From the Chief Justice

At a Bar/Bench luncheon held on 29 August last, our Chief Justice, Brian Martin sounded some ominous warnings about the future of the legal profession. He also foreshadowed significant reforms in court procedures and methods. His comments about the lack of a sufficient number of judges are particularly worth noting.

"It is quite some time since we have been able to gather together in such an atmosphere. We have all been just a bit too busy and I regret that diverting available time and resources into organising a social function does not always have the priority which perhaps it should have, particularly if relationships between the Bench and the Bar are to be fostered and maintained. After all, we do stand together these days facing significant attacks from many quarters which call for a degree of unified resistance.

The environment in which we work has significantly changed in recent years. Standard, old-fashioned, and it may be said, conservative practices have not adapted as well as they might to the significant and quite revolutionary changes which have permeated society. Amongst the great demands generated both by clients and governments is for measures to reduce cost and delay in the workings of the courts. That is not just as a means of producing greater client satisfaction in the judicial process, but to enhance the process itself as a means of resolving civil disputes in particular. If the profession and courts do not respond then people will look elsewhere.

One possibility is greater use of alternative dispute resolution methods. That should not be seen as alternative, in my view; that is as an alternative to the courts, but as additional dispute resolution techniques made available by the courts. That would be as part of a fresh concept of judicial functions and services available through the court structure. The litigant still comes to the courthouse, but on arrival or not long afterwards, and as occasion arises during the course of proceedings, opportunity is taken to professionally assess the nature of the issues and offer the most appropriate service to assist in resolution of them. Perhaps it remains in the adversarial system, but if evaluation shows another more suitable way, then it should be offered. Mediation, conciliation and arbitration arising as a result of neutral evaluation are all developing techniques not only designed to reduce cost and delay, but to give a greater prospect of litigation satisfaction. That does not mean that the judges and the profession are to be sidelined. Far from it. It means that we need to look to revising our skills and methods so as to remain part of an expanded role and not be marginalised as an antiquated and irrelevant method of doing business.

It is a broad vision, but if grasped and accepted it suggests a possible means of meeting emerging substantial challenges to the traditional processes. For example, there are some who would radically overhaul common law heritage and move to the continental civil approach to civil litigation. The inquisitorial approach where the judge has far more to do with it than here. Leaving aside the massive upheaval that it would bring about, it cannot be confidently asserted that that is a system without its own problems. Recent information indicates that some of them are looking at our way of doing things.

In the meantime what have we been doing of recent times, and what is proposed for the near future?

A few years ago, this court was among the earliest of those which now throughout Australia practice a form of case management. It is different from place to place and rightly so because of different conditions and volumes of work.

We cleaned out the Registry of all old files and in the course of that there was a spur to settling some matters which had been hanging around unattended for a considerable period. Over time each remaining file was brought under a degree of control by the court. That measure depended upon a number of factors, but it was a beginning and helped attune the profession and the litigants to the emerging new approach. Judges and Master also participated on the learning curve.

No longer was the process of litigation to be left entirely to the parties and their advisers; consensual delay was a thing of the past, and all of that in the broader interest of those wanting access to the court. Order 48 was formulated and of recent times its operation has been evaluated and amendments are now proposed. That is in the normal course of established good practice. Notwithstanding some perceptions that the system was not working, or not working to its greatest advantage, a comparison with the former hands-off approach demonstrates that it was justified and modifications only are called for.

Of recent years we have commenced to keep statistics, not just simply numbers of lodgements each year, minus matters disposed of, but in relation to the various categories assigned under the case management system, the number of such cases under the control of each judge, the progress of the matters, the time it takes from lodgement to setting down and the time it takes from setting down to hearing. From time to time there are distortions due to factors beyond the court's control, such as the increase of jurisdiction in the local court, which may mean a significant drop in new matters being brought here, but present indications are no significant drop in the number of trials.

Of recent times our attention has been forced to concentrate more on the criminal jurisdiction. Traditionally in this area the courts have taken a hands-off approach. The interests of the state and the accused are somewhat different from a plaintiff and a defendant having a contractual dispute. Nevertheless, it became more and more apparent as the numbers increased and resources remained relatively static, that it was necessary to try and introduce a modest degree of judicial oversight.

