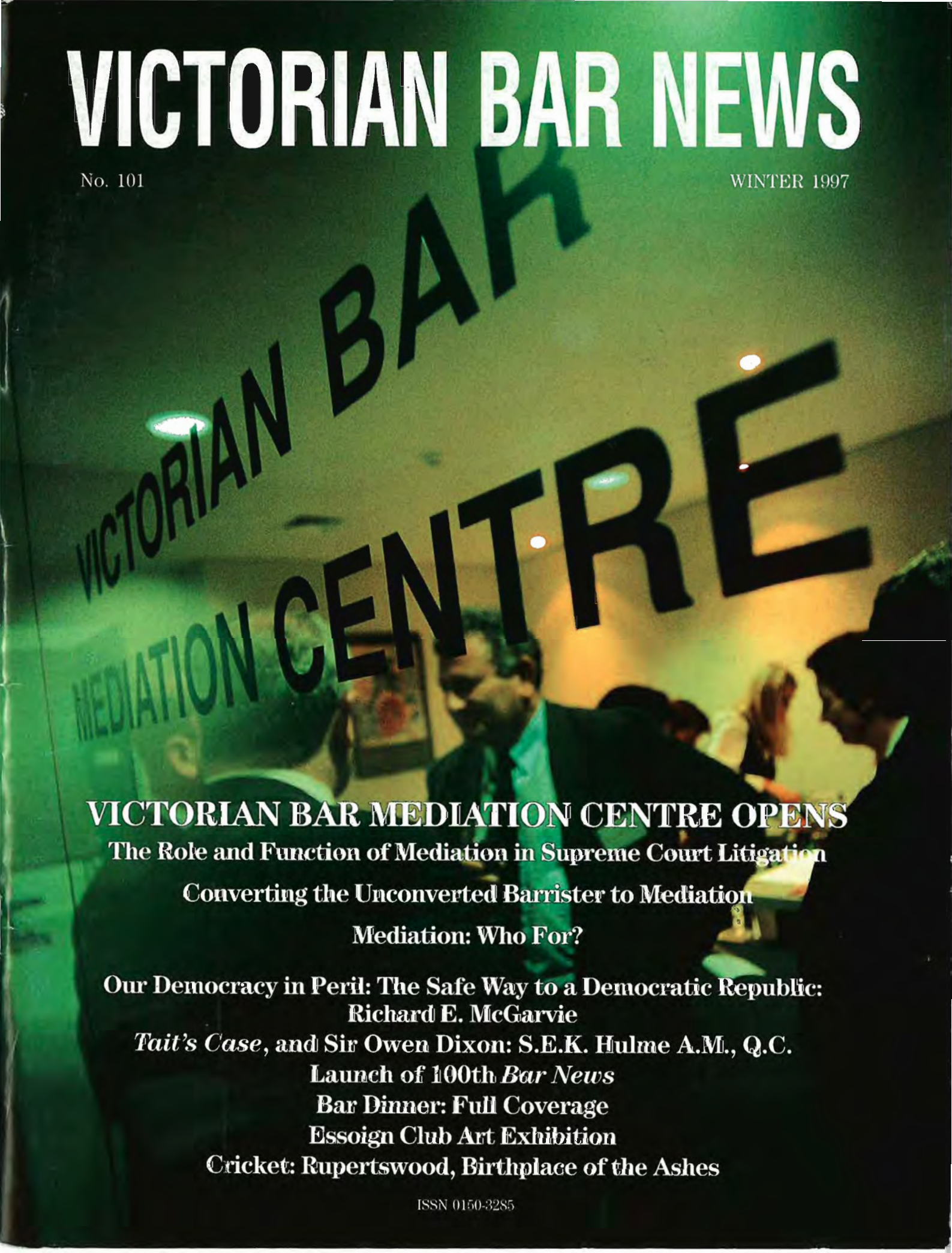
VICTORIAN BAR NEWS

No. 101 WINTER 1997



VICTORIAN BAR MEDIATION CENTRE OPENS

The Role and Function of Mediation in Supreme Court Litigation

Converting the Unconverted Barrister to Mediation

Mediation: Who For?

Our Democracy in Peril: The Safe Way to a Democratic Republic: Richard E. McGarvie

***Tait's Case*, and Sir Owen Dixon: S.E.K. Hulme A.M., Q.C.**

Launch of 100th *Bar News*

Bar Dinner: Full Coverage

Essoign Club Art Exhibition

Cricket: Rupertswood, Birthplace of the Ashes

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Welcome Justice Gillard

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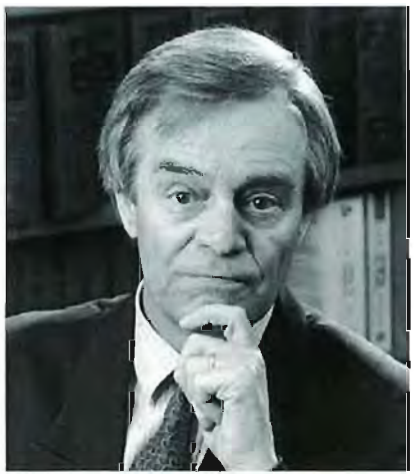

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B.A. Keon-Cohn Q.C. presents the Bar Dinner Speech

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for the year 1996/97
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On Robes, Rights, Retirements, and Republics

TO ROBE OR NOT TO ROBE

THE decision of the rank and file of the Bar on this question has been stated very clearly. There is to be no change.

The Bar Council called a general meeting of the Bar which decided on a show of hands to retain robes and wigs; and that view was overwhelmingly upheld by a poll of the Bar.

Irrespective of the merits or demerits of the decision, the editors must express concern at the (almost universal) practice which the Bar Council adopts in relation to general meetings of the Bar.

Many of us stayed away from the meeting on wigs and robes, not necessarily because we were apathetic in relation to the issue, but because we knew that, in all probability, after there had been a lengthy debate at the meeting and a vote taken on a show of hands, the meeting and the vote would prove to be abortive. The Bar Council would put the matter to a poll. Most of us are prepared to attend meetings — and certainly to speak at them — and even to vote — if the meetings have meaning. We are not, however, prepared to go through the frustrating experience of wasting time being party to the facade (or is it farce?) which general meetings of the Bar have become.

A NEW CAREER PATH?

The Australian Law Reform Commission's Issues Paper released at the end of April this year raises the possibility of introducing a European style judiciary to Australia. The suggestion is that judges be recruited on graduation and promoted through the ranks of a new branch of the civil service.

As we see it, professional judges could then be promoted on merit by an executive which could determine merit by reference to the good of the community. Judges so appointed who take over complete management of the cases before them and determine the issues on an inquisitorial basis might well process more cases more efficiently than does our present judicial system.

We can see much merit in such a course from the point of view of a government which prefers to have a judiciary that does not "rock the boat". If the legal rights of the individual are subordinate to the general interests of the State then the Issues Paper has much to commend it.

The President of the Commission, Alan Rose, . . . made statements which indicate a move towards what the new Chief Executive of Hong Kong would consider a more Chinese approach to justice.

The President of the Commission, Alan Rose, was interviewed in the June issue of *The Lawyer* and he made statements which indicate a move towards what the new Chief Executive of Hong Kong would consider a more Chinese approach to justice.

In an interview some three or four weeks ago, broadcast on the ABC, Mr. Tung Chee-Hwa stressed the difference between Western European and Chinese philosophy. He said, as well as we can remember his words, that in the west the emphasis is on the *rights* of the individual; in China the emphasis is on the *responsibilities* of the individual and the good of the *community*.

To quote an answer given by Mr. Rose to Michelle Grattan (the *Australian Lawyer*, 5 June 1997, p. 11): "There's no question we have judges and lawyers striving for a close to perfect outcome. What we're raising is a question as to whether that pretty low level of error is something which must attend all civil dispute resolutions, or whether the consumer, in a trade-off for lower costs and quicker resolution, is prepared to accept higher risk. What we see in judicial resolution is very little opportunity for trade-off of any kind. Is this area of government so different from other areas of government . . . We are asking if the users of the system are prepared to accept a different level of risk, in exchange for lower prices, both as taxpayers and consumers, and in having a service which is more consumer-oriented".

People who seek to enforce their rights are "consumers". That is true. They are, however, more than that. They are citizens who have rights. Those rights should not be removed or watered down in the interests of bureaucratic efficiency.

Should the criminal courts also become more "consumer oriented? It would certainly be more efficient if the arresting officer could conduct the trial and determine the penalty. This would save much public expenditure.

The Commission contemplates the possibility of watering down the powers of the High Court. After all, that court does on occasion cause more difficulties for the executive than did that "turbulent priest" who was murdered on the orders of Henry II.

In answer to a question from Michelle Grattan (*Australian Lawyer* p. 11) Mr. Rose said: "When you look at recent decisions of the High Court, we are getting an increasing tightening and elaboration of judicial power to the point where we are now looking at aspects of judicial procedure being fundamental to the Constitution. If that train of High Court decisions continues, we are very seriously asking whether that can be seen to be in the public interest. If judicial procedure is so hedged in by High Court restraints, we have only got one option — a constitutional change".

King John would no doubt have been very happy to have had Mr. Rose's assistance when it came to negotiating the wording of Magna Carta, as would William and Mary some 460 years later.

Judicial independence is a cornerstone of our democracy. The executive should be answerable to someone. However, the Australian Law Reform Commission appears to consider that judicial independence and the powers of the High Court may interfere with the "public interest" — as represented presumably by the wishes of the executive.

It is not often that one sees law reformers anxious to increase the power of the bureaucracy, reduce the power of the Courts and put efficiency before individual rights. Perhaps it is symptomatic of the increasing move towards authoritarianism in our society. Certainly it bears out Mr. Rose's claim that "this is the first review [of the legal system] to consider how judicial resolution might be 'root and branch' changed".

The obsession with "efficiency" and the public good (as represented by an all powerful executive), which appears to be the cornerstone of post-Thatcher economics and politics, ignores the fact that there are some things more valuable than money.

In an authoritarian state, of course, efficiency and cost effectiveness are what is important. "Justice" and the "rights of the individual" become of secondary importance.

RETIREMENTS AND NEW APPOINTMENTS

There has been a plethora of retirements and a flurry of new appointments. Jenkinson J., O'Bryan J., Southwell J., Nathan J., Judge Byrne, Judge McNab and Judge Murdoch have escaped from the treadmill of justice. The appointments of Gillard and Chernov JJ. and of Goldberg and Finkelstein JJ. have not only changed the face of the bench. Their appointments have also enabled more work to trickle down to us lesser mortals.

It is not often that one sees law reformers anxious to increase the power of the bureaucracy, reduce the power of the Courts and put efficiency before individual rights. Perhaps it is symptomatic of the increasing move towards authoritarianism in our society.

The editors regret that for reasons beyond their control not all of the farewells and welcomes which should have featured in this issue will do so. For "technical reasons" some of the farewells and welcomes have been carried over to the Spring issue.

THE AUSTRALIAN REPUBLIC — INDEPENDENCE FOR WESTERN AUSTRALIA?

In the light of the very vocal Republic debate the editors revisited the Constitution. We found that the Preamble of the *Commonwealth of Australia Constitution Act 1900* provides:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

Article III of the Act provides:

Proclamation of Commonwealth. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Article IV of the Act provides:

Definitions: "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

'The States' shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State'".

By 1 January 1901, the day subsequently "appointed" under Article III, Her Majesty was satisfied that the people of Western Australia had agreed to join the Commonwealth. Western Australians, however, contend that the vote to join the Commonwealth was not a truly representative vote, that the result turned on the votes of "Eastern Staters" working in the Kalgoorlie goldfields.

We are led to ask two questions.

1. In the light of the Preamble and Article VI of the *Commonwealth of Australia Constitution Act 1900* can Australia become a Republic without:
   (a) there first being a dissolution of the Commonwealth?
   (b) the sanction of an Act of the Imperial Parliament?
2. Is the whole Republican Movement part of a WA successions plot?

The Editors

After the *Legal Practice Act 1996*, Some More 'Intractable' Issues

OVER the past year the Bar Council has been required to put a great deal of time, effort, and anxious care into negotiating the reforms to the regulation of the legal profession introduced by the *Legal Practice Act 1996*. This process of negotiation has been, for the most part, successful, with no small thanks owing to members of the Bar Council, Association committees, volunteer labour and expertise offered by our members and, of course, the Bar Council staff. There are, however, some other more intractable issues.

LEGAL AID

The legal aid funding crisis has the potential to compromise the rule of law and the role of the barrister in Victoria. The Bar Council, together with the Criminal Bar Association, has attempted to draw attention to the dire implications of the cuts upon the public's access to justice and upon the administration of justice by our Federal and State courts. These efforts have involved private discussions with Federal and State Attorneys-General and legal aid bodies, submissions to the Senate Legal Aid Inquiry, and a monitoring of Victoria Legal Aid policies through our involvement on the VLA Consultative Committee. The Council is also responding by increasing resources for the Law Aid scheme and the Bar's Pro Bono scheme.

The legal aid funding cuts carry direct and indirect implications for the livelihood of many members of the Bar and, more recently, the Council has been concentrating upon this aspect of the crisis. I have written to the State Attorney-General and to the Managing Director of VLA protesting at the recent proposed changes to fees payable to private practitioners. These changes appear to have been fixed arbitrarily and were announced by the Board of VLA without forewarning to the VLA Consultative Committee or to the Bar Council. As the tables of fees offered to counsel by VLA are set at progressively lower levels, the Bar Council is taking the step of commissioning a report into the level of income that a barrister taking predominantly legal aid work can expect. If as we suspect, that level of income proves to be intolerably

low, the Council will seek appropriate action from VLA and, if necessary, from government.

Another less predictable pressure that has been placed upon Victorian barristers by the funding cuts has been the VLA proposal, again announced to the Bar Council without consultation, to put members of the Bar on an annual exclusive retainer to undertake criminal defence work. The proposed retainers would constitute a de facto contract of employment, incompatible with membership of the Bar under its Constitution. The Bar Council is keen to help VLA in any reasonable attempts to reduce the cost of legal aid. However before the Council takes any steps to meet VLA's request to create a new category of membership for retained defence counsel, the Council must be satisfied that safeguards are in place to protect the independence of those counsel and thereby to protect the interests of their clients. To date, VLA has not responded to the Bar Council's invitation to show that such safeguards exist and will operate effectively.

ALRC REVIEW OF THE ADVERSARIAL SYSTEM

The review being conducted by the Australian Law Reform Commission into the adversarial system is another national public policy issue which may have a great impact upon the Bar. The publication a few weeks ago of the ALRC's issues paper, *Review of the Adversarial System of Litigation*, was accompanied by ALRC media releases that proceed from an assumption that access to courts should be restricted, and that the community should be prepared to accept rougher justice dispensed by officials or tribunals from which lawyers are excluded. Apparently one of the sins which lawyers routinely commit is to "give priority to the interests of their clients instead of broad issues such as administration". The whole approach of the ALRC seems to be informed by an extreme anti-lawyer sentiment which is unwarranted and unsubstantiated.

Peremptory though the ALRC approach may be, the Bar Council is taking the review very seriously. At a time when our courts suffer repeated attacks from government, the bureaucracy and the media, it is crucial that the independent Bars do all they can to reassert the value and efficiency of an adversarial system of justice which is administered by an independent judiciary and an independent Bar. I have written to the President of the ALRC and to the Attorney-General pointing out that the ALRC's issues paper is not supported by any data, from Australia or overseas, to suggest that a move towards an inquisitorial system would decrease the cost of justice. On the contrary, there is considerable empirical evidence from England and the US to suggest that a move towards an inquisitorial system will entail greater expense and greater delays. The Bar Council is preparing a detailed submission to be presented to the ALRC later this year. I also intend to put the Bar's views at forthcoming conferences, including the July conference in Brisbane, "Beyond the Adversarial System", and at the AIJA Asia–Pacific Courts Conference in August. In the meantime, the Bar Council is closely monitoring the ALRC's stance on this important issue.

COUNTY COURT CIVIL PROCEDURES

The Bar Council has been invited to provide a response to a set of recommendations prepared by Judge Keon-Cohen on behalf of the Council of Judges which out-

line a program of civil procedure reform in the County Court. The recommendations cover such topics as offers to settle, the use of expert evidence, judicial trial control, medical negligence cases, and multi-party actions. The Council is giving careful consideration to the recommendations which would, if implemented in their current form, radically affect the conduct of civil litigation in the busiest court in this State. The changes would be far-reaching and would directly impact upon members of the Bar. Again, the Council will be sceptical of any proposals which appear to proceed from an assumption that all practitioners unnecessarily delay or prolong cases and escalate costs. The Council has urged that the review process should be coordinated with other reviews to civil procedure, including those conducted by the Department of Justice and by the AIJA, and that the views of the profession should be well represented at each stage of any reform process that may take place in the County Court. It is the view of the Bar Council that Victorian barristers work hard to assist their clients and the courts, including the County Court, in the resolution of disputes, within the shortest possible time and at the least cost.

One implication of these issues is that if the position of the Bar and the crucial role of the independent barrister within the institutional framework of our society were both once assured, they are no longer. For this reason, the Bar Council considers that vigilance in protecting the role of the independent Bar in our system of justice is one of its major responsibilities.

Neil J. Young Q.C.
Chairman

Cheaper to Kill Than to Maim

SOME big negligence lawyer from Miami had once remarked in a seminar that the purpose of that big axe you always see hanging on the wall of the railroad car was to allow the conductor, after a wreck, to go through the train, killing the injured survivors, thereby keeping damages to a minimum.

Sandra M. Gilbert,
Wrongful Death: A Medical Tragedy (1995) p.274.

Legal Aid Funding Agreement Noted

THE profession would be aware that an agreement has been reached between Victoria and the Commonwealth that secures legal aid funding for the next three years. I wish to take this opportunity to inform Bar members of the details of that agreement and also initiatives undertaken by Victoria Legal Aid (VLA) to improve efficiencies within its office through the use of modern technology. The Office of Public Prosecutions (OPP) has also upgraded its office technology and developed efficiencies.

LEGAL AID AGREEMENT

Under the agreement, Victoria and the Commonwealth will continue to jointly fund Victoria Legal Aid for a further year. After that period, the Commonwealth members of the Victoria Legal Aid Board will vacate their positions and a wholly Victorian Board will administer legal aid in State matters. Commonwealth legal aid will then be provided on a fee for service basis. The Commonwealth has undertaken to accept responsibility for the level of aid available in Commonwealth cases.

A reduction in Commonwealth legal aid funding was certain. Victoria was concerned to minimise that reduction. The State was successful in negotiating to minimise the cut to $2.9 million compared to the cut of $9.1 million originally foreshadowed by the Commonwealth.

This agreement means that VLA will be able to plan for the next financial year and beyond with certainty and a single body will continue to be responsible for providing legal aid services for both Commonwealth and State matters in Victoria.

INITIATIVES BY VLA

VLA is constantly on the lookout for new systems and techniques it can utilise to run a more efficient and effective office. On 1 July 1997, it began using a new computer system called LA Office. It is a system that has been used successfully in the Queensland legal aid office and offers much more than the previous VLA statistical program that was used. It is programmed to run a legal office. It is more logical and quicker in the way it records and accesses information and will assist staff and hence applicants with their applications.

The program has a facility to enable electronic lodgement of applications. VLA is hoping to trial electronic lodgement within the next 12 months with a limited number of solicitors who perform high volume legal aid work.

VLA's library is now accessible on-line to its staff from their own terminals. It is hoped that this facility will be expanded to include community legal centres to enable them to make use of VLA's resources.

VLA has also established its own homepage on the Internet. It details the history of legal aid in Victoria and its structure. It lists all the offices of legal aid, how to contact them and also explains how one applies and eligibility criteria for assistance.

