap would only apply to members of the Bar Association.

Steps are also being taken by Commonwealth and state ministers with responsibility for insurance matters to establish national legislation similar to the Professional Standards Act. The Commonwealth has committed itself to amending the Trade Practices Act and other relevant legislation to support professional standards legislation consistent with the current NSW and WA legislation¹¹.

As Chris Merritt of the *Australian Financial Review* has said, if such caps were available it would greatly assist associations dealing with the advent of voluntary membership, because lawyers would find they themselves in a situation of 'no ticket, no cap'¹².

Alternatively, the Bar Council may have to think about ways to obtain increased income other than by practising certificate fees and membership fees. One possibility would be to enter the legal education market, selling a premium seminar programme to solicitors. Young Lawyers, a division of the Law Society with three employees, runs a very successful CLE programme which has a turnover in the order of \$500,000 to \$700,000 per year. The much larger College of Law Pty Ltd had revenue of \$10m last financial year. Given that many CLE presenters are members of the Bar Association, there would appear to be the potential at least for the Bar Association to establish a competitive product which could be a money-spinner. This would best be done as a separate initiative to its own internal education programme, but drawing on some of the same material. Already there are internal seminars which are attracting a high level of interest from solicitors even though they are not being marketed outside the bar.

AG's ability to influence the Bar Association

From the outset, the Attorney-General, by deciding what activities can be funded from the compulsory practising certificate fee, will shape the direction of the Bar Association into the future.

The Bar Council is confident that the current Attorney General will be sympathetic to its submissions. Even if that is the case, the new system provides an increased potential for a future attorney general , if so minded, to influence the activities of the

Bar Association. In that way the legislation could make it harder for a future Bar Association to actively and publicly oppose the government of the day.

Under the Act the government can make regulations for determining what parts of the activities of the Bar Association are to be considered 'regulatory'. A hostile government could make or change regulations in a manner that reduced that part of the Bar Association's income that is derived from the 'compulsory' fees.

More subtly, a future attorney general might 'interpret' the Act (and any regulations) in a different manner, and not approve any practising certificate fee that fails to meet with that (new) definition. Also, as new services and activities arise, a future attorney general could take a narrower approach to the question of what percentage of their cost can be funded out of the practising certificate fee, influencing what new activities are introduced.

The amendments also provide the attorney general with the power to require the Bar Association 'to prepare and submit a budget' for such period of time as the attorney general directs, relating to any costs (or projected costs) that are to be recovered by the practising certificate fee; sec 29D. The budget is to 'include such information as the attorney general directs. In particular the attorney general 'may require the provision of information about the administration of the...Bar Association'.

The attorney general has also been given the power to appoint an auditor to audit 'all or any particular activities' of the Bar Association': sec 29E. That auditor is to determine 'whether any activities the costs of which are recoverable [from the practising certificate fee] are being carried out economically and efficiently and in accordance with the relevant laws'.

The current Bar Council believes it has little to worry about because it believes it is well regarded, and Philip Selth, Executive Director, runs a very efficient organisation. However it is quite possible in the future that a disgruntled attorney general could require the association to furnish a detailed line-by-line budget, audit every activity of the association, and take steps to reduce any perceived 'subsidy' of membership activities by a reduction in the practising certificate fee. The risk of such action may influence the Bar Council not to do things which might jeopardise its funding situation.

The future

The Bar Association is no longer the gentlemen's social club it was two decades ago (or at least, it is no longer a social club). There is every reason to conclude that the Attorney General will accept that a great proportion of the Bar Association's activities today are 'regulatory', particularly when one includes all those activities that 'maintain professional standards of legal practice'.

However, whether the Attorney General accepts that in the order of 90 per cent of the Bar Association's activities are 'regulatory' is a moot question. If the Attorney General determines a lower proportion, the result will be a correspondingly higher membership fee, which will influence the future role of the Bar Association and test the commitment of barristers in NSW to the Bar Association.

In the past, barristers who did not like the Bar Association could attempt to change it via the ballot box. In the future there may be those who choose instead to save money and simply opt out.

For my part I hope that does not happen. I believe it is important for professionals to be members of the professional association which represents their interests. However, I am afraid that in the new environment of 'voluntary membership' not all will share the sentiments of United States President Theodore Roosevelt who said:

I would undoubtedly join the union of my trade. If I were opposed to the policy of the union, I would join for no other reason than to help rectify that mistake. . . . In short, I believe in the union, and I believe that all men who benefit by the union are morally bound to help to the extent of their power in the common interest advanced by the union. Unions, while they consist of members, do not belong to the members, but rather, they hold in trust, something for those in the future.

¹ The current fees vary, based upon seniority and location. They are set out in a chart below

² *Law Society Journal*, February 1998 (1998) 36(1) LSJ 81

³ Second reading speech, Legislative Assembly, 10 April 2002, Hansard at p1341

⁴ Legislative Council, 11 June 2002, Hansard at p2923

⁵ Legislative Assembly, 8 May 2002, Hansard at p1836

⁶ Legislative Council, 11 June 2002, Hansard at p2923

⁷ Some indication of the range of work done by the Bar Association in this regard can be found in the Executive Director's reports contained in the last two Annual Reports

⁸ The NSW rates here are those applicable for those who are in private practice practising in Sydney. There are lower practising certificate rates applicable for those who practise outside Sydney and for those who are Crown prosecutors, public defenders and parliamentarians. There are higher membership rates for those who are not practising barristers, such as interstate barristers, retired practitioners and Judges. The Victorian membership fees have no discount for those who practise outside Melbourne. The Victorian membership subscription fees are different for each year of practice. The membership fees recorded in the chart are the range applicable for each band.

⁹ For examples of the work done by the association in that regard, see the Executive Director's reports in the last two Annual Reports, dealing with such matters as the national practice model laws project, and the significant amendments to the Legal Profession Act and regulations

¹⁰ 11 June 2002, Hansard at p2907

¹¹ Joint Communique of the Ministerial Meeting on Insurance Issues, Adelaide, 6 August 2003

¹² Chris Merritt, Hearsay column, *Australian Financial Review*, 1 August 2003.