

**Address Given at the 2018 Tax Bar  
Association Annual Dinner**

May I begin by firstly congratulating Michael Flynn QC for his 2 years as president of the Tax Bar Association. I congratulate him on launching a very important and exciting initiative being the Tax pro bono scheme. No one has a legal right to representation in Australia, but through the generosity and kindness of the Victorian Bar, the profession is able to close the gap for those most in need. Those most in need can even include taxpayers. The presence of pro bono representation in tax appeals will greatly assist the members, senior members and deputy presidents of the AAT and the justices of the Federal Court. To Michael, and to all those members of the TBA who have made this scheme a reality, I thank you.

May I also congratulate Terry Murphy QC on his ascension as President of the Association and Daniel McInerney on his elevation to the Vice presidency and Eugene Wheelahan, S.C. on his appointment as Treasurer. For the next two years the Association will be in their very fine hands, and I wish them every success for the future. With names such as these they may transition you all to what might end up being called the Celtic Tax Bar Association.

I finally congratulate Eugene and Frank O'Loughlin, S.C. on their appointment as silks. It is a wonderful and noteworthy

achievement and I am personally thrilled for both of them. Note, however, more Irish names.

Tonight, I do not propose to address you on any grave or weighty matters. My theme is more light hearted, and if I had more time, what follows might even have been humorous. With the recent passing of George Beaumont Q.C., my theme tonight is history. The history of the Bar is important, and that includes this Association. That history will be lost if not recorded. Sir Kevin Anderson was a judge of the Supreme Court from 1969 to 1984 and was Chairman of the Bar in 1966-67. He wrote a wonderful book called "Fossil in the Sandstone" which describes life at the Bar from the close of the Second World War to his elevation to the Bench. It is a richly rewarding read - but where can one find something equivalent for the period after 1969?

The Tax Bar Association's own history will need to be recorded at some point. It was formally only a section of the Commercial Bar Association. Its formation was inspired by the existence of the Revenue Bar Association of the London Bar. It broke away and asserted independence in about 2006. I am now told, but was not then informed, that we were seen by "Commbar" as setting a dangerous and regrettable precedent. On one view, it was a case of "Texit" - perhaps setting a precedent for others.

What was it like to practice tax law when I joined my firm in 1991? As it happens, I think I caught the tail end of the way in

which the legal profession had operated for the preceding 100 years. It is now very different.

Let me give you an example. Legal research is now done by looking at a high definition screen and traversing a vital place – called Austlii – which in my case will always be *classic Austlii*. That, of course, was not possible in 1991. Legal research was undertaken manually. We consulted books, which now have no value and are never used. We used the Australian Digest and laboriously completed our research by consulting each annual volume of updates – one by one; we consulted the English and Empire Digest for Commonwealth cases; we used Halsburys (I still used my first edition when at the Bar – *when desperate*); and we used the indexes of the law reports. It was a common research task for tax lawyers to consult the consolidated index of the Australian Tax Cases, published in 1989, which indexed tax cases from 1969, and then to consult the index for each annual volume thereafter. I am still waiting for a new consolidated index for the period after 1989 – perhaps this is a job for one of you. Then there was the large set – bound in maroon vinyl – of every Explanatory Memorandum and Note, for every tax bill that had ever passed the Federal Parliament. I think it petered out in the late 1980s.

On each solicitor's desk was a large plastic box. This was a new thing. It was a type of computer. The screen was black on which appeared, illuminated in a *ghostly* green, words and numbers. There was no email – but a form of basic internal electronic

messaging called "Wang". This could only be used for simple communication. If you wanted to send something bigger, say a memorandum to a partner, this was placed in a thing called an envelope and physically delivered. A lawyer did not type. She or he was given a dictaphone. These were always used with night staff ready to type matters overnight. The lawyer to secretary ratio was 2 to 1 and sometimes 1 to 1. Everyone had an office. There was no human resources department.

Clients still undertook end of tax year structuring. The High Court had yet to hand down **Peabody** and there were no cases concerning the operative provisions of Part IVA until **Peabody** was handed down in the Federal Court at first instance in 1992. Junior Counsel for Ms Peabody was Justice John Logan. Senior Counsel for the Commissioner is now the Chief Justice of Australia. The weeks leading up to 30 June were immensely busy as trustee resolutions were prepared, minutes of board meetings drafted and promissory notes circulated. We were urged to make sure that there were no small errors - such as a typo with the brand new thing called the ACN number - that might undo the path to the deduction sought, or to the elimination of avoidable tax imposts.

At the Bar, Greg Davies, Tony Pagone, John de Wijn and Justice Davies were all juniors. There was then another Justice Davies who sat in Sydney. The largest number of cases my firm had were sales tax classification disputes. My first case, assisting a senior

associate, was to gather evidence to support the proposition that the seating to be installed in the new stadium at the MCG was of a “kind ordinarily used for household purposes”. For that purpose, he gave me a camera and told me to venture out and take photos of chairs in different places; in houses, in schools, in churches, in restaurants and so on. I do not know whether he was seeking to establish the Socratic form of a chair in this way. The case never ran.