Anyone is able to contact VLA through world wide electronic mail. For those interested in accessing the homepage: http://www.vicnet.net.au/~viclegal/

INITIATIVES AT THE OFFICE OF PUBLIC PROSECUTIONS

Members would be aware that the Office of Public Prosecutions came into existence as a statutory entity in July 1994. The OPP is effectively a large solicitor's office which services the needs of one client — the Director of Public Prosecutions. The OPP employs about 100 lawyers and works

closely with the Chief Crown Prosecutor and Crown Prosecutors.

Over its short life, the OPP has seen some significant changes. In September 1995 the OPP assumed responsibility for all committals handled at the Melbourne Magistrates' Court and is presently moving to achieve coverage of country committals within the current financial year.

At the same time, there has been an enormous shift towards the use of technology in the everyday functioning of the Office which has produced benefits for the OPP and will in time benefit other areas of the criminal justice system.

Going back just a few years, the whole of the OPP and Crown Prosecutors were serviced by computers that were used almost exclusively for word processing. The case management system was restricted to trial matters and allowed for only eight users.

Assisted by a grant of $1.5 million from the Government, the OPP set in train a project to bring itself up-to-date. The program was directed to two fronts: to put a computer on every desk and establish a network with all the advantages that come with E-mail, access to library resources, remote locations and so forth and also to develop a comprehensive case management system.

A new case management system has now been developed called PRISM — Prosecution Recording Information System and Management — and is the most advanced prosecution case management system in the country. Among its features is the scheduling of cases and hearing allocations as between OPP staff and Crown Prosecutors using electronic mail and scheduling. Consideration has been given to extending electronic briefing beyond the OPP. It is hoped that in the future the OPP will be able to engage Counsel directly by E-mail to their clerks or to Counsel's Chambers.

Efforts have been made to avoid the duplicate keying of data and to take advantage of existing data bases within the criminal justice system. To that end, PRISM interfaces with both the Magistrates' Court computer system (CourtLink) and the Criminal Trial Listing Directorate. The original Magistrates' Court number is imported into PRISM and used as a unique identifier. The economies and advantages can be quite dramatic. Over a year, the OPP handles about 2500 County Court Appeals. Given the sheer volume and the number of charges involved, the task of inputting the data into PRISM would be both daunting and expensive. Cooperation with the Magistrates' Court has enabled an interface to be established with PRISM so that the OPP receives all the relevant data concerning these appeals by electronic means. All those details, name of defendant, court, informant, charges and so on are entered into the PRISM case management system at (almost) the push of a button. In a way, this arrangement reflects much of what is being sought to be achieved by Operation Pathfinder — carrying out the same tasks but in a more efficient and effective manner.

All these changes are ongoing and I hope that they will not only continue to confer benefits on the OPP, Crown Prosecutors and VLA but will benefit all the other parties involved in the justice system.

Jan Wade, M.P.,
Attorney-General

The Victorian Bar Inc.

This page is a new feature in *Bar News*. It is intended to inform all members of the Bar and other practitioners regulated by the Victorian Bar Inc. about professional practice matters of which they should be aware. The matters will include summaries of all practice rules made by the Bar and all changes to those rules, notification of determinations of the Ethics Committee and the Legal Profession Tribunal relevant to practice as a barrister and any other information of importance received from the Legal Practice Board and the Legal Ombudsman.

To ensure that you are kept up to date with these matters and to comply with the notification requirements in the *Legal Practice Act 1996* (Vic) (see for example, s.74(3)), it may be necessary from time to time to issue a Practice Page Supplement to the *Bar News*. This will be done as and when circumstances require it.

CLERKS' (AUDIT AND TRUST MONEY) PRACTICE RULES

ON 15 May 1997, the Bar Council resolved to amend Rule 5.8(1) of these Practice Rules to read as follows:

"A separate ledger shall be opened for each matter and shall contain:

(a) the name and address of the client;
(b) the name of the legal practitioner conducting the matter;
(c) the name of any other party or other sufficient particulars to identify the matter; and
(d) a brief description of the nature of the matter".

This amendment was requested by the Clerks in order to allow them to open the appropriate accounting records in the name of each barrister on their respective lists rather than in the name of each client of those barristers. The revised Practice Rule has been submitted to the Legal Practice Board and to the Legal Ombudsman for consideration.

RENEWAL OF PRACTISING CERTIFICATES FOR 1998

Practising Certificates were issued by the Bar to its members and other regulated practitioners for the first time in April this year. These Certificates are valid to 31 December 1997. However under the provisions of the Legal Practice Act, holders of Practising Certificates issued by the Victorian Bar Inc. are required to apply for a Practising Certificate for the year commencing 1 January 1998 on or before 30 September 1997. This date should be noted in your diaries. Well prior to 30 September, you will receive a copy of the appropriate application form together with details of the appropriate fee to enable you to meet this statutory deadline.

It should be noted that you should retain your existing Practising Certificate until 31 December 1997.

REFUND OF PRACTISING CERTIFICATE FEES UPON SURRENDER OF PRACTISING CERTIFICATE

After consultation with the officers of the Legal Practice Board, the Bar Council on 15 May 1997 determined that the Victorian Bar Inc. would adopt the following policy in relation to the giving of refunds of Practising Certificate fees to those who surrender their Certificates:

(a) If the Practising Certificate is surrendered between 1 January and 31 March in the year of its currency, a refund of three-quarters of the fee paid for the Certificate will be given;
(b) If the Practising Certificate is surrendered between 1 April and 30 June in the year of its currency, a refund of one-half of the fee paid for the Certificate will be given; and
(c) If the Practising Certificate is surrendered after 30 June in the year of its currency, no refund will be given.

BALLOT ON THE GUIDELINE RELATING TO BARRISTERS' DRESS

The scrutineers appointed by the Victorian Bar Council for the purposes of the Ballot in relation to the proposed amendment to Clause 12 (Dress) of the Guidelines, have reported to the Bar Council that:

The result in relation to question 1 was:
Yes: 300
No: 519

The result in relation to question 2 was:
Yes: 3 11
No: 517

The amendment was lost and the Guideline therefore remains unchanged.

VICTORIAN BAR MEDIATION CENTRE

The Victorian Bar has for some time provided a dispute resolution service through its Dispute Resolution Committee. This service is now better resourced as a result of the opening of the Victoria Bar Mediation Centre, a purpose-built mediation facility.

The Centre, which is located on the 3rd floor, Douglas Menzies Chambers, 180 William Street, Melbourne, was officially opened on 30 April 1997 by the Honourable Mr. Justice Phillips, Chief Justice of the Supreme Court of Victoria.

The Mediation Centre was developed by the Victorian Bar Council to cater for the needs of parties undergoing mediation and thus is an efficient and comfortable environment in which parties can resolve disputes. The Victorian Bar Dispute Resolution Committee chaired by W.J. Martin Q.C. made a significant contribution to the design of the Centre through its experience in mediation and its desire to establish a first-class facility.

The Centre consists of two boardrooms and four meeting rooms supported by ancillary services such as catering, photocopying and receptionist. The normal configuration for a two-party mediation is a boardroom which seats 18 people and two meeting rooms each of which seat ten people. The Centre is thus able to conduct two mediations simultaneously or alternatively the entire Centre can be booked in order to accommodate larger mediations. An after-hours staffing service is available for an additional fee.

The seating arrangements are quite flexible so that the Centre can be used as a conference facility for appropriately sized groups.

The Centre has operated for six months and usage has been growing at a consistent rate as practioners have become aware of its services. It is now used regularly by a number of law firms.

The daily booking fee for the use of a boardroom and two meeting rooms is $350, additional meeting rooms are $75 each and the whole Centre costs $650 per day. Book-

ings for the Centre can be made by telephoning the receptionist on 9601 6930 or by fax on 9640 0199.

David J. Bremner
Executive Director
The Victorian Bar Inc.

NEW ARRANGEMENTS FOR URGENT APPLICATIONS TO THE PRACTICE COURT

The Supreme Court has introduced a new procedure to enable urgent applications to be made out of court hours to the judge assigned to the practice Court. The new arrangements are as follows:

Members of the profession wishing to make an urgent application are to contact the Judge's Associate by telephone at Chambers, at home, or on the "mobile" number 0412 251 757. The associate's "home" and "mobile" telephone numbers are now published in the daily Law List.

Should members of the profession be unable to contact the Associate on any of the published telephone numbers, then they can ring the Prothonotary on a second "mobile" — 0419 303 981 — and seek his assistance.

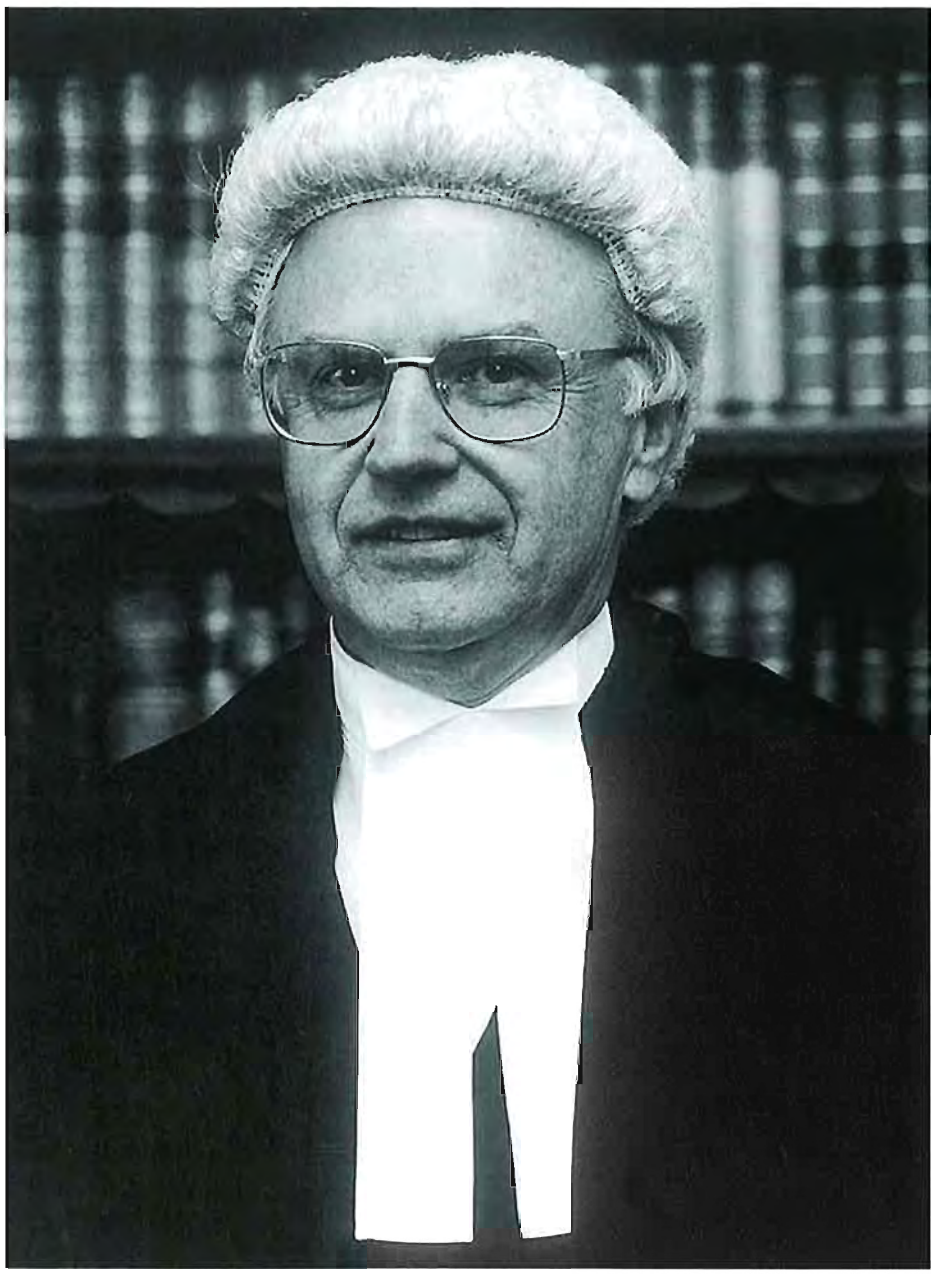
The aim of the Court is to ensure that contact can be made at *all* times.

On behalf of the Chief Justice, I ask that you publish details of the new arrangements in the *In Brief* and *Bar News* and also advise the Barristers' Clerks.

If you require any further information, please contact Bruce McLean, Chief Executive Officer on 9603 6269.

Justice Chernov

ON 16 May 1997 the Honourable Justice Alexis Chernov was welcomed by the legal profession on the occasion of his appointment as a Justice of the Supreme Court of Victoria. The pleasure in and approval of that appointment expressed by the Victorian profession at the welcome ceremony reflected the universal judgment of lawyers throughout Victoria and in other States and other countries where His Honour has come to be known. The conviction the profession has of the wisdom of this appointment is founded on the outstanding contribution His Honour has made to the law, the administration of the law and the legal profession through the service he has given to the Victorian Bar, the Australian Bar Association, the Law Council of Australia and currently LAWASIA and through the service he has provided to the community and the courts in his extensive practice which has taken him overseas and to all States except Queensland and the Northern Territory. Since 1982 he has chaired the Australian Motor Sport Appeal Court.



Chernov J.

Members of the Bar have known little of His Honour's origins and early life. Born in Lithuania on 12 May 1938 of Russian parents, His Honour attended school in Salzburg where his parents lived during the war. In 1949, his mother who was then a widow, with His Honour and His Honour's brother migrated to Australia where they were first billeted at Bonegilla. His Honour attended state schools at Camberwell and Caulfield and then completed his secondary education at Melbourne High School. Although His Honour did not speak English until the age of 11 he successfully completed the course for the degree of Bachelor of Commerce at the University of Melbourne in 1961. After working with BHP as a graduate trainee he commenced an honours law degree working as a senior geography master at two Melbourne secondary schools to support himself. After graduating LL.B. (Hons) he was admitted to practise on 1 March 1968 and came to Bar three weeks later where he read with the man who is the last member of the High Court appointed from Victoria, Sir Daryl Dawson.

His Honour was first elected to the Bar Council in September 1972. As well as holding other offices on the Council, he served as Treasurer from March 1982 to September 1984, and Chairman from April 1985 to September 1986. The Council regarded him as a wise leader and tireless worker who, while conducting his busy practice, frequently worked into the early hours of the morning drafting submissions to Government or other bodies on behalf of the Council. During his time as Chairman he had to grapple with Government to restrict the decimation of common law rights arising from transport accidents and to fight to maintain the independence of the Bar. He brokered the resolution of a number of differences which existed between the Bar and the Law Institute such as the method of fixing barristers' fees in a situation where there had been no agreement as to the fee before the work was done. One of the arduous tasks he performed as a member of the Council was to choose and arrange for the installation in 1984 of a system which

enabled barristers to communicate by telephone without going through a manual exchange.

After a stint as Treasurer, His Honour served as Vice-President of the Australian Bar Association from 1986 to 1987 and then served on the Law Council of Australia holding office as its President in 1990–91. During the latter presidency His Honour led the move towards a more national legal profession and was one of the architects of a permanent home for the Law Council in Canberra, which required weekly meetings in Canberra with the builder. Also during His Honour's presidency the Australian Advocacy Institute was established. His involvement over recent years in LAWASIA and currently as its Vice-President has been directed to forging closer links between Asia and Australia. Concurrently with his service on professional councils he was a member of the Council of Presbyterian Ladies College for seven years.

His Honour's career at the Bar has from the beginning involved him in a wide and thriving commercial practice. His industry was soon recognised by the leaders of the Bar who made known their appreciation at having him working with them. As a junior his talents were recognised by Government when he was appointed under the *Co-operation Act 1958* to investigate the collapse of Co-operative Farmers and Graziers Direct Meat Supply Ltd. He took silk in 1980. Although he had an extensive advisory practice conferences were largely confined to early morning and evening and in court hours he was usually in court. He worked in a variety of trial and appellate courts including the High Court. He had three trips to the Privy Council. He thrived on complex commercial causes which raised arguable legal issues. Two of the many landmark issues in which he was involved were the entitlement to take up share issues when Bell Resources sought to raid BHP and the liability of directors where companies trade close to insolvency.

Having tutored in law at Melbourne University Colleges in the late 1960s His Honour was lecturer in Equity for the Council of Legal Education from 1971 to 1975. He has been co-author of two editions of a text on Tenancy Law and has delivered numerous learned papers at conferences in Australia and in the United Kingdom.

He has maintained his interest in legal education as a founding member of the Australian Advocacy Institute and as a member of the Graduate Advisory Board for the Faculty of Law, University of Melbourne since its inception. His involvement in LAWASIA is an asset to that Board which oversees a program to attract graduates from overseas as well as from Australia to a high-quality postgraduate legal training program. His Honour has been a member of the Council of the University of Melbourne since 1991 and chairs that Council's Legislation Committee.

His Honour married Elizabeth Hopkins in 1966. They have three children, Andrew, Carolyn and Michael. What started out as the family beach house at Point Lonsdale and became a beach house with a tennis court led His Honour to acquire a nearby farm where he bred Simmentals. Later the peace and scenic beauty of a farm nestling on a creek at the foot of the Cathedral Ranges induced him to trade the Point Lonsdale farm for that farm. On many weekends, the incidence of which many barristers would regard as too infrequent, His Honour has been found planting trees, harrowing pastures or working at the law in a farm outhouse which he uses as a study. Fortunately for his guests, of an evening His Honour prefers a log fire and a glass of wine at the farm house to the austere comforts of the outhouse.

So naturally did His Honour's support of Carlton come to him that when recently asked by a newspaper poll for the identity of the team he supported, His Honour is reported to have replied "No allegiance." This, as all Essendon supporters know, is the Carlton supporters' version of "Carlton. Doesn't everyone?"

The Victorian Bar firmly believes His Honour's experience in the law and the community, learning and temperament make him a worthy appointment to the Supreme Court Bench.

Justice Gillard

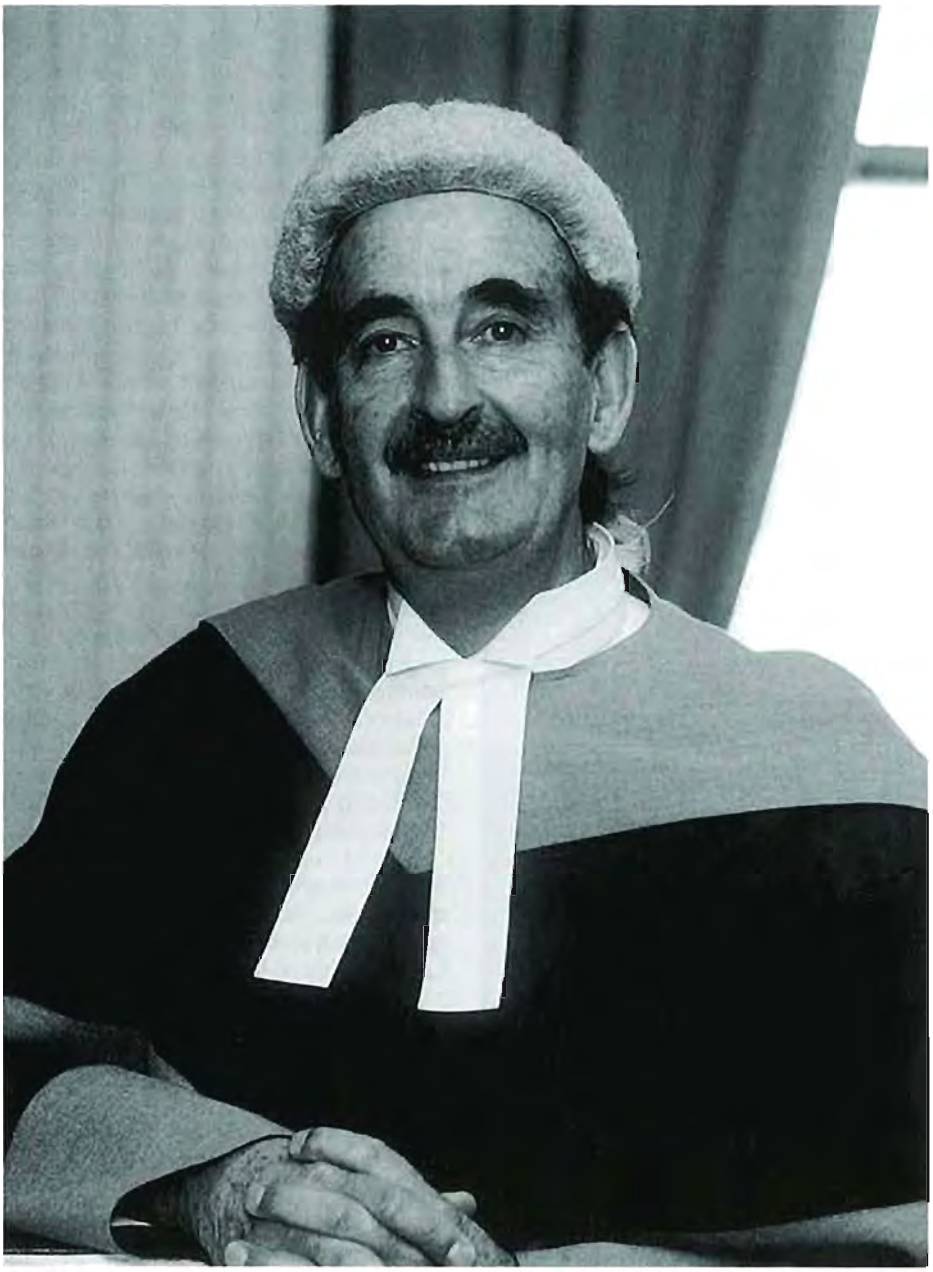
ON Thursday, 8 May 1997, His Honour Mr. Justice Eugene William Gillard was welcomed to the Bench of the Supreme Court of Victoria. So ended the barristerial career of one of the great characters of the Victorian Bar. "Bill" Gillard as he was known to all, was born in 1939 which, even those who had trouble with Accounts will acknowledge, means that His Honour was at least 57 and probably 58 at the date of his appointment. It is important that this fact he recorded as rumours were circulating that His Honour was only 47 or 48 years of age. However, like so many other apocryphal rumours concerning the life and times of His Honour, the source of the rumours could usually he traced to His Honour's room in Owen Dixon Chambers West.