My main concern was the late plea. Days set down for trial, abandoned at the last moment without a chance of getting another case on, although no doubt welcome to the judge, it does nothing to shift the list. As I say, no doubt the judges enjoy the prospect of a few days out of court, but the lists have become such that there is little relief in that pleas, Justices' appeals and other short matters which can be dealt with on little notice are invariably wheeled in. Our criminal statistics extend over a greater period of time and are probably more reliable than the civil jurisdiction, but by way of example I can say that of recent years the number of new matters brought here has increased significantly. At the end of 1995 we had 151 files covering 963 offences and at 30 June 1997, 269 files covering 1439 offences. In 1995 we dealt with 129 pleas and to 30 June 1997 190, 40 trials then as opposed to the 53 now. Some of those trials have been significantly longer than previously.

Some proposed rules have been drafted by Justice Mildren and circulated for comment with the authority of the judges. We will be turning to further consideration of those rules in the light of comments from the profession shortly. The objective is clear – try as best as we all can to focus on what the case is about, get the charge and particulars plainly stated as early as possible, and try to ensure that early indications of plea or trial are firmer than they are at the moment. That will depend on cooperation between the Director and those persons representing accused persons, all to be managed within an overall idea of not compromising the rights

continued on page 17

From the Chief Justice

continued from page 16

of the accused whilst at the same time trying to advance the interests of the community in seeing criminal matters dealt with as quickly as possible and without undue cost.

It will require particular involvement of the Aboriginal legal aid services which may require more resources and improved management and legal skills. With respect to those practitioners who undoubtedly do their very best, the level of legal skills available need significant upgrading. Too often the change only occurs when more senior counsel briefed to appear arrives on the spot and gives advice based upon mature consideration of the material. By then the court resources are committed, and often times cannot be redirected.

One of the aids to reducing cost and delay in all jurisdictions will arise from the imminent installation both in the courthouses at Darwin and Alice Springs of in-house video-conferencing facilities. I am told that all necessary approvals have been given. The technology to acquired is of the highest standard. It will be used for obvious purposes like receiving evidence from within and without the Northern Territory, for instance as between Darwin and Alice Springs and vice versa and anywhere in the world virtually, where witnesses may be at the time a trial is being conducted. Direct links between the courthouses and the jails will be established (the jails already have their video-conferencing established). Considerable savings in costs are envisaged as a result of the obviating necessity to bring every prisoner to court each time that the prisoner's matter is to be mentioned. Justice Bailey is working out some of the protocols about this, but I envisage that as a general rule a prisoner will not be brought in for arraignments, but will be at the other end of the video-conferencing system able to see and hear what is going on and the court will be able to see him. The very considerable cost and security risks of transporting prisoners to and from jails and keeping them in courthouses in close proximity to members of the public will be reduced. I am sure we have all seen examples of a witness, maybe Dr Lee, maybe Mrs Kuhl or a policeman in the chain somewhere, who arrives, spends a short time in the witness box and then goes back to Darwin. The airfares, accommodation and other expenses, to say nothing of the disruption to the witness' normal work will all be significantly reduced by the use of the new facilities. We already have experience with taking evidence in criminal matters from remote locations, albeit within the courtrooms, and I see no significant distinction between that and what is the proposed use of the video-conferencing arrangements. By the way, it might also be possible to arrange for the services to be used when a legal practitioner wants to speak to his client who is in jail. The details of that need yet to be worked out, but are not beyond the realms of possibility. It is envisaged that there will be fees to be paid for the use of the equipment, but they will be nothing like the cost which would be otherwise incurred in having a witness brought to the courtroom.

Now they are all pretty much internal matters, but are happening at a time when governments are pushing the profession to adapt practices and become more attuned to the running of their business as if in competition in trade and commerce. The dangers for that in service to the public in a professional manner are plain. The time-honoured ethics of the conduct of legal practice and relationship between client, fellow practitioner and the court are threatened. The growth of the mega-firm with the like of accountants and other people in partnership pose significant questions, the answers to which may not be altogether pleasant. Solicitors are usually pretty careful about whom they take on as a partner and there is at least a common understanding between partners as to their respective rights and responsibilities and ethical behaviour. A commonality may not be there if the conduct of legal practice is to be opened up to other than legal practitioners.

