BARRISTERS, SOLICITORS AND AMALGAMS: A TALE OF TWO CITIES

A paper by the Hon Alan Blow AO, Chief Justice of Tasmania presented to the AAL/AIJA/ALJ Enduring Courts conference in Sydney on 9 September 2023.[1]

The Sydney Morning Herald started out in 1831 as a weekly newspaper named the Sydney Herald. On page 1 of its first issue, there was a report of Governor Darling sending to England for the King's approval some regulations that had been made by the Supreme Court of New South Wales dividing the colony's legal profession into two "branches" – barristers, with a right of audience in the Court, and solicitors or attorneys with no such right of audience.

When the Supreme Courts of New South Wales and Van Diemen's Land commenced to sit in 1824, the fledging legal professions in Sydney and Hobart were not divided professions. There were no restrictions in place as to what sorts of work barristers, solicitors, attorneys, proctors or others were or were not permitted to undertake. That changed in New South Wales in the 1830's, and New South Wales has had a divided profession ever since. However no such change occurred in Van Diemen's Land and Tasmania has had a fused legal profession ever since 1824.

Division in New South Wales

The background to the division of the profession in New South Wales has been set out very thoroughly in a number of publications[2].

The ancient usage whereby only members of the Bar would be heard in the superior courts at Westminster was not a rule of law for the colonies. Rules as to admissions and rights of audience were made on a colony by colony basis.[3]

---

[1] Dr Elise Histed, the Supreme Court of Tasmania's Research Officer, has provided substantial assistance in the preparation of this paper.

[2] Bennett, JM, *History of Solicitors in New South Wales,* Legal Books Pty Ltd, 1984, Chapter 3; New South Wales Bar Association, *A History of the New South Wales Bar,* Law Book Co Ltd 1969; Bennett, JM and Forbes, JR, *Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century*, (1970-1971) 7 University of Queensland Law Journal 172–195.

[3] *History of the New South Wales Bar,* page 45.

The 1823 Charter of Justice under which the Supreme Court of New South Wales was established contained, in clause 10, a provision authorising and empowering the new court to "approve, admit, and enrol" barristers, advocates writers, attorneys, solicitors and proctors who had been admitted in Great Britain or Ireland and authorising those persons to "appear and plead" and "act for any suitor of the said Court". Clause 10 also prohibited other persons from appearing, pleading or acting in the new court, and authorised the court to admit additional persons as "Barristers, Advocates, Proctors, Attorneys, and Solicitors", but only if there was an insufficient number of such professionals in the colony who were competent and willing to act.

In September 1824 two men who had been admitted to the Bar in England, Robert Wardell and William Charles Wentworth, were admitted as barristers in the Supreme Court of New South Wales and immediately sought an order that the attorneys and solicitors then practising in Sydney retire from the Bar. They argued to the effect that, on a proper interpretation of the 1823 Charter of Justice, solicitors and attorneys had no right of audience. At that stage there were only ten lawyers practising in New South Wales – the Attorney-General, the Solicitor-General, Wardell, Wentworth and six attorneys and solicitors. Forbes CJ gave judgment against Wardell and Wentworth, holding that the charter could not bear the construction that they had sought to put upon it. However he said that he hoped that in time a separation of the profession into two branches would be accomplished.[4]

An opportunity to divide the legal professions of the two colonies arose as a result of the passage of the *Australian Courts Act* 1828. Section 10 of that Act empowered the judges of each of our two courts to make rules for various matters, including "the admission of attorneys, solicitors and barristers". In March 1829 a proposed rule, dividing the profession into two branches, was read out in the Supreme Court of New South Wales. The provisions of the proposed rule were debated in the Full Court on 1 June 1829. In a reserved decision on 5 September 1829, the Court announced that the profession was to be divided, provided that the rule would not take effect "until His Majesty's pleasure shall first be made known". Those then practising were allowed to choose which branch of the profession they would practise in. No other persons were to be admitted as barristers unless they had been admitted as advocates or

[4] ibid, pp 34-36

barristers in one of the King's courts in Great Britain or Ireland. Various qualifications for admission as solicitors or attorneys were also provided for.

As a general rule, regulations made in the colony became effective without Royal approval, but were subject to disallowance at His Majesty's pleasure. However the rules relating to the status of members of the legal profession were not to take effect until His Majesty's pleasure had become known because of the impact that commencement and subsequent disallowance could have on members of the profession. By 1831, concerns existed as to whether the rules made on 5 September 1829 had ever been sent to England for His Majesty's approval. It appears that nobody knew whether they had been sent or not. Governor Darling therefore sent those rules and certain others to the King in 1831 and publicly announced that he had done so. The report in the first issue of the Sydney Herald was not a stale news report of the making of the rules, but a report of the action taken by the Governor[5].

On 1 November 1834, after a delay of over five years, Forbes CJ informed the Bar that His Majesty's pleasure had become known and that the rules dividing the profession were in force. There were angry scenes. A number of attorneys and solicitors had assumed that nothing would ever happen, had failed to elect to practise as a barristers, and had lost the opportunity to do so. The result is that, ever since 1 November 1834, New South Wales has had a divided legal profession.[6]

Continued fusion in Tasmania

In 1823 the Charter of Justice for Van Diemen's Land contained the same provisions as to the admission of barristers and others as the 1823 Charter for New South Wales. However there was no move to divide Tasmania's legal profession. Some barristers were admitted to practise in the Supreme Court of Van Diemen's Land but, unlike Wardell and Wentworth, none of them appear to have taken any step towards the reduction of the rights or status of other admitted members of the profession.