It is gratifying that His Honour now has a title other than "Head of Chamber" or "the great EWG" which, like his age, had their source in His Honour's portal.

It was preordained that as one of the sons of the well respected Supreme Court Judge, Sir Oliver Gillard, Bill would have a career in the law and ultimately follow his father to the Supreme Court Bench. Those members of the Bar who appeared before Sir Oliver Gillard said on seeing Bill robed as a Judge at his Welcome that the resemblance was unnerving and uncanny.

Bill Gillard was educated at Melbourne Grammar, however the Liber Melburniensis (the Who's Who of Melbourne Grammar) rather surprisingly contains only Bill's year of entry to the School and the fact that he obtained a First Class Honour in Physics in 1957. This entry in the Liber Melburniensis is unusual in two respects First, it does not rehearse an academic career which one might have expected a potential lawyer to have had and secondly, the entry is scant in its reflection on Bill's extra-curricular achievements at the School We cannot believe that this was a momentary aberration of modesty on Bill's part, but rather, taking into account His Honour's demeanour, deposes by its silence to the fact that His Honour was a late developer as a sportsman.

Both these matters were the subject of subsequent mitigation. It was revealed at His Honour's Welcome that in his youth His Honour excelled in baseball, being selected for the All Australian University's Baseball Team in 1961 and, on leaving school was



Gillard, J.

minded to pursue a career as a pharmacist. There is something unnerving about the concept of Bill Gillard telling customers, seeking to have prescriptions filled, that he would prescribe for them that which he thought they ought to have. Bill has often been likened physically to the actor John Cleese and there emerges a vision of "Fawlty's Pharmacy."

However, none of that was to be because "the great EWG" pursued a career in law. And an enviable career it has been. His Honour took on every manner of case including personal injuries, crime, defamation and large commercial cases. He was never afraid to fight hard cases and by the end of his career as a barrister, had certainly achieved recognition from his peers as one of the outstanding general advocates at the Victorian Bar. It would he remiss, however, not to indicate that Bill Gillard was and is an excellent lawyer who has the ability to go straight to the heart of the legal issue in a matter. This skill was not confined to the law, as on many Monday mornings Bill would berate his chamber colleagues with: "Have you heard the latest rumour? Bombers for Premiers!"

His Honour read with Sir Ninian Stephen and signed the Bar Roll in June 1965. Before taking Silk in November 1979, His Honour had no less than ten Readers: Schwarz, Hicks, Garde Q.C., Kendall, Lucink, Austin. Magee Q.C., Brookes, Misso and Campton.

His Honour served on the Victorian Bar Council from 1974 to 1980 and again from 1981 to 1990. He was Chairman from 1988 to 1990. His Honour served on the Australian Bar Association as Senior Vice President in 1988–1989 and as President in 1989–1990.

Since being Chairman of the Bar, His Honour has served the Bar in various capacities and, most importantly, organising the system of Professional Indemnity Insurance for Victorian barristers. It is largely through His Honour's direct negotiations and representations that the level of premiums for our professional indemnity insurance have remained so low.

These auspicious events in His Honour's life were always kept in perspective by His Honour's three great passions: cricket, the Essendon Football Club and his Porsche 928 motor vehicle.

His Honour's love of cricket has seen him tour the test cricket playing countries of the world. Visitors to His Honour's Chambers could view the evidence of a photograph and the page from the relevant score book testifying to his dismissal during a club match of Desmond Haynes, the great West Indian opening batsman. His Honour captained the Victorian Bar cricket team for a number of years

Although His Honour never played football at the highest level, he does have his name ascribed for posterity in the Essendon Football Club Hall of Fame. However, we are obliged to indicate that this is not on a donors brass plaque as indicated at His Honour's Welcome, but rather on a brick in Moonee Ponds.

Upon his appointment, His Honour did ask the Chief Justice if there was an underground carpark for his Porsche. We understand that Bill is still waiting for a response.

As a vastly experienced trial lawyer and outstanding advocate, His Honour is an ideal appointment to the trial division of the Supreme Court. However, let no-one underestimate His Honour's knowledge of the law and let nobody appear before His Honour with a view to postulating an argument that cannot readily be supported by authority at hand.

We heartily congratulate His Honour upon his Appointment.

Justice Goldberg

ALAN Henry Goldberg has finally succumbed to the notorious and repeated attempts to prise him out of his beloved corner suite in the Chambers which were affectionately known as Goldies, then later as Golan, Heights.

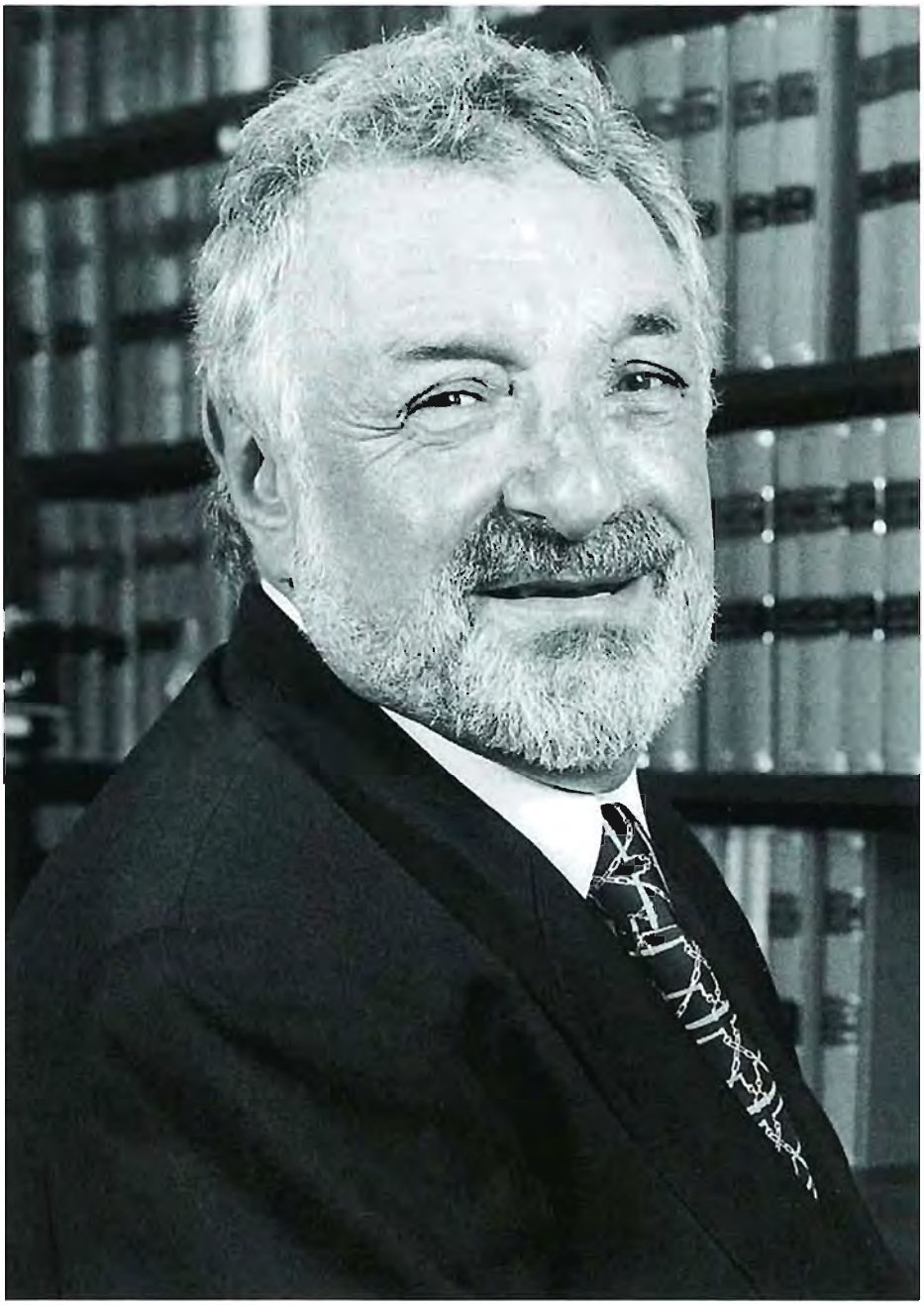
His Honour overcame significant ill-health as a child. The early medical interventions seemed only to sharpen his wit and charm, harden his resolve to succeed, and induce a love of long hours of dedicated application to his studies.

Contrary to medical advice he never abstained from any sporting or physical activity, and by the time he completed his schooling at Scotch College, he was a highly accomplished tennis and squash player, as well as the possessor of a honed and intellectually hungry mind.

Young Goldberg's service to the nation and to his friends started early. He was a valued member of the Scotch College Cadets (in a kilt) and Melbourne University Air Force Squadron. His vow to his grandfather not to consume alcohol until 21 enabled these altruistic services to be extended to his irreverent friends as a much needed driver to University Balls.

At Melbourne University His Honour was an instant academic and social success, active in the life of the Law School, then in its heyday under the intellectual leadership of Zelman Cowen, David Derham, Norval Morris and Harry Ford. The young Goldberg was quickly appointed to the Law Review Board, and as with everything in which he was involved, he threw himself into its activities with his usual vigour. His Honour topped many subjects through his four years of Law School, was unstoppable as an advocate, and represented Melbourne Law School at the Inter-Varsity Moot Court Competition (as it then was) in Adelaide in 1961.

Legend has it that the Melbourne team that year comprised Goldberg J., Douglas Graham Q.C. and Ron Castan Q.C. Castan was delayed in Melbourne due to a family funeral. On his arrival in Adelaide he was informed by a delighted Goldberg that by a stroke of incredible good fortune, Goldberg J. and the present Solicitor-General for Victoria had managed to lose their first round moot, thereby ensuring that none of the three would-be advocates need be further distracted from the more important aspects of the week's activities i.e. drinking and associated physical activities. (At that time, current notions of political correctness which have infected the universities and even extended to the Faculty of Law, were as yet unheard of.)



Goldberg J.

Thereafter Goldberg J.'s career took a more serious turn. After LLB (Honours) at the University of Melbourne and serving articles with Darvall & Hambleton, he spent a year at Yale University, acquiring a Master of Laws Degree during a year which included dramatic events in the USA

encompassing the assassination of John F. Kennedy and the shooting of Lee Harvey Oswald.

By 1965 Alan Goldberg had commenced reading in the Chambers of Daryl Dawson. It is fitting that he has taken his place on the Bench as Sir Daryl Dawson, with whom he has maintained a life-long friendship, brings his judicial career to a close.

The most remarkable characteristic that has marked Goldberg J.'s almost 32 year long career at the Bar has been his remarkable sense of humour, and the quickness of wit that has constantly amused and engaged all of the judges before whom he has appeared. With some Counsel the use of humour and wit may be a device to cover up a dearth of argument and authority, or an inability to respond to a difficult question. In His Honour's case, the situation is precisely the opposite. The use of wit and charm was a weapon to disarm the unwary. His Honour followed through with arguments which were fully and comprehensively prepared, presented with forensic clarity and compelling force.

His Honour rapidly built up a great reputation as a tough, fearless and charming advocate, and took silk in 1978, at the relatively tender age of 37. This at a time when "Young Turks" taking early silk were relatively rare.

When he took silk, His Honour had a reputation for an awe-inspiring capacity to conduct three phone conversations and two conferences simultaneously. At one stage he and his wife Rachel were also running a cattle farm near Woodend. His Honour would regularly rise at 5.00 am, drive from his home in Kew to Woodend to tend to the calving or spreading of hay, then return to Chambers for his regular 8.00 am conference, before resuming a hard-fought case in the Supreme Court Commercial Causes List.

Some friends feared for His Honour's health and his sanity. They need not have worried. His Honour, relieved of the burden of paperwork, unwound sufficiently as a new silk to perform the work of only two ordinary people in lieu of four, as had previously been the case.

In the next 19 years, as a leader at the Bar, His Honour came to be the master of all that he undertook. His work ranged across the Commonwealth and Papua New Guinea including areas of constitutional law, frequent appearances in the High Court, major arbitrations and commercial disputes, as well as a dominance of Trade Practices work as the operation of the legislation in that field came to the fore.

The law reports amply demonstrate the breadth and depth of His Honour's practice. His Honour also had the privilege of contesting the longest running civil case in Victoria. After 250 hearing days over a patent for the offshore separation of oil and water King J. found that they did not mix. Nevertheless the experience will augur well for His Honour's case management. Not so well known was His Honour's appearance in the well-known Dollar Sweets case: "A.H. Goldberg Q.C. and P.H. Costello for the Plaintiff" [1986] VR 383.

But His Honour's enormous reserves of energy have not been applied solely to the practice of the law. He has been continuously active within the organised Jewish community, holding posts of communal significance ranging from the presidency of the Melbourne Hebrew Congregation and the Chairmanship of the Australian Institute of Jewish Affairs, to the Chairmanship of Mount Scopus College. In between these activities His Honour has served as President of the Victorian Council for Civil Liberties (while maintaining his long-standing friendship with some of the very politicians whose policies he was criticising without reserve), Deputy Chair Advisory Board of Melbourne Symphony Orchestra and a member of the Victorian Council of Legal Education and the Victorian Board of Examiners.

It is no secret that various courts have been keen to recruit Goldberg J. to their ranks for quite a number of years. His allegiance to the Bar and to his colleagues with whom he has shared Chambers (in some cases, for over 20 years) have dissuaded him from succumbing to these overtures, until this year.

Finally, the Bar lost him to a higher calling. The Federal Court is fortunate to have Goldberg J. adorn its Bench. The Bar is enormously gratified at the elevation of one of its universally popular and best-loved colleagues. The Australian legal world, and the community as a whole, is enriched by the opportunity for His Honour to apply his great energy, his generous heart, and his superb legal talents, in its service as a member of the federal judiciary.

Justice Jenkinson

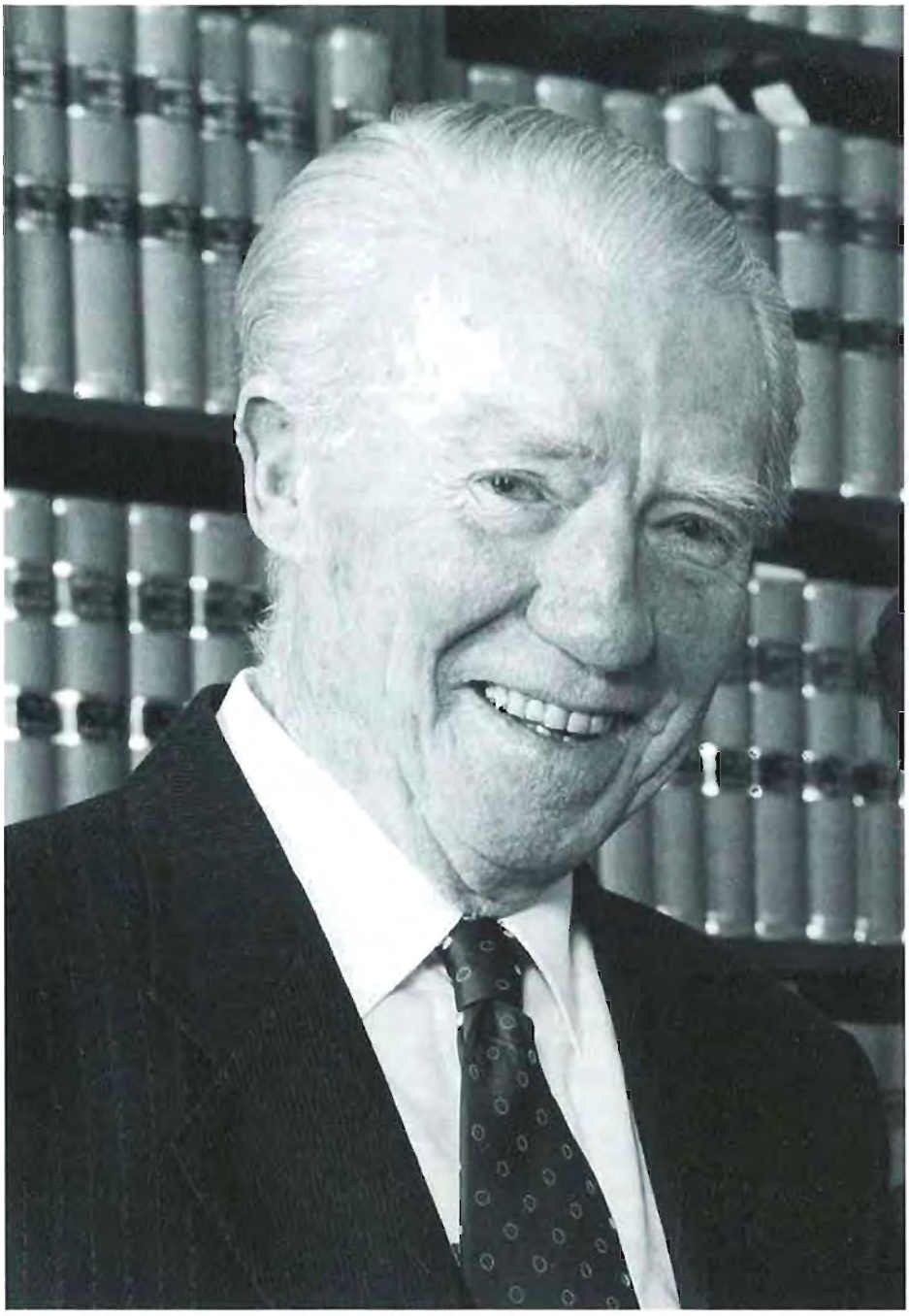
KENNETH Joseph Jenkinson was born on 14 November 1927. He was educated at Xavier College and The University of Melbourne.