The use of modern technology also requires to be carefully considered as an external force. It can undoubtedly be a great advantage and possible cost saver. But how often do you return to your letter or opinion to be corrected on the word processor, more than once, simply because it is easy to do? A few years ago, you would fix the alteration with an ink pen, remember them? Letters were carefully constructed in a courteous manner even if the message was meant to be firm. The facsimile message not only changed the means of communication but the communication itself. Mobile telephones provided the means of demanding instant answers regardless of circumstances. Communications are no longer a means to an end but may be an end in themselves if sought to be used oppressively. Computerised databases open the field of legal learning to anyone with access to a computer and modem. Unreported judgments pour off the printer, sometimes selectively; the unrepresented litigant has as good an access to authority as does the most senior practitioner. All of this needs to be carefully monitored to ensure injustice does not ensue.

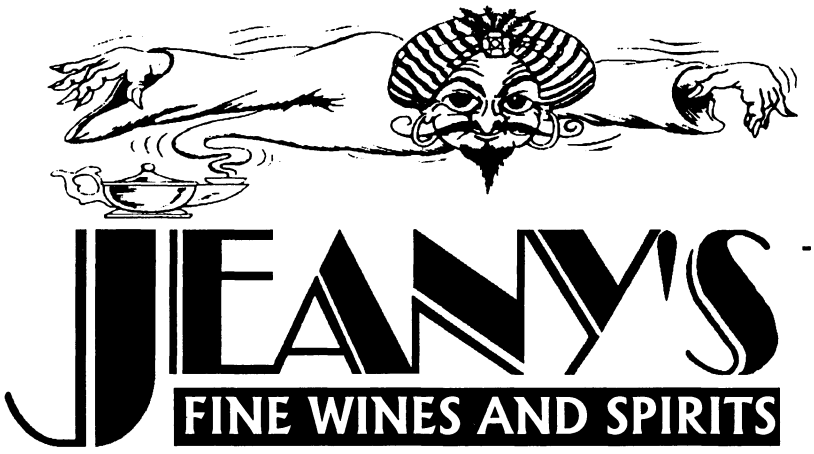
Although there is much more to be talked about, I will close with an observation or two on particular aspects of judicial independence. That independence can be offended by a lack of adequate resources. The judiciary must have a fair chance to discharge its functions without undue pressures which can arise from overly burdensome volume of work. I have already mentioned some of the statistics, but it is not just the regular work which must be disposed of. Recent events show just how fragile is the ability of the court to adequately cope. Occasional lengthy trials, regular overruns in standard matters, unforeseen complexities, illness or other personal causes all bring about disruptions to orderly conduct of business. In a small court there is no fat, no room to try and get on with the work in the face of disruption, without having to reorganise lists and call upon judges to do more than their already allocated tasks. The fact is, we are all booked up months ahead. To this ought to be added the immediacy of the requirement to deal with issues arising from fresh legislation such as mandatory sentencing. My quick estimate is that of the order of 15 judge days, not in the working budget, have had to be found to hear arguments in court in the last few weeks. In every case time was needed out of court for consideration. Who knows what might be next?

Justice Bailey's appointment was not an addition to the Bench. He replaced the former Chief Justice four years after he retired.

As from next year all judges will be taking the entitlement to long leave. The present plan is for at least one judge to be absent for about six months in every year from now on. That is the way it is. I do not need to do the sums for you. 26 judge weeks or thereabouts will no longer be available in each year. That means a significant reduction in judge time in crime and in the civil jurisdiction in both Darwin and Alice Springs. A Cabinet submission seeking the appointment of an additional judge and/or of an acting judge for at least six months was deferred shortly before the election was called. That may be the reason, may be not. I trust that we will find out shortly.

On the public perception front, I think it likely that the published views of politicians and machinations of the local media have caused the court's reputation to be quite unfairly damaged. I need not go into the issues in particular, but I have an accumulation of extracts from newspapers, radio broadcasts and Hansard. Many of you have

continued on page 20



Petaluma Wines

Petaluma is widely regarded as Australia's pre-eminent producer of vineyard-specific premium table and sparkling wines. Petaluma was established by Brian Croser in 1976 and the House of Bollinger has been a major shareholder since 1985.