Who were the leading tax silks when I started? Sadly, neither walks this gentle earth any more. For a firm that acted for taxpayers – and that is all they could do then – the stand out silk was Neil Forsyth Q.C. The other was B J Shaw Q.C., whose canvass was much broader, and about whom others have spoken. I do not claim to have known Forsyth in any serious way but I wish to pause and say something about him because as I look around this room the number who knew him is getting smaller and smaller. In 1991 junior solicitors did then not talk to Queen’s Counsel. So my conversations with him were very brief indeed. Indeed, it was usually confined on my part to a semi-audible ‘Hi’. But I was a witness to many conferences, and an enthusiastic reader of many of his opinions. He was short, perhaps one could call him portly, bald and bearded. He had, I think, the largest set of chambers ever at the Victorian Bar, which seemed to comprise – although in fact it did not – one entire side of 500 Bourke Street at the old Latham Chambers. It contained a very extensive library, a grand desk and a very very long antique conference table, which –

I think in truncated form – may be found in the chambers of John de Wijn QC.

Forsyth was a wonderfully courteous and kind man. He gave his advice fearlessly and with complete integrity. Above all, he was an exceptional lawyer and an ineffable master of all fields of taxation jurisprudence. The future of many epic restructures or vital transactions turned upon whether he would bestow his blessings upon the client's endeavor. As it happens, I even had the privilege of seeing, and taking notes within, the famous Forsyth study at his home in St Vincent's Place which was the subject of the High Court decision in **FCT v Forsyth** (1981) 148 CLR 203.

Forsyth was a very great advocate, but I really knew his work from his written memoranda. His prose was magnificent. No one has written tax advice with greater lucidity. He rendered the most intricate agreement comprehensible and exposed with complete clarity the most complex of income tax provisions. In short, his written work was a joy to read. Forsyth's opinions were coveted by the firms and carefully stored for decades. In those days the written opinions of Queen's Counsel had a status only slightly less authoritative than that of a judgment of a superior court. In some case, solicitors would give even greater weight to a QC opinion, especially if it had been signed by Forsyth. Typed as they were on foolscap paper, Forsyth opinions were eagerly consumed by baby solicitors – in my case with wonderment – and embarrassingly often with puzzlement as I had, yet again, failed to follow the

argument. How could Mr. Forsyth know so much law? He was like an Olympic ice skater who makes ice skating look so very easy until you place your first foot on the ice.

Being a member of a National Court, I should not forget the Sydney Bar. In those early days I had yet to meet D H Bloom, Q.C., although with his then junior, Brendon Sullivan S.C., they seemed to be in every Sales Tax classification case. But I did encounter the great T E F Hughes Q.C. That was because, like so many tax lawyers at the time, I got swept up by the famous **Grollo** case. One day a book should be written about it. In any event the firm I worked for had briefed two silks to represent the Grollo brothers – Hughes and Ray Finkelstein – what a team! For a young man Hughes was proof positive that God sometimes bestows huge reserves of charisma on just one individual

In 1991, the written work of the inner bar was a vital part of the commercial fabric of Australia. Each firm had a store of the work of Forsyth, S E K Hulme, J D Merralls and B J Shaw, to name a few. Some large Melbourne companies, such as The National Mutual Life Association of Australasia Ltd – which no longer exists – did not need to go to Court but instead regulated its affairs in accordance with the wisdom of Senior Counsel. Sadly, those days have passed. Corporate Australia appears to be shy of the Bar – if not suspicious of it. That, in my view, is a mistake. Giving advice about the application of the law to *something* is ultimately about making predictions. What would a judge say if this issue were

ever litigated? The members of the Bar are best placed to make such predictions precisely because of their relationship with the Bench.

Neil Forsyth Q.C. was not a loud man; he was never aggressive and bore the title of his immense success modestly. He did not need to shout for his wisdom to become so well known. That reminds me of a story I have sometimes told about *another* wise man and the case of **McCormick v Manny**. Please indulge me. In 1831 Cyrus McCormick created a machine to harvest crops. Demand for this invention grew and in time attracted strong competition from rival machines. One of these had been created by a John Manny. In 1854 McCormick sued Manny for patent infringement. The case was to be tried in Chicago. A team of great East Coast lawyers was assembled. They decided to add a local lawyer who knew how the machine worked. The local lawyer worked long and hard on his case preparation. Letters were exchanged between him and the East Coast lawyers. But then the venue was changed to Cincinnati and the local lawyer was no longer needed. He was surplus counsel. But non-one could be bothered to tell him this and he continued to prepare the case - noting its new venue. He travelled to Cincinnati. On the first day of the trial he went to meet up with the East Coast team on the steps of the Court. They walked straight past him and refused to acknowledge him. They cut him. Stunned, he then went into the Courtroom but discovered there was no room for him and his books at the bar table. Initially he was ignored as the



team assembled their papers. The Senior East Coast lawyer then eventually told him that he was no longer needed. He was dismissed. He accepted his fate courteously. He showed no anger. Ashamed and intensely embarrassed he watched the trial from the public gallery. Imagine that happening to you whilst waiting to meet the Sydney Silk and instructing solicitors outside the High Court in Canberra! If that had ever had happened to me, I probably would have left the Bar. The name of that local lawyer was Abraham Lincoln. And, as President, he would 8 years later make that Senior East Coast lawyer his Secretary of State for War (Stanton). Lincoln had reserves of patience and forgiveness that we all can learn from.

**Steward J**

**29 November 2018**