As a young man he was employed as a clerical assistant in the office of the Commonwealth Crown Solicitor, his first task being a "cutting" and "pasting" contribution to what became the 1950 reprint of the Commonwealth Acts. At the ceremonial sitting of the Federal Court in Melbourne on 29 April 1997 to mark his retirement from the Bench, he confessed to having strayed from his desk on many occasions in that period to observe Barwick K.C., Evatt K.C. and other leaders of the Australian Bar in the great constitutional cases of the day which were heard in the same courtroom as he was being farewelled. Then it had been known as No. 1 High Court. It seems likely that witnessing the giants of the Bar and Bench at work made a lasting impression on the young Jenkinson and helped fashion his approach to advocacy and judgment.

Certainly his future was significantly affected by other events at that time. He married Rachel, the daughter of a leader of the Criminal Bar, Bill Fazio, and, after signing the Roll of Counsel on 2 December 1953, became his reader in Equity Chambers.

His arrival at the Bar was at the height of the "prescribed premises" landlord and tenant case boom on which many young barristers of the fifties honed their skills; and Ken Jenkinson's innate capacity for precise thought and the detection of nice distinctions admirably qualified him fully to participate. Apart from that lucrative and busy field, the young Jenkinson soon developed a reputation in crime, common law and equity and, perhaps because of his experience at the Commonwealth Crown (where he had completed articles), he soon became the acknowledged expert at the Junior Bar in Commonwealth employees' compensation cases, an esoteric area of the law which nevertheless produced a steady flow of briefs.

In 1961 he moved with most of the Bar to the new Owen Dixon Chambers. His practice continued to grow, both in size and diversity; and he was in much demand for paperwork which was invariably painstakingly correct. He had a friendly smile to greet all comers to his chambers — of whom there were many who needed a solution to a problem which, having been provided by Jenkinson, they would happily claim as their own. No matter how busy he was, his invariable practice was to lay down his pen, listen patiently, and then give the answer or leap to his books and find it.



Jenkinson J.

His influence was felt even more remotely. On one occasion one of his readers agreed to do some "devilling" for a none-too-particular member of the Common Law Bar but before returning the briefs wisely sought his master's opinion as to the adequacy of his work. The opinion was expressed by total and meticulous redrafting. In due course, the none-too-particular

member returned the briefs complete with impeccable "Jenkinson" pleadings, an improvement in style and thoroughness which ought to have surprised his solicitors. On another occasion, having been asked by a former reader, who was appearing in a long and complex criminal trial, to peruse his proposed submission that the case against his client should not be left to the jury, he offered to suggest some alterations and the result was a wholesale redraft which bore as little resemblance to the original as it was an improvement.

He had seven readers between 1964 and 1970: Wheeler, Adams, Mahony, Hepworth, Beaumont, Kemelfield and Lally. On 4 November 1970 he was appointed Queen's Counsel. This was something of a blow to his clerk, Ken Spurr, who thereby lost his number-one junior for any last minute brief — no matter in what field of law, in what court or other forum, or how ill prepared the case. It was, however, a boon to the big firms of solicitors who flocked to Jenkinson's chambers as if they had been waiting for this recognition of his standing.

On 21 October 1982 the appointment of Jenkinson J. as a Judge of the Federal Court was announced. It caused more than a stir both within the Supreme Court and in the profession.

They found a hugely capable leader who was able to do justice to his client's case, however complex, and whatever the field of law involved.

Jenkinson's career as a silk was interrupted when he was appointed a board of inquiry into prison discipline in 1972 and 1973, and the calm and careful manner in which he discharged his duties in that capacity probably advanced what most considered his inevitable appointment to the Bench. In 1973 he was elected a member of the Bar Council and also became Chairman of the Council of the Hawthorn Institute of Education (then the State College of Victoria), an office in which he remained until his appointment to the Federal Court. In 1974 he was appointed as a member of the Prisons Advisory Council.

He was appointed a Judge of the Supreme Court of Victoria on 18 February 1975. It was a bitter-sweet appointment for many of his colleagues at the Bar for, while they shared the general enthusiasm, the appointment also terminated his vast "consulting" practice from which they had been benefiting for years.

As was expected, Jenkinson J. rapidly established a reputation as a judge of the very high standard which had long characterised the Court and, no doubt assisted by his wide general practice while at the Bar, appeared equally at home in all the areas of its work. In addition, from 1977 he was Deputy Chairman of the Adult Parole Board.

On 21 October 1982 the appointment of Jenkinson J. as a Judge of the Federal Court was announced. It caused more than a stir both within the Supreme Court and in the profession. At that time, at least in Victoria, an appointment to the Federal Court was not considered as desirable as one to the Supreme Court.

Securing Ken Jenkinson was something of a coup for the Commonwealth. In announcing the appointment, the Acting Attorney-General acknowledged that the Judge would bring to the Federal Court a wealth of experience in the application of the law and a reputation for fairness and integrity.

Jenkinson was attracted by the prospect of the variety of the work of the Federal Court and, though based in Melbourne, the opportunity to hear cases presented by the best advocates throughout the country. This was far-sighted; and, no doubt, the steady development of the Federal Court to its current status was a source of continuing satisfaction to him. While some may have entertained doubts when he was appointed that the work of the Federal Court would draw adequately on his capacity for judicial versatility, he is now seen to have made lasting contributions — both at appellate level and at first instance — in the fields of tax, administrative law, intellectual property, trade practices, constitutional law, criminal law, immigration, bankruptcy and company law. It is impossible to convey in a few sentences the impact which his judgments in so many areas have had and will have. As to the respect which they are and will continue to be accorded, it may not be wholly inappropriate to refer to just two where his analysis of the case met with the subsequent approbation of the High Court: see *Chamberlain and Another* v. *The Queen (No. 2)* (1983–1984) 153 CLR 521, at 558; and *Collector of Customs* v. *Agfa-Gevaert Limited* (1995) 186 CLR 389.

In 1983, Ken Jenkinson was also appointed as an additional Judge of the Supreme Court of the ACT and a Presidential Member of the Commonwealth Administrative Appeals Tribunal; and these offices also provided welcome opportunities for judicial diversification. For example, the former was pleasing because it enabled him to continue from time to time to preside over criminal trials (including that of David Harold Eastman which attracted national publicity). It was as Presidential Member of the AAT that he made the decision at first instance in the *Agfa case*. Between 1984 and 1991 he was also Deputy President of the Federal Police Disciplinary Tribunal.

His great recreation has always been tennis and he and John Keely have been celebrated doubles partners for several decades. Now that he has followed his doubles partner into retirement from the Federal Court, they should be able much more freely to indulge their habit of dispatching opponents many years their junior — with all the opportunity for modesty which such situations provide. At those times at least Rachel will have an opportunity to pursue her own new goal: how to adapt for the first time to living without a practising barrister or a judge in the house!

We wish them both, and their family, many happy "retirement" years.

Faxing Up a Judgment

DAVID Crystal (*The Cambridge Encyclopedia of the English Language*, 1995 at page 255) discussing variation of accents in the pronunciation of vowels included this item from the *Spectator* (12 September 1992):

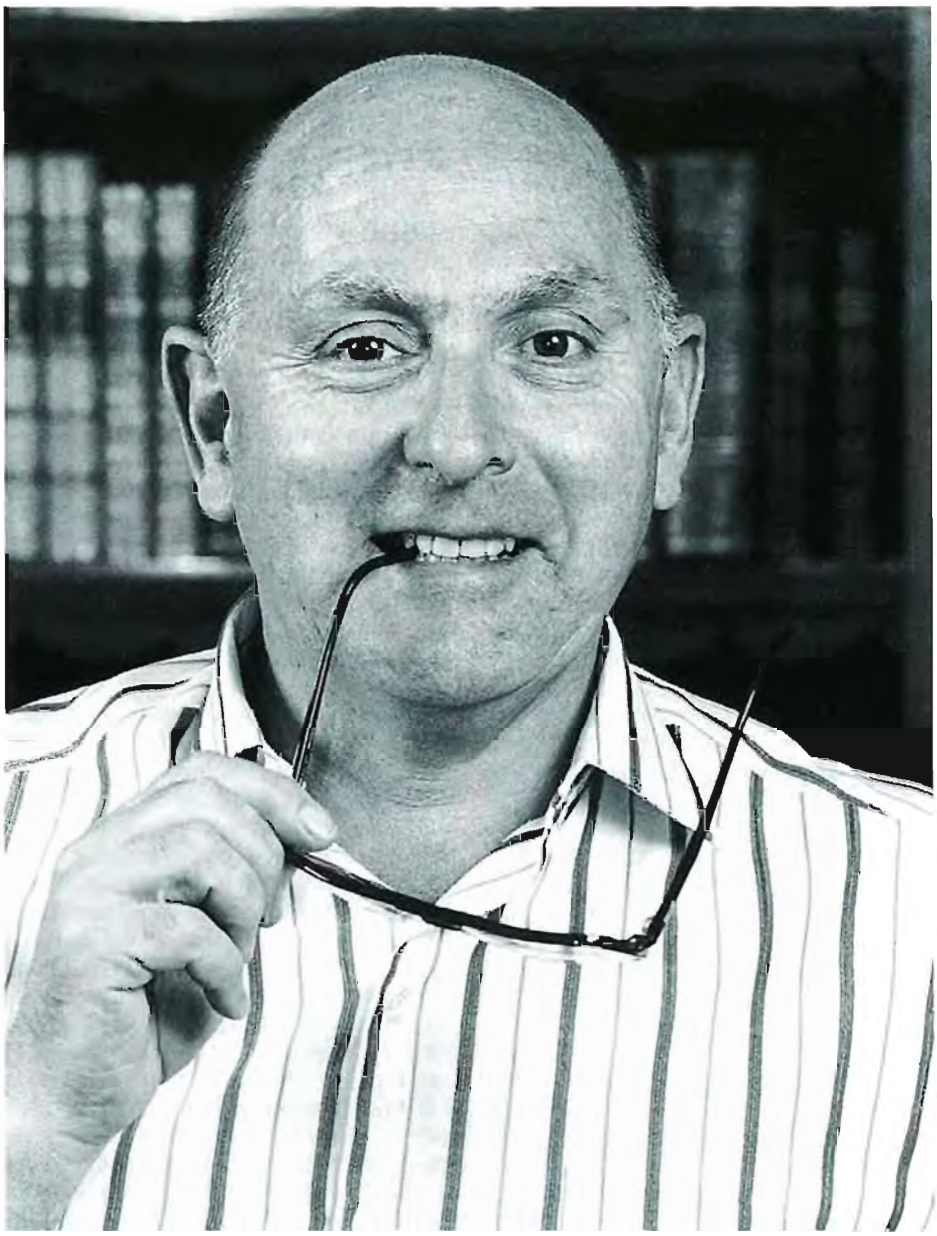
Ever on the search for legal jokes not necessarily connected with the death penalty, I consulted a friend who is still practising. She said a member of her chambers was in court on Monday morning when the judge said, "I'm afraid we'll have to adjourn this case, I have written my judgment out, but I left it in my cottage in Devon and I can't get it sent here until tomorrow". "Fax it up, my Lord", the helpful barrister suggested, to which his Lordship replied, "Yes, it does rather".

Justice Nathan

ON 14 April 1997 one of the great characters of the legal profession in Victoria ended his service as a Judge of the Supreme Court of Victoria. It is a service marked by constant striving to achieve a just result in any dispute which came before him, a concern that the law should be relevant to the circumstances of the present time, a sense of humour which was not always appreciated by those who were subjected to it, and an energy the envy of a person half his age. Mr. Justice Nathan's presence on the Bench will be sadly missed.

Howard Thomaz Nathan, the boy from Toora, ended up at the Bar after an education at Wesley College as a scholarship winner and the University of Melbourne from which he graduated in law in 1960, having earlier considered the Church and education as possible careers. In 1961 and 1962 he studied economics at the London School of Economics, then returned to Australia taking up teaching positions in law first at the ANU and then at Monash. In May 1964 he came to the Bar, reading in the chambers of Hazelwood Ball. In the years that followed, when personal injuries and workers' compensation were areas of legal practice producing good incomes for many barristers, he developed a busy practice in each of those areas, with more than the odd cameo appearance in criminal courts and in commercial and industrial matters, administrative law and town planning.

Throughout his time at the Bar Howard Nathan was active in Labor politics. He was a member of the South Melbourne City Council from 1971 to 1974, serving a term as Mayor. He is still remembered, perhaps unfairly, as the Mayor who wore a red beret and replaced the limousine with the Mayoral Vespa -- a tradition not carried on by his successors. In those days the future judge had the habit of sprinkling his conversation with Italian phrases. As part of the mayoral duties he was visiting the Taoist temple in Raglan Street, South Melbourne. The custodian, an elder of the community, had shown the Mayor the treasures kept in the place, dating well back into the nineteenth century, and His Worship was greatly impressed. When it came time to leave, greatly enthused by the experience, and without thinking, the civic worthy said, "Thank you very much. It's all very impressive. Ciao!" Immediate embarrassment. His achievements in office were considerable. If he had done nothing else Howard Nathan's term as Mayor would be remembered for his successful persuasion of the Housing Commission to abandon its policy of erecting blocks of high rise flats in the City of South Melbourne, and to undertake future projects on a more human scale. In those days South Melbourne was not the affluent area it is today: one wonders how Nathan as Mayor would have dealt with the plans to develop the Yarra bank which have reached such a remarkable conclusion recently.



Nathan J.

Following the election of the Whitlam Government in 1972 Nathan went to Canberra as ministerial advisor to Senator Jim McClelland, the Minister for Labour. It is a period in his life which he enjoyed very much, but which came to an abrupt end with the events of 11 November 1975. Nathan was in Perth conferring with employers and

unions in the mining industry. At 11.00 a.m. a halt in the discussions was called to observe a minute's silence, during which the telephone rang insistently. It was 2.00 p.m. in Canberra, and Nathan heard the voice of his Minister say, "Guess what, Digger, it's back to the Bar for you."

Return to the Bar he did. Silk followed in 1980. From that time on the main part of Nathan's practice was in the industrial courts. A significant departure from the usual round came, however, in the form of a brief to appear, pro bono, for the Labor opposition before the Commission of Inquiry into the Housing Commission's Pakenham land deals. Another case caused a very different kind of concern. Fortunately it does not happen to many of us that we face physical danger in the course of our careers. Nathan had a brief to appear for a young woman who had come from the Middle East to marry one of her countrymen who had immigrated to Australia some time before. She had brought with her considerable wealth which, in the manner of the community of which she was part, was taken over by her husband. The relationship soured, and the woman left the house. The husband, however, refused to part with her money. An action was commenced in the Supreme Court to recover it. The trial come on before Tadgell J.; Nathan Q.C. and Peter Vickery appeared for the plaintiff. The trial, to say the least of it, was tense. Toward the end, when things were not going well for the defendant, he said that if he lost he would kill the plaintiff. Now, while all concerned did not doubt that he could, it was decided that it was more probably than not the sort of angry reaction which is common enough in such circumstances, and not such that the authorities should be alerted. To do so might only inflame the situation. On the day set for judgment all assembled to hear the result. The defendant was ordered to return to the plaintiff her property. No sooner had the judge left the bench and the parties started to leave the court, the defendant produced a pistol and started shooting. Life was lost and others suffered serious injuries. The plaintiff's leading counsel had a narrow escape: there was little doubt that the defendant would have shot him. He had left the court by another door to attend to another case, and returned to find a scene the like of which had not been seen in a court in Australia before, and has not been seen since. The story has a sequel. A few years later, soon after his appointment as a Justice of the Supreme Court, the judge was visiting Pentridge Prison. The governor of the prison was showing his guest around, and led him into a recreation room. The defendant was there before him. Quietly the judge said, "That's the man who tried to kill me", and within moments the judge was surrounded by prison staff, and out of the room.

The trial, to say the least of it, was tense. Toward the end, when things were not going well for the defendant, he said that if he lost he would kill the plaintiff.

In his speech at his Honour's farewell the Chairman (Young Q.C.) reported that the judge had "misinformed the public by stating, 'I have always kept a straight face and I have never in my life made a facetious comment'." In the period between Canberra and Spring Street he had chambers on the 10th floor of Owen Dixon Chambers near those occupied by Michael Black, Michael Dowling and Neil McPhee. One evening Nathan was attending some theatrical or musical performance. During the interval he encountered one of the women at the Bar in the foyer. She was talking to friends who had no idea who Nathan was. He walked up to the barrister and made some outrageous, and untrue, remark and walked off. The barrister, not at all offended and knowing her colleague's habits decided that "pay-back" was called for. The story was told the gentlemen aforementioned, and a plot was hatched. Dowling went along to Nathan's chambers one morning. After a subdued greeting he said, "I've something a little difficult to raise. One of our colleagues has been to see me about an incident she says took place at the theatre on Saturday night." He then proceeded to relate the event in detail, and exactly. He continued, "She's very upset about it. She's seriously thinking about suing you." Nathan was devastated. Straight to McPhee he went, where he was greeted with the news that it sounded pretty serious, and that he had better be prepared for the worst. Black was engaged to draft a convincing statement of claim, which he prevailed on a solicitor friend to have engrossed under the firm's name, and served by an articled clerk from the office. It doesn't matter how the charade ended. It was a lesson the future judge has never forgotten, but it didn't stop him.

In 1982 the first Labor Government elected in Victoria for many years took office following a general election. Mr. John Cain was appointed Premier, and he assumed as well the office of Attorney-General. To assist him in performing the duties of that office he appointed counsel, H.T. Nathan Q.C. It didn't take long for the journalists to decide that the appropriate title for counsel assisting the Attorney General must be "the Attorney Colonel", and it stuck. There were those who, irreverently, referred to him as "Little Jesus". Dowling rang to speak to this exalted personage one day. The phone was picked up, and Dowling said, "Is this Little Jesus?" Came the reply, "This is John Cain speaking." On the other hand, Hartog Berkeley (then Solicitor-General) rang to discuss some important subject, to be greeted with "This is Little Jesus" and responded "This is your Father speaking."

Throughout this period, and on into his judicial career Howard Nathan gave generously of his time and effort in community service. He was chairman of St. Martin's Theatre, served on the board of Hanover Welfare Services, and on the Australia Council and the board Film Victoria. In recent years he was President of Temple Beth Israel.

Mr. Justice Nathan was appointed to be a Judge of the Supreme Court of Victoria on 22 November 1983. The Chairman said in the speech already referred to, ". . . for a trial judge of (the) court, the more sought after assessment is that he was guided at all times by a keen sense of justice and an empathy for the ordinary men and women of our society." This is the assessment, he submitted, which should be made of Nathan J.'s career. In the course of that judicial service it fell to the judge to decide many cases where those qualities were called for. Soon after the *Penalties and Sentences Act 1986* came into force a man pleaded guilty to a count of possessing an amount of heroin. The circumstances called for consideration of the provisions of the Act allowing a court to make a community based order. It was the first case in which it was appropriate to do so. In making such an order His Honour was concerned that the work the subject of the order was required to perform should not be mere "rock-breaking exercises", but should be "commensurate with the prisoner's physical and mental capabilities". It can only be hoped that those humane admonitions have been heeded by those responsible for administering the scheme in the years that have followed.

However, it could hardly be expected that such an ebullient personality would be suppressed in his new role. Among the

judges of the court he developed friendly relationships which have been maintained throughout 13 years. It is hardly necessary to tell here the many stories which have circulated widely at the Bar of His Honour's unorthodox approach. The tale that a jury were led in callisthenics is apocryphal: during a lull in a tedious trial, and after some considerable time sitting still, His Honour invited the jury to stand and stretch if they wanted to. His Honour was certainly in need of it. To cap off his judicial career by setting the cat among the AFL pigeons must have given His Honour considerable pleasure, as well as going to the heart of what appeared to be an injustice, a view now shared by at least one other judge of the court.

The Chairman concluded his speech at Nathan J.'s farewell with these words:

There is no doubting that Your Honour has always displayed an acute sense of where the justice of the case really lies, coupled with an ability to cut through unnecessary formalism, or dubious logic, to reach a decision that was fair and just.