Petaluma wines are the result of defined production that involve several vineyard regions in South Australia:

They are:

- the Clare Valley where grapes are sourced for the production of Petaluma riesling;
- the Piccadilly Valley, adjacent to Mount Lofty, where pinot noir and chardonnay grapes are grown for the production of Petaluma chardonnay and Croser methode champenoise;
- Coonawarra, a mature vineyard for the production of Petaluma Coonawarra, a cabernet sauvignon and merlot-based wine;
- Sharefarmers Vineyard, Coonawarra provides grapes for Bridgewater Mill sauvignon blanc and chardonnay and Sharefarmers cabernet, malbec and merlot-based wines.

In 1984 Petaluma produced its first sparkling wine from Piccadilly Valley fruit and purchased the historic Bridgewater Mill, built in 1860. In 1986 Petaluma released a range of wines under the Bridgewater Mill label, in 1992 purchased Tim Knappstein Wines and in 1994, purchased Mitchelton Wines.

1986 Petaluma Riesling: intense lychee, nashi pear and tropical fruit aromas are matched by a sweet fruit palate and a dry lingering finish. An exceptional wine.

1995 Petaluma Coonawarra: 1995 was another excellent merlot vintage and the cabernet sauvignon performed very well, aged in new Nevers oak barriques for 18 months prior to bottling. 1995 was an extremely small vintage in Coonawarra.

1996 Petaluma Chardonnay: aromas and flavours of ripe peach and nectarine overlaid with smoky oak. Typical of Piccadilly Valley chardonnay of a very good riping year.

1995 Croser: 80% pinot noir and 20% chardonnay grapes for a high quality Australian sparkling wine. Two years on yeast lees in the cellar of the Bridgewater Mill have produced complexity and added texture to this, the eleventh vintage of Croser.

1995 Bridgewater Mill Shiraz: matured in French oak barriques for two years prior to bottling. Exotic spices and berry fruits combine to make 1995 Mill Shiraz one of the best.

1996 Bridgewater Mill Sauvignon Blanc: owes the core of its tropical fruit zest to sauvignon blanc grapes from the Sharefarmers Vineyard in Coonawarra; one of Australia's best of style.

1995 Sharefarmers Red: composed of 55% cabernet sauvignon and 45% malbec and was matured in french oak barriques for 18 months. An elegant, spicy and cedary style which has become the hallmark of the Sharefarmers Vineyard.

The Petaluma range of wines will be availableat a special members' price for October.

From the Chief Justice

continued from page 17

attempted to put the record straight, and for that I thank you. But it is a very hard job with an unsympathetic executive and unintelligent press determined to push a line regardless of the damage which may be caused to one of the constitutional foundations of our society. Fair criticism can be accepted and used to advantage. The other cannot. Populist views espoused for short term advantage without regard to the consequences for the longer term stability of the judiciary is to be condemned. It has the potential to deprive the community of one of the linchpins of stable democratic society.

I am presently investigating how the court might better represent itself to the community and protect its legitimate interests. In other jurisdictions courts have found it necessary to take on full-time media liaison officers. I am not convinced that it is necessary here, yet, but certainly the court needs advice as to how it can better represent itself in the public forum in a proper, measured and responsible way.

But I have gone on quite long enough. There are any number of issues which no doubt occur to you which are of significance in this day and age for the environment in which we try and practice the law, but these matters are not confined to the Territory, nor indeed to Australia. Last weekend I was at the meeting in Sydney of Asia-Pacific courts and court administrators, involving chief justices and judges from a number of nations to our north and in the Pacific. The sorts of problems that I have talked about are not uncommon and it is undoubtedly time for us to all get back to basics.

In that vein, I am reminded of the experience of one of the delegates at the conference who took the opportunity to go to Taronga Park Zoo during a day off. As he was walking around the zoo, he became conscious that sitting on a bench nearby was a sizeable monkey and on approaching, he saw that it had a book in each hand and appeared to be studying it. Closer still, and he recognised that in one hand was the Bible and in the other, Darwin's *Origin of the Species*. Assuming that the monkey must be literate, he enquired as to why he was reading those particular books. The monkey looked at him, put his head to one side and said, "I want to solve one of the imponderables of life – am I my brother's keeper?"

That's it. Thank you."