---

[5] Bennett, JM, *History of Solicitors in New South Wales,* p 53
[6] *History of the New South Wales Bar*, pp 43-47

In 1831, pursuant to a provision in the *Australian Courts Act*, Van Diemen's Land was granted a second Charter of Justice. It explicitly provided for a fused legal profession. It provided for persons who had been admitted in various capacities to the superior courts in Great Britain and Ireland to be admitted and enrolled, and "to act as well in the characters of Barristers and Advocates, as of Proctors, Attorneys and Solicitors".

Although the Supreme Court of Van Diemen's Land was never expressly authorised to admit barristers to practise solely as barristers, it sometimes did that. A new roll of practitioners was commenced in 1831, and it is recorded in that roll from time to time that individuals were admitted simply as barristers, while most were admitted as barristers, attorneys, solicitors and proctors.[7]

In 1840 the Legislative Council of Van Diemen's Land passed the first statute relating to the admission of practitioners, 4 Vic No 29. Section 3 of that Act made provision for certain individuals to be "eligible for admission to practise as Barristers Attorneys Solicitors and Proctors".

No legislation has ever been introduced in Tasmania to prevent solicitors from practising as barristers, but from 1863 onwards there have been legislative provisions for individuals to be admitted to practise solely as barristers. There have also been legislative arrangements for individuals, after admission to practise as barristers and solicitors, to elect to practise solely as barristers.

The *Barristers and Attorneys Admissions Act* 1863 contained a provision, s 4, which authorised the Court to admit individuals as barristers only. They were required to pass an examination in general literature and in law, and to have resided in the colony for twelve months before admission, but they were not required to have worked as articled clerks.

A similar provision was contained in the *Barristers and Attorneys Act* 1874. However no such provision was contained in the *Legal Practitioners Act* 1888 or the *Legal Practitioners Act* 1898. From 1888 until 1952 the court was empowered to admit persons only as "practitioners",

[7] From 1824 to 1844 some 6 applicants were admitted as Barristers only, whilst 76 applicants were admitted as "Barrister, Attorney, Solicitor, Proctor". See *Supreme Court of Tasmania*, Roll of Practitioners.

and a practitioner was defined to mean a person "admitted to practise as a barrister, attorney, solicitor and proctor".

In 1952, the 1898 Act was amended to provide for interstate barristers to be admitted to practise in Tasmania as barristers. Similar provisions were contained in the *Legal Practitioners Act* 1959, and the *Legal Profession Act* 1993. It became common for interstate barristers, particularly Melbourne silks, to get admitted in Tasmania and appear in important civil cases.

In 1962 the 1959 Act was amended to introduce a system of fidelity bonds. As a general rule, firms and sole practitioners were required to obtain fidelity bonds, but the new provisions did not apply to any practitioner who "professes to practise only as a barrister and does so practise". From then on there were a number of practitioners who held annual practising certificates but were exempted from the fidelity bond requirements because they notified the Law Society of Tasmania that they were practising only as barristers. Most of them were politicians and academics who were hardly practising at all, but from time to time a number of practitioners, who had the right to practise as both barristers and solicitors, practised as barristers only, and did so on a full-time basis.

In 1972 the Law Society of Tasmania made some rules entitled the *Barristers' Rules of Practice* 1972. Under those rules, a practitioner who proposed to practise exclusively as a barrister was required first to cause his name to be placed on a practising list kept the Secretary of the Society. The rules contained various provisions that one would expect, including a cab rank rule and a rule prohibiting barristers from soliciting business. Previously Tasmania had had no written rules as to the conduct of barristers.

A number of Tasmanian practitioners were appointed as King's Counsel and subsequently Queen's Counsel between 1950 and 1998. Before each appointment, the appointee gave undertakings to the Chief Justice that he (they were all male) would practise only as a barrister, and would abide by the conventions applicable to His/Her Majesty's counsel.

It was not until 1983 that a group of barristers commenced to share chambers together for the first time in Hobart. They occupied part of a building named Treasury Chambers. It had been given that name by its original occupant, a company that carried on business as a wholesaler of wines and spirits. The members of those chambers moved out in 1991, going to a building

that was originally a malthouse and establishing Malthouse Chambers. There are now several sets of barristers' chambers in Hobart, as well as a number of barristers practising in the north of the State.

Since 1983 Tasmania, like the other Australian jurisdictions with fused professions, has had a recognisable separate bar. The Tasmanian Independent Bar, as it was then known, was represented for the first time on the Australian Bar Association in 1995. The Tasmanian Bar Association Inc is now also a constituent body of the Law Council of Australia.

The arguments about the desirability or undesirability of divided or fused professions are beyond the scope of this paper. However it is worth mentioning that the late Campbell McComas once addressed that subject whilst masquerading as the President of the Law Society of England and Wales. He told his audience that a man who cannot afford the services of a barrister should always take special care to ensure that he never needs one.