The Bar shares that sentiment, and wishes the Hon. Howard Nathan Q.C. many years of happy and active life in the years ahead, filled with ample opportunity for "huntin', shootin' and fishin'".

Justice O'Bryan

THE Honourable Norman O'Bryan retired as a Judge of the Supreme Court of Victoria on 6 May 1992 and continued to serve as a Reserve Judge of the Court until April 1997. He has now ceased to act as a Reserve Judge.

As is known by most lawyers, he was the son of the late Sir Norman O'Bryan of the Supreme Court, his brother Peter also being a well-known solicitor in Victoria. Norman O'Bryan married Margaret Uniacke in 1954. Of their six children, three of the males are practising lawyers in Victoria, namely Norman and Stephen, both at the Victorian Bar and Michael, a partner in Minters. One of the daughters, Katherine, was for many years the Associate to two Supreme Court Judges.

Norman O'Bryan was admitted to the Victorian Bar in 1954 and read in the chambers of Mr. Douglas Little, later Mr. Justice Little of the Supreme Court. His practice was always anchored in the common law and ranged through all of its facets. He quickly established a huge practice as a junior. He was known to be a barrister of unflagging industry, with a significant courtroom presence and complete devotion to the advancement of his client's cause. He took silk in 1971 and was a notable success, appearing in many leading cases and Royal Commissions. As a leader of the Common Law Bar, it occasioned no surprise when he was offered and accepted an appointment to the Supreme Court of Victoria in 1977.

His 20 years of service to the Court and the Victorian community have been marked by the same characteristics that distinguished him as a barrister — devotion to the task entrusted to him, prodigious industry, a strong sense of justice and a practical approach to the solution of legal problems. Moreover, as a judge he had the gift of getting to the heart of the issues and, even in the 1970s and 1980s, when the necessity for prompt despatch of litigation was not so urgent as now, he was quick to deal with his cases and to move on to the next. He never shirked any task and was one of the finest trial judges in the last 20 years. He presided over many important trials and I mention only the Occidental–Bank of Melbourne litigation, a case of remarkable complexity, his conduct of which, until it was settled after about six months, was remarked on by all involved (about 35 Silks and juniors) as exemplary. His continuing contribution as a Reserve Judge, with the same impeccable standards as prevailed throughout his judicial life, has assisted the Court to keep abreast of its complex work.

In addition to the discharge of his judge's duties, Norman has made wider contributions to the community, for example as a member of St. Vincent's Hospital Board of Management from 1980–91, a member of the Board of Mannix College, Monash University, 1984–91, and organiser of the speakers' program at the Biennial Australia–Greece Medico-Legal Conference, now a well-established conference of excellence which publishes its papers.

Margaret and Norman have been warm and generous hosts to their friends for decades. A devotion to the Royal and Ancient game as it is played at Peninsula Golf Club (of which Norman is President) will provide happy hours for them in Norman's retirement, which is not complete, as he will keep his hand in as the Chairman of the Insurance Industry Complaints Panel.

All lawyers wish him a happy and fulfilled retirement.

On the Ball(s)

Dear Sirs,

MAY I suggest the following as the motto for the Bar Football Team — if and when they play again! "Nemo dat quod non habet".

Yours faithfully,
Cubito Presso

The Editor's Response:

Our correspondent, who appears to be a rather laid-back Latin scholar, seems to be suggesting that a person who does not have the ball(s) cannot deliver the ball to another person. We have reason to believe that our correspondent is one of those known as a "flannelled fool". The editors would be delighted to receive an appropriate riposte.

Sir Sydney Thomas Frost

Former County Court Judge was 'a very decent man'

SYDNEY Thomas Frost born 13 February 1916. Died Melbourne 20 April 1997 aged 81 years.

The heading of this obituary that "he was a decent man", is a quotation which was frequently made by the late Syd Frost of other people. He was not one to readily denigrate others.

Syd as he was affectionately known by all who knew him, and I was privileged to be one of those who worked with him in the law, did not have an easy avenue to success. Syd and his twin brother, Jack (who survives him) were about three years old when their father died and ten years old when their mother died.

Despite that, through sheer application and having been gifted with a substantial intellect he succeeded where many others have failed.

His education commenced at the Ascot Vale State School, then Essendon High and later Melbourne High School before going on to study law at the University of Melbourne.

Along the way he won the Alexander Rushall Scholarship which was a scholarship of some distinction in those days. That scholarship enabled him to complete his law degree before going on to work as a solicitor in the office of Maurice Kelly, a man well known to many of us (who might be described as being of mature years) as a solicitor with a very large debt-collecting practice. No doubt that was where Syd first cut his teeth as an advocate which prepared him for his barristerial years later in his career.

It was at the office of Maurice Kelly that Syd met his late wife Dorothy. They were married in January 1943 while he was on home leave from the AIF, which he had joined in 1941. (For the benefit of the younger members of the profession, they should know, if they don't already know, that you joined the AIF as a *volunteer*, you were not a conscript.)

There were three children of that marriage, Elizabeth, Jeremy and Andrew.

Following Syd's return from the Islands after the war had ended and his subsequent discharge from the army he began to practise as a barrister.

He steadily established a very significant practice in both the areas of common law and occasionally in the criminal area.

In his early days, he also partook of a minor career as a part-time tutor in commercial law, in the commerce faculty of Melbourne University and in drafting at the Melbourne Law School.

In 1961 Syd became a Silk and in 1964 was appointed to the Victorian County Court. Shortly after his appointment to that Court he was elevated to the Supreme Court of Papua New Guinea replacing the late Sir Reginald Smithers. Syd succeeded Sir John Minogue as Chief Justice and in 1975 was knighted at Port Moresby by Prince Charles. He became the first Chief Justice of the Independent State of Papua New Guinea.

As a solicitor who briefed him over a number of years, in his capacity as both senior and junior counsel, and in a great variety of litigation, I had nothing but the greatest respect and affection for him as a person with whom it was a delight to work.

Following his retirement from the Bench in 1977 he conducted a number of inquiries and perhaps the most significant of all and most far reaching was his inquiry into whales and the whaling industry. His findings in that inquiry led to the cessation of whaling in many international waters and he received significant and well-earned international acclaim for his work in that area. So far as Australia is concerned his findings led to the closing down of at least two whaling stations which were, up until then, situated on the Australian mainland.

Syd was a quiet, modest, man who apparently would break out of such modesty when on the golf course. His twin brother Jack, while conceding that in many areas he could not surpass Syd, at least claims that he could consistently have the better of him at a round of golf.

As a solicitor who briefed him over a number of years, in his capacity as both senior and junior counsel, and in a great variety of litigation, I had nothing but the greatest respect and affection for him as a person with whom it was a delight to work.

He was absolutely meticulous in his preparation of a case and equally meticulous in his presentation of same when on the floor of the court.

Members of juries readily warmed to him for his sincere and almost unobtrusive manner. There was nothing bombastic about his approach to the people in the witness box nor did he endeavour to talk down to members of the jury.

Unlike many members of the Bar, who possess an unfortunate habit of voicing their dissatisfaction with some aspects of the brief delivered by their instructing solicitor, and voicing that dissatisfaction in the presence of the client, Syd was never ever guilty of that in the writer's experience. That was indicative of his general approach of compassion and consideration for other people.

The writer recalls him saying on one occasion, after he had been called as an expert witness in a Federal Court case and cross-examined for some time that he realised how difficult it was for witnesses. The experience changed his attitude, if indeed that was necessary, towards witnesses in the box.

The writer did not have any experience of him as a Judge but it was evident from those who did, and who attended the funeral service at St. Peters Anglican Church East Melbourne, that he was viewed as a very sound Judge and wise counsel and good friend to his fellow members of the Bench.

Syd will long be remembered with great affection and respect by those of the old brigade who knew him, and worked with him, be they members of the Bar or solicitors. Certainly the writer will be one of those.

Yes, he was a very decent man.

The Role and Function of Mediation in Supreme Court Litigation

Speech given by The Honourable J.H. Phillips, Chief Justice of Victoria, at the opening ceremony of the Victorian Bar Mediation Centre, Wednesday, 30 April 1997

DISTINGUISHED guests, ladies and gentlemen, the history of court connected mediation in the Supreme Court of Victoria is both short and remarkable.

As recently as 1990, an amendment to the Supreme Court Act empowered the judges to make rules with respect to "the reference of any proceeding or part of a proceeding to mediation". A further amendment gave immunity from suit to a mediator in the performance of his or her duties.

Rules for civil proceedings generally were made as a consequence in 1992, but these had been preceded by rules, made in the preceding year, which provided for the appointment of mediators in cases in the Building Cases List.

These building cases rules reflected the success His Honour Judge Lazarus had obtained by use of mediators when he was Judge-in-Charge of the County Court Building List.

The early mediation rules vested power in the judge to order a reference to a mediator with or without the consent of the parties. But references were made, in the ensuing years, by masters with the parties' consent.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1. *George Golvan Q.C., Justice Hansen and Justice Batt.*
2. *Master Kings.*
3. *George Golvan Q.C., Chief Justice Phillips, Bill Martin Q.C. and Neil Young Q.C.*
4. *Neil Young Q.C.*

In 1992 the Supreme Court had a substantial problem in its general Civil List. There were over 1000 cases waiting to be heard and the consequent delays were unacceptable.

The Council of the Judges, meeting in August of that year, decided on an all out effort to be staged in November. The entire Court, with the exception of a Practice Court Judge and three members to constitute the Full Court, was allocated to sit in November to hear civil cases. There were four teams of five judges involved.

Mr. Justice Beach, as Judge-in-Charge of the Civil List, conducted a series of callovers at which practitioners and the parties were required to be present.

At these callovers the possibility of mediation was explored and over 250 cases were referred to mediators. A number of senior members of the Bar and senior solicitors had agreed to conduct these mediations without fee.

A settlement rate, during mediation, of a little over 50 per cent was obtained, but we received anecdotal evidence that a number of additional cases settled shortly after mediation. In other instances where a trial eventuated, its duration was sharply reduced by a number of issues being resolved in the mediation process.

The result of all this effort, in which mediation played a most significant part, was that the backlog, except for a hundred or so obdurate cases, was eliminated. This exercise became known as "the Spring Offensive".

Subsequently, Mrs. Carole Bartlett of the Law Institute published the results of a survey conducted of practitioners who participated in the offensive. She concluded:

> There is no doubt that mediation played an important role in the Spring Offensive. It contributed significantly to the ultimate disposal of a large number of cases, a number of which would not otherwise have settled.
>
> Mediation . . . offers the possibility of resolving some disputes in a timely and cost effective manner that virtually guarantees user satisfaction. On this basis, it should be considered a permanent option to be encouraged in certain cases at an appropriate time.

5. Jonathan Mott and Mark Derham Q.C.
6. The Opening.
7. Chief Justice Phillips.

In the months following this effort, the judges considered the creation of a panel of mediators to be registered in the Prothonotary's Office and available for litigants. After a deal of discussion, it was resolved that the Court would make no appointments of this sort, but, rather, would leave it to the two branches of the profession to supply lists of suitably qualified mediators.

These lists were duly supplied in 1993. All persons on them had completed at least one approved course in alternative dispute resolution.

The next years saw a substantial increase in mediation references. In 1994 the Victoria Law Foundation and the Attorney-General's Law Reform Advisory Council published a book of standards for court connected mediation in Victoria approved by the Dispute Resolution Committees of the Bar and the Law Institute.

I will particularly mention a series of proceedings arising out of the collision between H.M.A.S. *Voyager* and H.M.A.S. *Melbourne* in 1964. These matters were mediated by the Court's Chief Executive Officer. Nearly a hundred of them were settled at a total figure in excess of $40 million. It has been estimated that court costs to the order of $15 million were saved in this exercise.

The next event of significance was a supplementary attack on the Civil List in March, 1994 — commonly known as "the Autumn Offensive".

This time some 150 cases were referred to mediation and we kept figures for settlements which occurred immediately after mediation ended.

A total settlement figure of 79.35 per cent was obtained.

This time, the mediators (who came from the profession's supplied lists) charged fees. Pursuant to an understanding I had with the profession, a number of mediators were available at a daily fee of $900.

Court connected mediation has attracted an extraordinarily wide range of opinions. It has its zealots particularly in the United States where some people regard each resolution of a dispute by orthodox trial as a failure of the justice system. It also has its critics — some of them very distinguished, like Sir Laurence Street, the former Chief Justice of New South Wales and now a noted mediator. As I understand it, Sir Laurence believes the Court should not be connected with mediation and that it should be left to mediators operating independently of the courts to conduct this form of alternative dispute resolution. I should add that this view has not prevented Sir Laurence from being of very great assistance to the Supreme Court of Victoria. Earlier this year, for example, he successfully mediated a mining dispute which had occupied a judge for many months.

Rachel Lewitan Q.C., Ada Moshinski Q.C. and Georgina Gregoriou.

Bill Martin Q.C.

Court connected mediation has attracted an extraordinarily wide range of opinions.

It may be that it is the matter of communication between the judge and the mediator which troubles Sir Laurence and in this connection it is to be noted that our rules, from the very beginning, have tightly restricted that communication to the mediator providing a report on whether the mediation is finished and no more.

As we have seen, the rules have empowered references to be made without the consent of the parties by the judges. By a further rule made in 1995 the judges extended this authority to the masters. I do not know personally of a reference being made over the objection of a party or parties — it may have happened occasionally. I will allow that resort has been had to a deal of persuasion in lieu of compulsion.

Follow-up studies of the New South Wales initiative of providing extra-judicial, non-binding summary judgments by senior lawyers in personal injury cases, showed that litigants rated two factors most highly in the dispute resolution process. These were:

- speed in resolution (with consequent cost reduction); and
- an opportunity to hear their case put to an impartial authority.

It seems to me that mediation supplies both these factors.

In late 1995, all three Victorian courts made a formal commitment to mediation as part of their procedures. This was known as the "Portals" initiative. In the Supreme Court the commitment took tangible form by the judges emphasising mediation as a possible solution throughout the currency of actions. Feedback from a very large users advisory group has indicated that practitioners see the period between the fixing of a trial date and the trial as a very propitious time for mediation.

Accordingly, it is raised by the Listing Master when the trial date is fixed and a settlement figure somewhat exceeding 50 per cent is being obtained. This procedure will continue to be an integral part of the new arrangements for the Civil List under the aegis of the Litigation Support Group. The National Alternative Dispute Resolution Advisory Council Chairperson, Professor Hilary Astor has reported to me that after studying the "Portals" initiative "the Council regards the Portals programme as a very significant initiative which will provide useful guidance for other courts and tribunals."

I am sure that mediation will continue to prosper and that the opening of this Victorian Bar Mediation Centre will be a significant step in its progression. I congratulate the Bar and its prominent members who have been behind this initiative. I wish it well.

Mediation: Converting the Unconverted Barrister

George Golvan Q.C. recently wrote an editorial for *LEADR Brief* in which he extolled the virtues of mediation. For those who are not yet "converted" that editorial is reprinted below (with the permission of the author and of *LEADR*).

IF mediation is such a great idea, why do some barristers remain distinctly unenthusiastic and, in certain cases, actively hostile?

The unconverted can generally be placed into the following categories:

The Traditionalist

The true function of a barrister is to be a well remunerated warrior in an adversarial procedure, fighting the good fight on behalf of his/her client. The traditional barrister is trained to "win" cases by clever procedural manoeuvres and finely tuned advocacy skills. Mediation is not a forum which enables "real" litigators to display their professional talents, and let's face it, you don't get the opportunity to kick the other side in the butt.

Many solicitors still prefer to appoint experienced and respected barristers as mediators, particularly in difficult and large economical matters.

The Sceptic

Mediation does not really work! In many cases, it has just been imposed by the courts on unwilling parties to help clean out Lists, and create impressive settlement statistics. In any event, 95 per cent of all cases settle regardless. All mediation does is assist cases to settle which would have resolved anyway during normal litigation. The other side really proposes to use mediation as a Machiavellian manoeuvre to force you to disclose the strengths and weaknesses in your client's case before trial, and cannot be trusted.

The Economic Realist

Mediation may be a good idea for some, but the process has become hijacked by solicitors as a way of expanding their practices, and barristers have little part to play in mediation conferences. More importantly, mediation is resulting in settlement of cases which would normally be determined by a hearing, and cost barristers valuable trial work.

Some of the preceding concerns are legitimate. After all, mediation is not suitable for every dispute. Certainly, the mediation process does not permit barristers to display some of their traditional skills — such as vigorous cross-examination. It is true that mediations are often conducted by solicitors before solicitor mediators, without counsel being briefed. However, barristers have always had, and are increasingly taking on, an important role in mediations. Like it or not mediation is here to stay and barristers will need to develop new skills and areas of practice to be able to satisfy the demands of their clients and the requirements of judges.

Barristers should take the following relevant matters into consideration:

- Although there are a number of successful solicitor mediators, many solicitors still prefer to appoint experienced and respected barristers as mediators, particularly in difficult and large economical matters. The experience in Victoria in court-annexed mediations, particularly in specialist areas such as building cases, banking disputes and personal injury claims, is that experienced barrister mediators in the area of the dispute are frequently, if not usually, selected by the parties to act as the mediator. A number of barristers have been able to establish very successful mediation practices, and work is expanding, not drying up.
- Solicitors and clients increasingly appreciate that taking part in a mediation is not just an ad-hoc procedure that can be accomplished with little work or thought. Participating in a mediation requires skill and preparation, in which the input of a trained barrister can be vital in achieving a satisfactory resolution for the client. For example, drafting of well written Position papers, required by many mediators, is a procedure that demands as much thought and care as the preparation of any pleading. Equally, opening statements for a mediation conference, which need to be made concisely and well, can be crucial in clarifying the issues for negotiation and persuading the other party to make concessions. These days, the opening statements are frequently delivered by barristers.

Participating in a mediation requires skill and preparation, in which the input of a trained barrister can be vital in achieving a satisfactory resolution for the client

- Negotiations in the course of the mediation demand skill, thought, creativity and preparation. For example, when meeting with a mediator in a caucus session, a well prepared advocate is able to identify to the mediator the weakest and least defensible aspects of the other party's case, which can then be focused upon by the mediator to gain concessions. Interest based negotiations encourage a search for creative solutions. Barristers do have an important role to play and can effectively exercise many of their legal and forensic skills in the mediation process.
- Finally, neither courts nor litigants are prepared to put up any longer with Byzantine and expensive adversarial procedures. The new Lord Chief Justice, Lord Bingham, recently described the excessive costs of civil litigation as "a cancer eating at the heart of the administration of justice". The position is no different in Australia. There is an irresistible demand for quicker and cheaper justice with control of litigation shifting to the courts. Compulsory court-annexed

mediation is at the forefront of this trend. Barristers who disregard or deliberately ignore the importance of mediation and the important part it can play in their practices do so at their own peril, because they will be increasingly left behind.

Mediation has rapidly become the alternative dispute resolution process of choice in most commercial and civil disputes. Effective mediation cuts through the posturing tactics of litigation and gets to the real merits of the dispute and the true interests of the parties. It has a remarkable rate of success. Many barristers who were sceptical about the mediation process have come away from mediation conferences as true believers!

George H. Golvan Q.C.

VICTORIAN BAR MEDIATION CENTRE

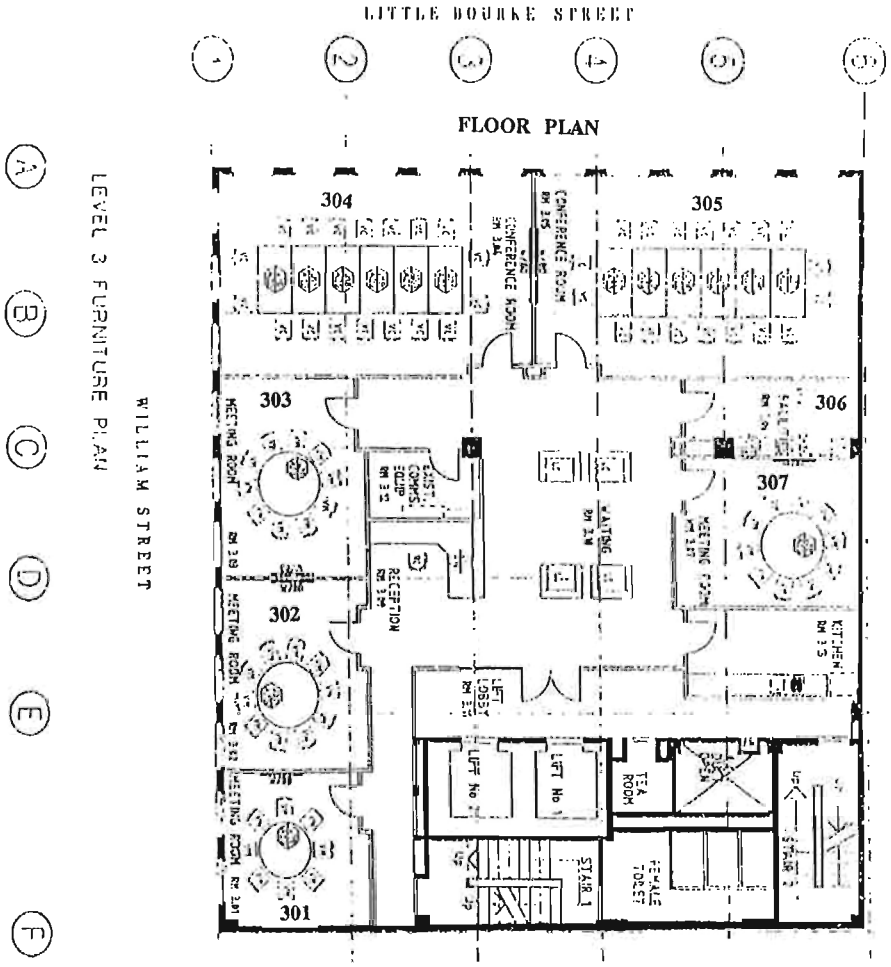
3rd FLOOR, DOUGLAS MENZIES CHAMBERS
180 WILLIAM STREET, MELBOURNE
Tel: (03) 9601 6930, Fax: (03) 9640 0199

LIST OF CHARGES

1. Room hire *alternatives
   - — Boardroom and two conference rooms, recommended option $350
   - — Additional rooms $75
   - — Two conference rooms $275
   - — Whole venue $650
   - — Weekly/long bookings By arrangement
2. Facsimile — to receive $1
   — to transmit $2
3. Photocopying per page .40
4. STD telephone calls and video facilities By arrangement
5. After hours staffing fee per hour $40
6. After hours air-conditioning and electricity (*after 6.00 pm) per hour $80

*Hire fee payable on booking.
Hire fee payable if cancellation later than 72 hours.
Preliminary conference included at no charge subject to availability.

Luncheon catering can be arranged at least by 11.00 am.
Evening catering can be arranged preferably on 24 hours' notice but not later than 2.00 pm.



Room	*Seating capacity*	*Room description*
301	8	Medium conference room, seats 8
302	10	Large conference room, seats 10
303	10	Large conference room, seats 10
304	18	Boardroom, seats 18, variable configuration
305	18	Boardroom, seats 18, variable configuration
307	10	Large conference room, seats 10

Mediation: Who For?

Robert Vial, a lawyer who now works exclusively as a mediator conducting his own private mediation practice. He is also a mediator with the Domestic Building Tribunal, a conciliator with the Legal Profession Tribunal and regularly assists as a coach on mediation training courses conducted by LEADR, Bond University, the Accord Group and other organisations.

AS mediation is being seriously considered and used for resolving disputes, there is an important question that must be addressed: "Whose mediation is it and why is it being conducted?"

Many articles have been published in the *Law Institute Journal*, the *Australian Dispute Resolution Journal* and overseas mediation journals that touch on this question.

Is it for the parties themselves to participate in the decision making using the mediation process, given that they have been unable to resolve their dispute through normal channels of discussion, negotiation or other legitimate means? Is it for the parties, their lawyers or other advisors who may wish to use the mediation as a "fishing expedition" to find out more about the other's case before going to court? Is it for the mediator to practise skills learnt at a recent mediation training course (for which good money has been paid to attend) in the hope of gaining some positive runs on the board for future work in this area? Is it for the relevant court or tribunal to "clear its lists" and manage caseload more effectively?

Depending on who one talks with, there will be different points of views raised and very different answers suggested to these questions.

My experience over the last 11 years of working as a mediator has led me to consider many of these and other questions. Issues of case management are important. It is also important that parties not sign agreements at a mediation unless they have been fully advised concerning their rights and the implications of what they are signing (whether legal, financial or other). Advisors obviously play a very important role at this stage at least.

Working as a mediator is about understanding and working with the dynamics of how people are relating with each other during the whole mediation process.

However, I subscribe to the theory that a mediator, while being flexible during the mediation process, should ultimately check with the parties themselves (or those attending with authority to settle) about the implications of the options or proposals they are considering for resolving the dispute. The mediator, whoever he or she is, must constantly ask the parties such questions as "How is this agreement you are about to enter into going to work in reality?" and "What if . . . ?"

Asking these sorts of questions takes skill, patience, the ability to work with people and to help them maintain the trust in both the mediator and the mediation process that has hopefully developed during the course of the mediation. Basically, it assists the parties in making decisions they can all live with.

Working as a mediator is about understanding and working with the dynamics of how people are relating with each other during the whole mediation process. This, in my view, starts as soon as the mediator is contacted. It means not just working with how the parties are relating with each other, but how their legal representatives or others involved in the process are relating and understanding the negotiating styles of all. Questions about the parties' willingness and capacity and those of their advisors to be in involved in a mediation always have to be addressed.

For those who are serious about working as mediators, it is important that they constantly work at developing these and other basic interpersonal skills (such as active listening, summarising and reframing) that are essential, in my view, to be effective in this field. Some people have natural skills in these areas, some must work hard to acquire them, others will never acquire them no matter how hard they work. Being a mediator is not suitable for all, just as being a barrister or a solicitor is not suitable for all.

Investing and spending time on professional skill development is essential in this line of work and those wishing to work as mediators must invest in their skill development and constantly address quality control issues. Attendance at a three- or four-day basic mediation training course is just a small first step.

Our Democracy in Peril: The Safe Way to a Democratic Republic

Richard E. McGarvie

I raise deep alarm. The republic debate is drifting us down tracks that would ruin our democracy. We must get our heads out of the clouds of theory, come down to earth and look at Australian reality.

Australians have built one of the world's oldest and most successful democracies. That is our priceless possession. Yet, in preferences for the way of going to a republic if we decided to do so, the way that would totally secure the strengths and safeguards of our democracy drew only 3 per cent support in the Morgan Poll last year. The two ways that would destroy it shared 94 per cent support.

The only safe way to go to a republic is the Australian way which would give us the republican equivalent of our present system. It would involve only a further couple of steps along the same track Australian evolution has followed for two centuries. That has taken us from Governor Phillip, arriving with the First Fleet in 1788, a complete autocrat, to the Governor-General and Governors now the de facto heads of state of our democracy. Democracy would be entirely safe in a republic which continued them doing the same things in the same way, but as the actual heads of state.

The positions of Governor-General and Governor have developed in Australia very differently from corresponding positions elsewhere, such as in the other Westminster-type federations of Canada and India.

The Australian way is the way I put to the Republic Advisory Committee and the first option it discusses in its 1993 report. In essence, though not in every working part, it is the option recommended by the South Australian Constitutional Advisory Council in its September 1996 report.

It is so safe, simple and obvious that it has little attraction for theorists. The debate has almost overlooked it.

The two models which shared 94 per cent support would first demolish the tried and tested positions of Governor-General and Governors as developed in Australia. Their places would be taken by republican Presidents selected, appointed, tenured and dismissible in totally different ways. They would be elected for five years by Parliament or the whole electorate, have the powers of a Governor-General or Governor, and be dismissible during the period only by a two-thirds majority of a joint sitting of both Houses of Parliament. Based on features of republics around the world, these imported models do not have a shadow of Australian experience to back them. It is not enough to say their features work in overseas countries and cultures. They may sound all right in theory. They sound innocuous but are really changes of drastic potential. In the living reality of the political culture and constitutional practice of this country they would immediately corrode and ultimately destroy our democracy.

The debate has given hardly a thought to preserving our democracy.

There are no villains in the piece. Leaders of the debate on both sides wish to keep democracy but the debate has lost its way. It has concentrated on the heady, emotional issue of general preference for monarchy or republic. The models that would serve as bridges to the republic of an elected President have been sketched. Most in the debate have been so fascinated, or so repulsed, by the view of a republic they would have from those bridges, they have not found time to check the foundations. Perhaps they assumed someone else had done the checking. Clearly neither bridge has the strength in its foundations to cope with the stresses or bear the traffic of our modern democracy.

I take no side in the debate whether we should become a republic or stay a monarchy. Our absolute priority must be to maintain our democracy in all its strength. It is a secondary consideration whether we do that under a monarchy or republic. The only choice we should make is between our present democracy within the monarchic system and that same democracy within the one republican model that will retain it. We must totally reject both models for an elected republican President.

The organisational change needed to move to the republican equivalent of our present system is to set up a Constitutional Council of three eminent Australians to take the place of the Queen in performing the one power she now performs appointing or dismissing a Governor-General as advised by the Prime Minister. The Council would be created under the Australian Constitution, which would by formula automatically select its membership from persons retired from non-political, constitutional positions of trust such as Governors-General, Governors and High Court Judges. It would only have that one power of the Queen and perform it the same way on the Prime Minister's advice. It would have no other power or duty. It would only be paid during the process of receiving and acting on advice.

The other change has constitutional but no operational effect. It involves making the Governor-General actual head of state of Australia and transferring or patriating from the Queen the few remaining powers of head of state that are the Queen's not the Governor-General's. In practice nothing would change because for over half a century Governors-General have exercised the Queen's powers in respect of Australia on the advice of Australian Ministers.

For Australia to become entirely a republic, similar changes would be made in each State. Then each Governor of a State becomes its actual head of state, the State has its own Constitutional Council and the remaining powers of the Queen in respect of the State are patriated to the Governor.

The Queen's relationship with Australia as head of the Commonwealth of Nations would continue in the same way as it does with other member countries, whether monarchies or republics.

I outline the way that either our present monarchic system or its republican equivalent would keep our democracy safe and secure in future. I can deal with them together because, although the Constitutional Council replaces the Queen in the republican equivalent, there is no alteration in the operation of any part of the system at all. I speak mainly of the Governor-General but

what I say applies to the Governors whose positions in the States are much the same.

As in the past, the Prime Minister alone will select a new Governor-General. There is no need to consult anyone though it is open to do so. When a selected person agrees to serve, an informal arrangement is made with the Prime Minister to serve for a period, usually five years. The Prime Minister then advises the Queen, or in the republican equivalent, the Constitutional Council, to appoint the person Governor-General. The Queen, or the Constitutional Council, is entitled to counsel the Prime Minister against an unsuitable appointment but, if the Prime Minister insists, is bound by convention to make the appointment. The appointment is made and the Prime Minister in announcing it says the new Governor-General will serve for five years or whatever period has been arranged.

The Queen or the Constitutional Council will still appoint the new Governor-General "at pleasure". That means that at any time if the Prime Minister advised that the Governor-General be dismissed, the Queen or Constitutional Council would be bound to do so. Again there would be the opportunity of counselling the Prime Minister against dismissal but if insisted on, the Queen or Constitutional Council would be bound to dismiss within a couple of weeks of the advice.

The Governor-General has no legal right to serve for the arranged period because the informal arrangement has no force in law and could not be enforced in a court. However, the realities of politics make the Governor-General's position secure. The community regard the Governor-General, who is central to their system of government, as belonging to them, not to the Prime Minister. A Prime Minister having a Governor-General dismissed, one whom the community regards as complying with the constitutional conventions and meeting the standards it expected, would encounter an immense, adverse political reaction. A Governor's position is the same. Every Governor-General or Governor knows that while in theory dismissal is possible, in reality their service will last for the arranged period so long as the expected conventions and standards are satisfied. In Australia no Governor-General or Governor has been dismissed during the arranged period over the last 80 years.

It is crucial to our democracy, however, that the Governor-General be always liable to prompt dismissal for breach of convention.

The Governor-General exercises many vital powers central to our system. It is the Governor-General who can prorogue (adjourn) Parliament, dissolve it and bring about a general election, summon it after the election, and convert a bill into an Act by signing assent after it has passed both Houses. The Governor-General is the one with the power to appoint or dismiss the Prime Minister or any Minister. The Governor-General is legally entitled to exercise those powers as and when he or she chooses. In a different way, the Constitution and Acts of Parliament provide that numerous powers of the widest variety are to be exercised by the Governor-General in Council. They include appointing judges and issuing writs in a general election. Powers of the Governor-General in Council require the advice of the Ministers of the Federal Executive Council before they can be exercised but the Governor-General is legally entitled to refuse to exercise them although the Ministers advise it.

The theory that the opposition would join the government for a two-thirds majority to move a republican President who was frustrating the government by defying the convention, cannot stand up to scrutiny in clear Australian daylight.

If one person, the Governor-General, has all those powers, you might ask, how are we a democracy? What gives us our democracy is the basic constitutional convention which binds the Governor-General to act in accordance with advice from Ministers of the elected government. It is the link between the decisions made by the community in elections and the exercise of those powers by the Governor-General.

As we often see in the English language the word "convention" has several different meanings. The meeting at the end of the year to consider a republic has been called a "constitutional convention". The conventions I write about are binding constitutional customs. A constitutional convention is a constitutional custom so uniformly followed and expected to be followed as to create a sense of clear obligation, and backed by so effective a sanction as to be binding in practice though not in law.

The convention is not binding in law and you could not get an order from a court directing the Governor-General to do what Ministers advised. It is firmly binding in practice, having been uniformly followed for decades and being backed by the effective sanction of dismissal. Every Governor-General knows that failure to comply with the convention would lead the Prime Minister to advise the Queen to dismiss the Governor-General. Within two weeks the Governor-General would be dismissed with public approval and loss of reputation. The basic constitutional convention is deeply embedded in the Australian constitutional system. It would remain identically embedded in the republic equivalent, with the Constitutional Council dismissing instead of the Queen.

It is a pity that in the debate we did not describe the issue as patriating the remaining powers of head of state from the Queen to Australians. Then we would have started on the basis that we have one of the world's best democracies and asked how we could patriate those powers while maintaining democracy at full strength. Our priority would have been to protect the basic constitutional convention on which our democracy depends.

Instead, confused by the word "republic", we set off in a different way. The search went around the world to see how republics get their heads of state. Protection of the convention was usually forgotten. It was also forgotten that for a convention to be binding in Australia it must be backed by an effective sanction. Professor Sawer emphasised that in 1977 in his *Federation Under Strain.* One of his prime examples of that was the way the sanction of dismissal makes the basic constitutional convention binding on the Governor-General.

Both models for an elected republican President would ruin our democracy by first destroying the basic constitutional convention. It would cease to be binding because it would have lost its effective sanction of dismissal. Democracy would unravel. We would be forgetting the lessons of centuries of history that you do not put people in positions of great power unless they are subject to democratic control. When the basic constitutional convention withers so does the democratic control.

In assessing how those models for a republican President would work we must look at the living reality of Australian political culture. Australians have been a particularly successful people, politically and constitutionally. It was a miracle we got federation. It has been a miracle that

we have made it work so well. I admire Australian political achievement. I also admire Australian Rules Football. But both games are played hard. You don't find one team coming to the aid of the other to help them out of their difficulties.

The theory that the opposition would join the government for a two-thirds majority to move a republican President who was frustrating the government by defying the convention, cannot stand up to scrutiny in clear Australian daylight. Say you had a President who, at a time when the government's popularity with the electorate had slumped, rejected Ministers' advice to assent to an unpopular government bill which had passed both Houses.

Usually the opposition, of whichever side of politics, would be more likely to commend the President for recognising what a bad government it was, than to join in a resolution of dismissal. Without the opposition's support it would usually be pointless for the Prime Minister to initiate a two-thirds resolution of a joint sitting.

Governments in Australia normally do not have a two-thirds majority of both Houses. No government has in the Federal Parliament for over 50 years. In March 1996 the Howard Government won with what was called a landslide majority. In a joint sitting it had 131 votes. It would need 150 for a two-thirds majority. In Victoria for 45 of the last 50 years governments have not had a two-thirds majority in both Houses.

The result would be no better if we imagined that change to an elected republican President would change traditional political culture so that oppositions would support governments. A President with an instinct for self-defence could avoid a resolution of dismissal by exercising the power to prorogue (adjourn) Parliament or to dissolve it.

The models for an elected republican President sharing 94 per cent support last year are recipes for disruption that would cost us our democracy by giving us an undismissible President. They are not worth trying to patch up. Their destruction of the basic constitutional convention is a fatal flaw. The notion that it does not matter because we could create a legally binding obligation to exercise powers as Ministers advise, might appeal to theory but not to practical experience. The novelty of bringing the courts into the political process to order a President to comply with Ministers' advice, would be as damaging to the process as to the courts. The spectacle of putting the political process on hold while court trials, exercises of discretion whether to order compliance, and appeals took place, cannot be taken seriously.

The system could not even be regarded as working if the President, mentioned above, who refused to assent to the government bill, resisted a court order to do so and was committed by court order to prison until he or she assented to the bill. Posterity would be unforgiving if we substituted that ineffective legal sanction for the sanction of the basic constitutional convention, so effective that it has not had to be used for 80 years. An elected republican President would lack other essential attributes.

The system would not work with two rival centres of political power. The present system and its republican equivalent are designed to avoid the Governor-General being actuated towards becoming a political rival to the Prime Minister through the mandate or authority that comes from election. The Governor-General is selected by one person, the Prime Minister.

Because Australian parties vote as blocs, and the support of the opposition would usually be necessary, the vote of a joint sitting electing a republican President would usually be entirely or almost unanimous. The President's mandate from the Parliament would far exceed the Prime Minister's, who might have a bare majority in the lower House, having been elected by a small majority within the party room and in minority in the Senate.

A President elected by the whole electorate would hold the only office in the system directly elected. The President's mandate would overshadow the Prime Minister's. It would be an irreversible move towards the American system. We should only go to that system by choice — not by accident. Before going there we would have to rewrite our Constitution to introduce the different checks and balances that over two centuries of American experience has shown that system needs.

Democracy requires that two of the basic parts of our system be chosen by elections the Parliament and the government. Equally it requires that the other two — the head of state and the courts — be not elected. The need to face elections deprives judges of impartiality. The head of state should be a person of influence but virtually no effective power, because powers are exercised as advised by elected Ministers. It is only in exceptional circumstances as a last resort to protect the system from stalling or serious abuse that a head of state is justified in using a reserve power independently of Ministers' advice.

The incentive to wield effective power would be created by the mandate of election by Parliament or people. Our system needs a person with high reputation and respect, capable of exerting influence but acting above politics in a non-partisan way.

It is unfortunate that the name "President" has been used because it arouses visions of the totally different position of President of the United States. For entirely different reasons, it would be expected that in the United States the most powerful political leader in the world, combining the two offices of head of government and head of state, would be elected.

In Australian experience Prime Ministers have chosen suitable Governors-General. They know their own reputation with the community and with history will be affected by their choice. They have the whole of Australia to choose from.

If a President is elected by a two-thirds majority of a joint setting it would be naive to assume there will not be parliamentary inquiries into suitability as occurs with Supreme Court Judges in the United States. Baseless but wounding allegations of disgraceful conduct would be prone to be made there or via Internet or overseas television where there is now little protection. Why should people of repute, like those who the community has expected to be Governors-General in the past, enter that bear pit? Presidents would be very different people from what Governors-General have been.

Unless a multi-millionaire, a person could only campaign in the electorate for the position of President if supported by a political party. To secure election, policies would be stated and expected to be pursued upon election. The President would inevitably be a party politician with popular election-winning skills — a person vastly different from what Australians expect in a Governor-General.

We have two centuries' experience of adapting the office of Governor to perform the duties of head of state in a way that suits Australian conditions, culture and democracy. If, as we approach a century of successful federation, we decide to become a republic, we do not need to throw it all away and start again. We do not have to go around the world copying bits from other countries. We have the strongest reason to have confidence in what Australians have created and to take the adaptation of the tried and tested offices of Governor-General and Governors the little distance further that would give us a republic safe for democracy.

Tait's Case, and Sir Owen Dixon

S.E.K. Hulme

"Ah, did you once see Shelley plain,
And did he stop and talk with you
And did you speak to him again?
How strange it seems, and new."

Robert Browning

A Response by S.E.K. Hulme, A.M., Q.C. to the speech of the Chairman of the Victorian Bar Council, made on behalf of the guests, at a dinner held in the Essoign Club, Owen Dixon Chambers, on Thursday 15 May 1997.

IT is a great privilege to be invited to respond, on behalf of all your guests, to the remarks which you, Mr. Chairman, have so kindly made.

Let me express our gratitude, "each for his own, not one for another", as they say at Lloyd's of London.

We thank you for kind remarks true, and kind remarks untrue. Especially perhaps the latter, but you will not expect me to mar the pleasantness of the occasion by discussing which is which.

Remembering that the years pass, and that probably most people here tonight did not know him and indeed never laid eyes on him, I intended originally to speak of the great lawyer and judge whose name this building bears.

In thinking to do that, I noted that April of this year saw the 45th anniversary of Sir Owen Dixon's appointment as Chief Justice of the High Court of Australia, on 18 April 1952, and that July will see the 25th anniversary of his death, on 7 July 1972.

And I noted that in recent times of challenge and stress, this Bar called in aid the fine statement he made as to the Bar, at his swearing-in as Chief Justice. Before repeating that statement, let me say that in his utterances on such occasions Sir Owen Dixon never said one word from misplaced courtesy. He meant every word he uttered.

The activities at the Bar are greater than those on the Bench, and the responsibilities are no less. The Bar has traditionally been, over the centries, one of the four original learned professions. It occupied that position in tradition because it formed part of the use and the service of the Crown in the administration of justice. But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.

The conclusion was firmly stated:

Counsel, who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself.

Reflection on that statement brought to mind one particular case; the case known as *Tait's case*. Dixon himself, as you will see, played a late but decisive part in it. During the preparation of what I wished to say about Dixon, *Tait's case* acted rather like a cuckoo, pushing competing birds out of the nest. In the end I cut my losses, and decided that after the briefest reminder of Dixon's greatness, I would talk of that case.

Sir Owen Dixon was a Judge of the High Court of Australia from 4 February 1929 to 17 April 1952. He was its Chief Justice from 18 April 1952 to 13 April 1964: in all 35 years.

The period is not a record. That belongs to Sir Edward McTiernan, who served from 1930 to 1976; just on 46 years. Sir George Rich had 37 (mainly idle) years, from 1913 to 1950. Sir Hayden Starke had 30 years, from 1920 to 1950. The introduction of compulsory retirement at the age of 70 makes it unlikely that we will ever see such figures again.

Dixon's years as a judge were of course years of the greatest possible distinction. On his appointment as Chief Justice, Justice Felix Frankfurter of the Supreme Court of the United States sent a simple cable: "Law is enhanced". In Oxford in the 1950s, Dixon was already seen as the greatest judge in the common law world. On his retirement, Prime Minister Sir Robert Menzies referred to similar testimony from two Lord Chancellors. International recognition was evidenced in honorary doctorates from Oxford University and Harvard University, the Henry Howland Medal from Yale, and award of the Order of Merit, a distinction in the personal gift of the monarch. It is the only time the Order has ever been made for services purely to the law. Dixon's successor Sir Garfield Barwick spoke truly when he said that whereas for other judges, appointment to the High Court adds lustre to their name, in Dixon's case, "His lustre was shed upon this Court."

The greatness may I think be taken as undisputed. I long to say something of Dixon's kindness, of his sardonic humour, of his pleasure in the young, of the happiness and laughter which accompanied him everywhere, of the exhilarating joy of arguing to him. That temptation I must resist. Once started on that, I will not reach anything else. And I do wish to speak of *Tait's case*. It is all more than 30 years ago, and it should never be forgotten.

On 8 December 1961, Robert Peter Tait, I.Q. 94, was tried before Dean J. in the Supreme Court of Victoria, on a charge of murder. He was defended by John Starke Q.C. and the present Chief Justice, then Mr. J.H. Phillips.

It was a peculiarly violent, brutal and horrible murder — if one is allowed to have grades of murder, remembering of course that one is forbidden to do so with rape.

The only defence was insanity at the actual moment of the murder, though at no other time. There was no suggestion that Tait was unfit to plead.

On 8 December 1961 Tait was convicted, and as required by statute, sentenced to death.

An application for leave to appeal against the conviction was refused by the Full Court of the Supreme Court on 22 February 1962: see [1963] V.R. 520.

An application for special leave to appeal to the High Court of Australia was refused on 17 May 1962: see [1963] V.R. at p. 531.

And a petition for special leave to appeal was dismissed by the Privy Council on 2 October 1962: see [1963] V.R. at p. 531.

Against the expectation that the government would not execute someone who on any view was pretty dimwitted, and obviously unbalanced, whether or not technically insane, it was directed that the execution take place on 22 October 1962. It was said that "The Premier (Sir Henry Bolte) wants a hanging".

Three years before all this, Parliament had enacted the *Mental Health Act 1959*, intended to replace the *Mental Hygiene Act 1958*.

The provisions of the 1959 Act substituted for the concept of "insanity" the milder concept "mentally ill or intellectually defective". Dr. Allan Bartholomew, the Crown psychiatrist, had refused to certify Tait as insane. But it was believed that he would certify Tait under the 1959 Act, once it was in force. It was believed that if Tait were so certified, the execution would not take place.

But the 1959 Act was not in force. It had not been proclaimed, and it was not likely to be proclaimed while Tait was alive.

Unexpectedly — just how it happened has never been spoken out loud, but late at night people have said that a proclamation was slipped into a pile of documents for a Cabinet Minister's signature, and signed accidentally: somehow the 1959 Act was proclaimed to commence on 1 November 1962.

And those defending Tait — primarily, let us be frank, John Starke himself, passionately opposed to capital punishment, pursuing a personal campaign — set out to keep him alive until the new Act was in force, and Dr. Bartholomew had certified.

At the time — October 1962 — Starke was leading myself and Stephen Charles in the King Street Bridge Inquiry. We had the privilege and pleasure of discussing the *Tait case* with him a great deal, as he juggled the demands of the Inquiry and of that case.

Throughout the next few weeks he spent the week nights in Melbourne, staying in The Australian Club. The day did not contain sufficient hours to fit in going to and from his home at Mt. Eliza.

On 12 October 1962 — ten days to execution, 20 to the new Act — there was presented to Gowans J. a petition under s. 111 of the *Mental Hygiene Act 1958*. The petitioner was one David Horace Forde Scott. The report does not say so, but Mr. Scott was in fact the Executive Director of the Brotherhood of St. Laurence. The petition sought an order for an inquiry into an allegation of the present insanity of Tait. Starke and Woods Lloyd appeared for the petitioner Scott, and Phillips for Tait himself. Sir Henry Winneke Q.C., Solicitor-General, and Mr. Brian Shaw appeared for the Crown, in this and all later proceedings.

Gowans J. rejected the application on 15 October 1962: [1963] V.R. at pp. 533–537. Seven days to execution, 17 to the new Act.

The provisions of the 1959 Act substituted for the concept of "insanity" the milder concept "mentally ill or intellectually defective". Dr. Allan Bartholomew, the Crown psychiatrist, had refused to certify Tait as insane. But it was believed that he would certify Tait under the 1959 Act, once it was in force. It was believed that if Tait were so certified, the execution would not take place.

Gowans J. held that the old common law power of the Court to restrain the execution of an insane person had been subsumed into the statutory procedures under the *Mental Hygiene Act 1958*, and no longer existed. The principle remained, that it was illegal to execute an insane person. But the procedure for carrying that principle into effect lay solely with the executive.

Gowans J. further held that in any event the basis of the s. 111 procedure lay in a request for the making of an order for the protection of the alleged lunatic's property, and s. 111 could not be used for the sole purpose of obtaining a decision as to insanity. Tait had no property to protect.

In shortening times and in a number of other procedural ways, the proceedings before Gowans J. were affected by the fact that the execution was due to take place on 22 October: see [1963] V.R. at p. 535.

Appeal was brought to the Full Court.

At this stage, to the great surprise of the Bar, John Nimmo Q.C. appeared in the case.

Nimmo had probably not done a criminal case for 20 years, though he had done some in earlier times. He now practised almost exclusively in tax matters.

The introduction of such a man was deliberate. The Full Court would expect to find at the Bar table what Starke called the usual criminal boys, including himself. Starke wanted a change of pace. He wanted the Full Court to find at the Bar table someone whose very presence would come as a surprise, and whose reputation for integrity and *gravitas* and probity and general old-fashioned decency would add weight to the appeal.

The choice had fallen on John Nimmo, tax expert, Baptist lay preacher, wartime Field Officer with the Red Cross; a quiet man of great virtue. In 1954 Nimmo had returned to the Bar after several years as a member of No. 2 Taxation Board of Review. In 1963 he was appointed an Acting Judge of the Supreme Court of Victoria. He passed from there to the Commonwealth Conciliation and Arbitration Commission, the Australian Industrial Court, and the Federal Court. For activities in many fields indeed he was knighted in 1972. To the end of his days Starke expressed admiration for Nimmo's contribution to the *Tait case*.

With Nimmo there were introduced, for broadly similar reasons, (Professor) David Derham and Peter Brett. Each of them had a son who became a barrister. Both sons are here tonight.

The hearing of the appeal from Gowans J. began on 17 October 1962: five days to execution, 15 to the new Act. Starke and Lloyd appeared for the petitioner Scott. Nimmo led Derham and Brett and Phillips for Tait.

The hearing concluded on 19 October. The Crown having given an undertaking to defer the execution until after the Full Court gave its decision, judgment was reserved.

On the morning of 19 October a further application had been made to Dean J. This was made to him as the trial judge, and sought the exercise of the common law power to order an inquiry into Tait's mental condition.

Dean J. reserved the application for the consideration of the Full Court, which heard argument from 19 to 23 October, immediately on the conclusion of the appeal from Gowans J.

On this application Nimmo again led Derham and Brett and Phillips for Tait. Scott was not a party to this application, and Starke and Lloyd did not appear.

On 30 October, the Full Court gave judgment in both proceedings.

It dismissed the appeal from Gowans J., Pape J. going so far as to label the proceedings an abuse of the process of the Court. (Tom) Smith J. — he is too often forgotten today, so let me in passing pay tribute to far and away the best judge who has sat on

the Supreme Court of Victoria in my 40-odd years at the Bar — agreed that the procedure under s. 111 of the *Mental Hygiene Act* could not be used in the manner sought. But he left open the question of the common law power of the trial judge to intervene, and some of his remarks seemed to indicate that he thought it did still exist.

In the matter referred by Dean J., the Full Court held that it had no jurisdiction. Such an application could not be referred to the Full Court, and must be heard by the trial judge himself. But the Full Court went on, by majority, to indicate that in its view the common law power to intervene had gone, and that the application must fail. Smith J. disagreed, finding not only that the common law power still existed, but that the material before the Court "required" its exercise, at least to the extent of an order that Tait's condition be investigated by or on behalf of the Court.

Following the giving of those decisions on the morning of 30 October, Dean J. announced that he would commence hearing the application the next day, 31 October.

Around noon on 30 October it was announced that the postponed execution would take place at 8 a.m. on 1 November.

Oppressed by the timing, Dean J. announced that he would now commence his hearing at 5 p.m. that day, 30 October. The Tait team continued as before, led by Nimmo.

At 5 p.m. the timing stood: 31 hours to the new Act coming into force at midnight on 31 October–1 November; 39 hours to the execution, at 8 a.m. on 1 November; and in practice, at least 43 hours (to midday on 1 November) before steps taken under the new Act might open the government to pressure not to proceed to execute Tait.

At 10.30 p.m. on 30 October, Dean J. delivered judgment rejecting the application.

The judgment referred to the difficulties involved in deciding novel points of law without the opportunity to reserve judgment, and a "sense of dissatisfaction that a question of this kind has to be determined under these difficult conditions". Dean J. expressed respect for the "very forceful" views of Smith J., but considered that he should accept the view expressed by the majority, though it was not technically binding on him.

At 10.15 a.m. on 31 October 1962 — 22 hours to execution — they were all there in the High Court. Starke had for weeks seen the likelihood of the case finishing there, and he was greatly worried. "Look, Dixon will intervene if he can. I'm not worried about that. But he can only intervene if he's got jurisdiction. Where does he get it?"

The closest thing to a basis which Stephen Charles and I could come up with was s. 38 of the *High Court Procedure Act 1903–1955*, giving the High Court power to order a stay.

It was obvious to all in the courtroom, that Dixon was deeply offended by the notion of judges feeling compelled to decide, unreserved, matters they wished to reserve for consideration; was deeply offended by the notion of judges being compelled to sit hurriedly and at night. He was puzzled only that the principle he had just stated had not been recognised.

We warned that we ourselves considered the provision inapplicable. The power was to order the stay of an order made in the proceeding under appeal. The sentence of execution had been made in the original trial, a proceeding *not* under appeal. The present proceedings were appeals from the dismissals of a subsequent petition and application. In neither proceeding had there been made any order of a type to which a stay is relevant. We added that in the absence of anything else s. 38 just might provide the Court with a peg on which to hang its jurisdictional hat.

So the hearing began. Starke and Lloyd for Scott appeared only in the application for special leave to appeal from the dismissal of the petition under the *Mental Hygiene Act 1958*. Nimmo and Derham and Brett and Phillips appeared for Tait in that application and in a separate application for special leave to appeal from the decision of Dean J.

Starke's opening application was a double one: that the further hearing of his application be adjourned, and that an order be made staying the execution until the application was determined. He said that it was to be assumed that the execution would not proceed if the inquiry sought under the *Mental Hygiene Act 1958* disclosed insanity. He said that justice would be denied if the applicants were denied proper time to develop their argument against the decision of the Full Court dismissing the petition for such an inquiry.

All that was obvious enough. Heart in mouth Starke approached the issue of jurisdiction to order that the execution be stayed. He referred to s. 38 of the High Court Procedure Act. Dixon put the reference gently aside, for reasons of which Starke had been warned.

And then there came from Dixon perhaps the sweetest words Starke or Nimmo ever heard from a judge. The difficulty as to jurisdiction simply didn't exist:

> I have never had any doubt that the incidental powers of the court can preserve any subject matter, human or not, pending a decision.
>
> (1962) 108 C.L.R. at p. 623.

The principle is now seen as fundamental. As obvious, almost simplistic. The statement is cited and applied almost daily, and indeed with little regard to whether or not the case concerned has anything to do with the preservation of the subject matter of the dispute.

The principle was far from obvious before that October morning. Gowans J., and a good Full Court, and Dean J., had all been hamstrung by time limits flowing from alterable circumstance, believing that the Court lacked power to alter that circumstance.

Nimmo rose to support Starke's application.

It was obvious to all in the courtroom, that Dixon was deeply offended by the notion of judges feeling compelled to decide, unreserved, matters they wished to reserve for consideration; was deeply offended by the notion of judges being compelled to sit hurriedly and at night. He was puzzled only that the principle he had just stated had not been recognised.

> The thing which I do not understand is why the Supreme Court — the Full Court — has not all the jurisdiction of the Queen's Bench. The single Judge tries a criminal case by special statute, does he not, which puts him in the position of a Judge with a commission of oyer and terminer, or possibly gaol delivery. The Supreme Court, the Full Court, is still the Court, and the only Court, is it not — except under special provision? It has got the jurisdiction of the Queen's Bench and of the English Courts at Westminster.

After a short argument from Winneke for the Crown, the Court adjourned for a few minutes. On its return, Dixon said:

> We are prepared to grant an adjournment of these applications without giving or expressing any opinion as to the grounds upon which they are to be based, but entirely that the authority of this Court may be maintained and we may have another opportunity of considering it.
>
> We shall accordingly order that the execution of the prisoner fixed for tomorrow morning be stayed

pending the disposal of the applications to this Court for special leave and of any appeal to this Court in consequence of such applications.

Dixon wanted no mistake. He requested an assurance from the Crown that the general order indicated would be enough. No undertaking was forthcoming. Winneke said that he thought the order would be enough, but that he was not in a position to give an undertaking to that effect. He offered to seek further instructions. Some who were there thought that between the lines Winneke was inviting the Court to avoid all possibility of misunderstanding or slippage, by making its order attach more directly to particular persons. Whatever Winneke's intention, Dixon indicated tersely that he need not seek further instructions.

At the foot of the order we have already pronounced, we will add that we will order that the Chief Secretary and the Sheriff be restrained accordingly.

Further hearing of the matter was adjourned to 6 November 1962. Dixon again applied himself to ensuring that there was no room for mistake. He himself took charge of the drawing and settling of the order.

That completed, he summoned the Court's own Marshall, and instructed him to serve the order, adding:

While I have no desire to embarrass Sir Arthur Rylah unduly, you personally, acting on my direct instruction, will put this order into his own hand.

That these precautions were soundly based was recognised when it emerged later that the redoubtable Sir Henry Bolte asked in Cabinet what the legal position would be if they went ahead with the hanging anyway.

Premier and Cabinet were advised that the essence of the crime of murder lay in the deliberate and unlawful killing of one person by another.

It is believed that however anyone else spoke, Sir Arthur Rylah spoke very strongly against proceeding with the execution.

The execution fixed for 1 November 1962 did not take place.

On 6 November the High Court was informed that the *Mental Health Act 1959* had come into force on 1 November 1962. It was the first mention of that Act in any of the proceedings. The Court was informed that the Chief Secretary had made an order thereunder; and the sentence had been commuted, although not all formalities were yet complete.

The Court refused to lift its control of the matter. It adjourned again, requiring that the formalities be completed before the Court's hold was lifted.

On 15 November 1962 the Court was informed that all formalities were complete. The Commonwealth Law Reports note laconically the end of the struggle for the life of a man: "Dixon C.J. The motions are struck out."

Mr. Chairman, I remind you of the statement I read earlier from Sir Owen Dixon's swearing-in speech.

I would say that if ever a case illustrated the carrying out of the Bar's function of "standing between the subject and the Crown", it was *Tait's case*; that if ever a case showed the necessity for the Bar "to be completely independent", it was *Tait's case*.

Tait's case did honour to the Bar, to Counsel in it, and to the great Chief Justice who brought the matter to an end in one decisive statement.

In remembering them all tonight, your guests stand confirmed in their belief that the service which each has rendered to the Victorian Bar, in manifold and diverse ways, has been service rendered to good purpose.

Your guests thank the Bar again for the honour it has done us tonight. And we thank the Bar, profoundly, for the fact that it exists.

Ed Fieldhouse Chooses Independence Day to Conclude 14½ Years as Executive Director

EDWARD Thomas (Ed) Fieldhouse retired as Executive Director of the Victorian Bar and Company Secretary of Barristers' Chambers Limited on Friday, 4 July 1997 after 14½ years' dedicated service.

Ed commenced employment with the Bar and Barristers' Chambers Limited on 24 January 1983 bringing with him a wealth of experience in administration and finance.

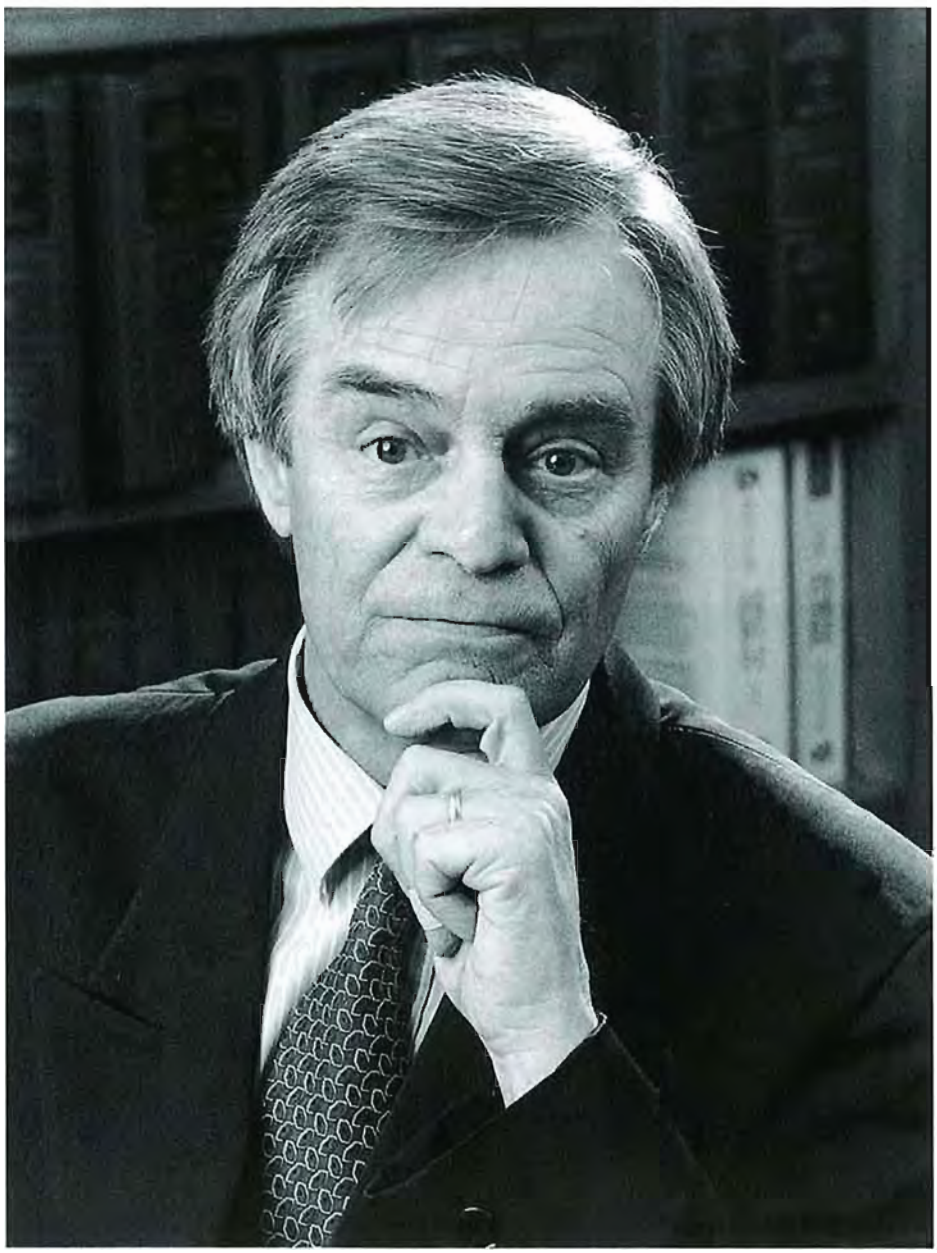
Born in England he became a permanent resident of Australia upon his discharge from the Royal Air Force in 1957 after completing a three-year posting to Victoria Barracks Melbourne as a member of the United Kingdom Services Liaison unit.

Before commencing employment with the Victorian Bar and Barristers' Chambers Limited Ed had held senior finance and administrative management positions with major Australian companies. He was also for three years Assistant Director of the Zoological Gardens, Melbourne, perhaps a not unfitting preparation for working for the Bar.

Ed, a modest and self-effacing man, was nevertheless glad to talk to *Bar News* for the opportunity it gave him to place on record his thanks for the cooperation and help of those members of the Bar with whom he closely worked and to make some comments about changes he has seen at the Bar since 1983 and those likely to occur in the future.

Ed recalls that when he started with the Bar there were 825 Counsel in active practice. Today there are 1259 Victorian Practising Counsel on Division A Part 1 of the Roll of Counsel, an increase of about 53 per cent since 1983. He does not think the volume of work for those Counsel in active practice has increased at the same rate.

During the period of his employment Ed has worked closely with 13 chairmen of the Bar Counsel and three chairmen of Barristers' Chambers Limited and notes that of the past chairmen with whom he worked, five have accepted appointment to the bench of the Supreme Court.



Ed Fieldhouse.

With the growth of Barristers' Chambers Limited Ed became inevitably more involved with the daily activities of the company than those of the Bar. He wishes to place on record his admiration of and regard for Mr. S.E.K. Hulme, A.M., Q.C., past Chairman of Barristers' Chambers Limited and Mr. A.J. Myers Q.C., the company's current Chairman. Ed regards himself as

fortunate indeed to have worked for two such dedicated members of the Bar who gave so generously of their time to the affairs of Barristers' Chambers Limited on a completely voluntary basis. He believes the Bar is indebted to them both as it should be to all those who serve or have served on the Board of Barristers' Chambers Limited, the Bar Council and its many committees.

Another past Chairman of Barristers' Chambers Limited who served with distinction during very difficult times was the late Mr. G.S.H. Buckner Q.C. His sudden and untimely death on 18 April 1994 was a great loss to the Bar and to Ed personally.

Ed considers himself especially privileged to have served with Mrs. S.M. Crennan Q.C., the first woman to be Chairman of the Bar Council, who was elected to that position in September 1993. Mrs. Crennan was and is greatly respected by Ed and all Bar staff. He is glad to have been involved in of that part of the Bar's history.

The changes brought about by the *Legal Practice Act 1996* will, Ed firmly believes, make it more necessary than ever for the Bar to remain united. He sees Barristers' Chambers Limited's proposed share issue as one important step in the right direction and those Counsel who take the opportunity to take up a qualifying share entitlement will be truly part owners of a company formed in 1959 for the benefit of the Bar as a whole.

After a motoring holiday with his wife Margaret, to Queensland, Ed will, at the request of the Victorian Bar Superannuation Fund, continue to act as Company Secretary of the fund on a part-time basis. Having decided on retirement Ed appreciates the value of having been a member of a superannuation fund and strongly urges those members of the Bar not yet members of a fund to consider seriously joining their own Victorian Bar Superannuation Fund.

Ed acknowledges that without the dedicated assistance of the staff of the Bar Council and Barristers' Chambers Limited his demanding and stressful job with its heavy workload would have been impossible to perform.

He extends his best wishes to his two successors, Mr. David Bremner as Executive Director of the Victorian Bar and Mr. Geoff Bartlett as Company Secretary/ General Manager Barristers' Chambers Limited. He hopes they both settle in well and accomplish all those tasks that will undoubtedly (and sometimes unexpectedly) be set for them. They will find their respective jobs very different, but in both cases most satisfying and rewarding.

Ed was farewelled at functions arranged by the Chairman and members of the Board of Directors of Barristers' Chambers Limited on Wednesday, 25 June 1997, the Chairman and members of the Bar Council on Thursday, 26 June 1997 and the staff of the Bar Council and Barristers' Chambers Limited on Friday, 27 June 1997.

We thank him and wish him well.

A Celebration of One Hundred Issues

THE last edition of the *Bar News* was its one hundredth. The first editor was Richard McGarvie. Did he think when he launched the modest roneoed few pages that was the first *Bar News* that it would end up as it is today? Did he think he would end up a Supreme Court Judge and Governor for that matter?

Over the one hundred editions there have not been too many editors. Not that there have been dozens of applicants beating the door down to take on the job.

McGarvie was followed by the long reign of David Byrne and David Ross as joint editors. Under their stewardship content size and quality improved and increased. David Byrne was (and still is) extremely meticulous particularly with designing the layout.

He, David Ross and Editorial committee would pore over the layout, measure the columns and count the words, all at his home helped greatly by bottles of Port.

After many years they decided to give it away. Byrne following in the shoes of McGarvie, and of course went to the Supreme Court. In 1986 Peter Heerey and Paul Elliott took over. Peter, as in the case of David Byrne, was meticulous. But not to the extent of measuring columns for printing.

The format of the magazine changed. It became glossier, colour appeared, photographs increased greatly.

Because of the size of the job, it was decided that professional assistance was needed on the technical side of things. David Wilken, former editor of the *Law Institute Journal*, and independent publishing consultant was brought in. Advertising began as well as selling the *Bar News* to non barristers.

It seems that senior editors end up elsewhere, as Heerey was appointed to the Federal Court and Gerry Nash Q.C. joined Elliott. They are still the editors, with the Editorial Board consisting of David Bennett Q.C., Julian Burnside Q.C. and Graeme Thompson. The Editorial Committee consists of Peter Lithgow (Book Reviews), Richard Brear, Carolyn Sparke, and Mal Park. Although there are many names, help is still needed, and because of the difficulty in getting barristers and judges to put pen to paper, most of the final work falls to the editors in conjunction with David Wilken.

There has been some criticism of the cost of the *Bar News*. There are those who hearken back to the good old days of a few pages handed out a few times a year.

There are those who believe that many sections of the Bar, especially the Junior Bar, are not properly represented.

John Pilkington, John Kaufman Q.C., and John Middleton Q.C.

John Pilkington and Peter Crockett.

Justice Heerey, Justice Spender, the Senior Editor and Justice Finn.

The Junior Editor, John Constable, Robert Richter Q.C., the Senior Editor and Tony Radford.

Recently the size has changed again. The Editorial Board is continually looking at improving the content and layout. There has always been a debate about the role of the *Bar News*. Some say that it should contain more "learned articles". Some say that there should not be any substantial articles at all, but only news and views. The present editorial policy is to balance these competing views. Articles should be short and practical. The magazine is not another *Australian Law Journal* or indeed, *Law Institute Journal*. There should be an emphasis on humour and the "toings and froings" at the Bar. It should contain reports from the Chairman, the Attorney-General and other bodies to keep the Bar

informed. But it should also emphasise the social side of what is increasingly becoming a "serious industry."

The costs are monitored and approved by the Bar Council. There are continuing policies to keep costs down. Recently a cheaper printer was engaged. The cost of photography and layout are especially watched. Advertising is being increased to assist in keeping everything down. But the Victorian Bar, in the present time of attack, needs a magazine which reflects its views and reflects them in the form of a colourful and professional magazine. There can be no return to the old days.

As to content, it is rare for any contribution to be rejected. Indeed the editors have difficulty getting people to write, and then getting them to write on time! So if people feel their views are not represented — write in!

In order to celebrate "a hundred issues", each being four seasonal issues a year, a few drinks were circulated in the junior editor's chambers. Former editors attended along with those who have assisted over the years.

The photographs on these pages reflect the revenge of the senior editor. Since he believes the junior editor's photograph appears too often, he insisted on having himself featured three times!

Sometimes the job of editor gets to you!

The Editors

The Supreme Court Librarian, James Butler takes a retrospective look at *Bar News*: Easter 1971 No. 1, Autumn 1980, Winter 1980, Autumn 1984, Summer 1990, Summer 1991, Autumn 1991, Winter 1993, and Winter 1994.

VICTORIAN BAR NEWS

No.1. Easter 1971

The Newsletter

"What's the Bar Council doing about it?" has long been the cry of members of the Bar. This question has often been provoked by a desire to know about the ethics rulings, investigations, representations to various authorities, procedural problems and sundry matters affecting counsel which have been or ought to have been the subject of the Council's attention.

By means of this quarterly publication the Bar Council hope to keep the Bar informed of these matters. This will be done by providing a brief account of the rulings made and other matters of interest.

Counsels' Fees

A committee has been appointed by the Bar Council to review the County Court scale of counsels' fees. It is now nearing completion of its work.

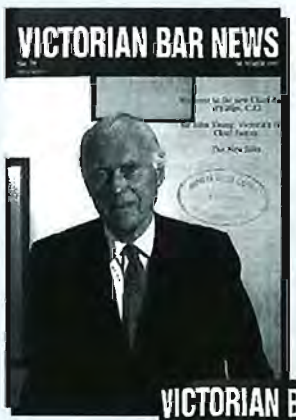
The committee will be in a position to expedite its recommendations if members of the Bar take the time and trouble to give their opinions in the questionnaire being circulated with the approval of the Bar Council.

The questionnaire raises issues of principle relevant to fees in all courts.

It is desirable that views on this questionnaire be given by all members of the Bar wherever they practice.

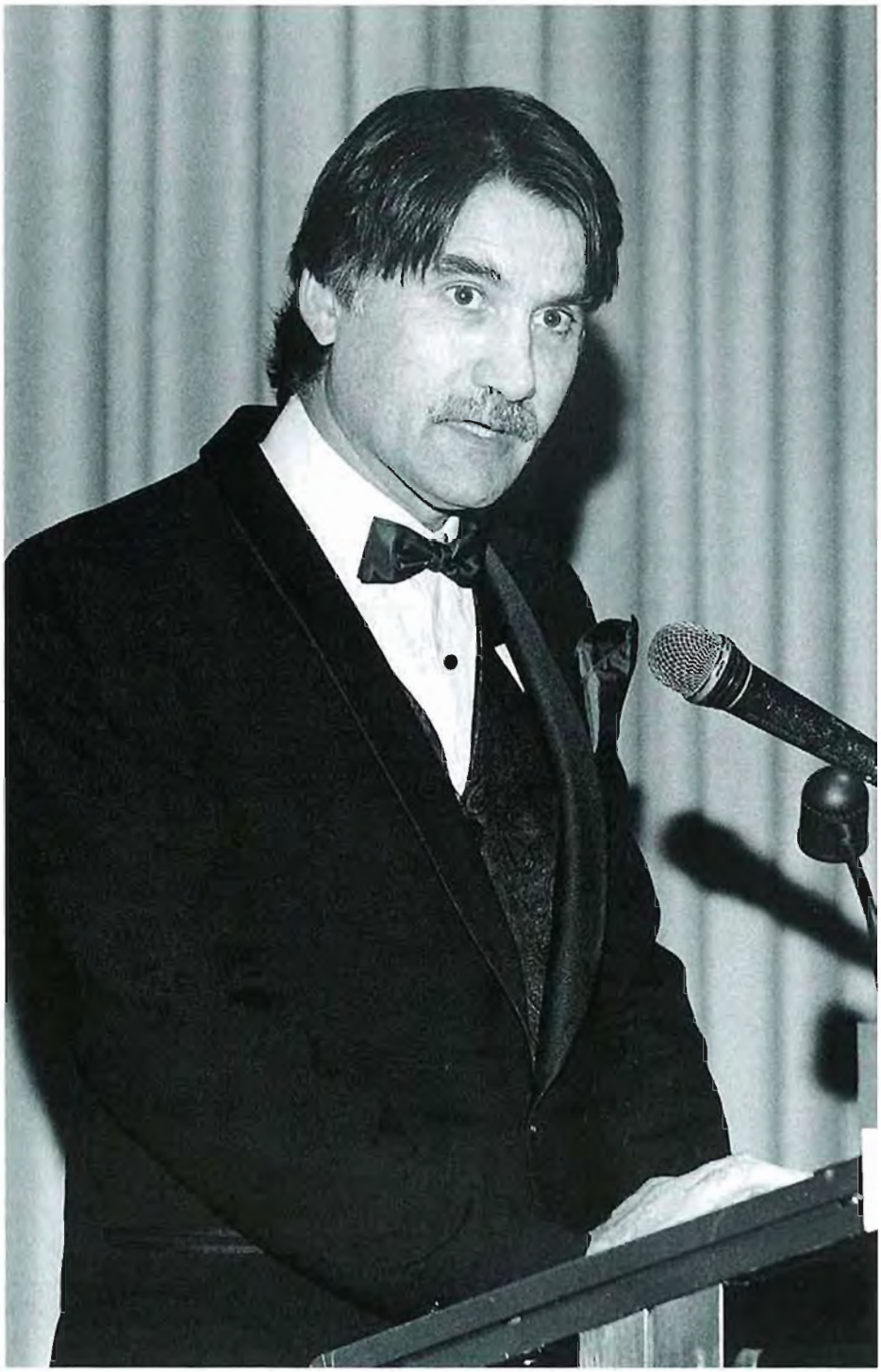
Victorian County Court fees have fallen far behind those in equivalent interstate courts - some examples:-

Scale	Brief Fee			Percentage Above Vic.
Over $1,500 to $2,000	Vic. $54	N.S.W.	$77.00	43%
		Qld.	$78.75	46%
Over $2,000 to 4,000	Vic. $65	Qld.	$105.00	62%
Over $5,000 to $8,000	Vic. $80	Qld.	$126.00	58%
		S.A.	$170.00	113%



Mr. Junior Silk's Bar Dinner Speech

Presented by B.A. Keon-Cohen Q.C. on Saturday, 14 June 1997



YOUR Excellency, Your Honours, distinguished guests and members of the Bar.

It is now my privilege to propose the toast to our honoured guests.

I offer a special welcome to the most Junior Counsel at the Bar, who is here tonight, Ms. K.M. Galdin.

In accordance with our "open door" tradition I sought, and have been greatly assisted by, the advice of my colleagues. Charles Francis Q.C. rang me this morning to tell me that in 1946, one Tony Murray, later Mr. Justice Murray, was Mr. Junior and that his speech was widely regarded as pre-eminent in his era. No Bar dinners had been held, for obvious reasons, during the war, and Murray welcomed an unprecedented six judges. Murray began his speech by recording some advice which Francis was kind enough to pass on to me. This is:

> You've got to make a speech which does not offend the Bench, and yet makes the Bar laugh. If you don't make the Bar laugh, then you've failed, and you can't make the Bar laugh without offending the judges!

Thank You Francis!

I was first alerted to this appalling prospect when appearing in the "Echuca circuit" of the Federal Court during the Yorta Yorta native title claim.

My opponent Wright Q.C., in the great tradition of circuit life, organised a dinner to celebrate my transformation. I went along expecting a relaxed and convivial evening. Not so. Wright delivered a stunning speech laced with his usual penetrating wit. He kindly gave me a small gift wrapped in brown paper. He demanded that forthwith, I open the package and reply.

My friends, beware of Silks bearing brown paper parcels! I opened this small package. I discovered — a black silk G string! "Exhibit G"!

Hold aloft G string

I was completely lost for words. I have never seen such a garment before. Knowing nothing about its utility, I did the only sensi-

ble thing: I put it on my head, and gave a speech in reply — like this!

Don G string

This is a true story!

Suitably robed, I proceed. I'm not sure what the good citizens of Echuca thought of this exotic legal ritual. How, where and when Wright expected me to wear this strange garment I have no idea. Perhaps the label gives a clue to his thinking. It reads:

Yves St. Laurent
Size: Large
100% Silk
Made in China

My friends, I was "made in Australia" — and I'm proud of it!

But to establish my credentials to both question such tradition and insult *absolutely everybody* — let me add that in the 1890s, my Jewish grandfather, Henry Isaac Cohen, married my Irish Catholic Grandmother, Ethyl Mary Keon. He was a member of this Bar, took Silk in 1920, was subsequently elected to Parliament, and held several portfolios, including Attorney-General. They begat, to cite Genesis, amongst others, my father. They called him Keon-Cohen. He in due course, married my dear mother. She was born in the north of England — not far from Edgbaston. She remains, despite 50 years in this country, British to her bootstraps — especially during an Ashes tour!

Given this history, not surprisingly, I was raised in a secular household, attended a Presbyterian School, then a High-Anglican University College. I have tried to read Satre, and these days, I attempt to understand a profound and ancient system of belief — the Aboriginal Dreaming. So be on notice — you are looking at a multicultural and ecumenical cocktail which has taken three generations and many creeds to perfect — a.k.a. Australian made!

To return to my head-gear: Wright never explained to me where he obtained this garment, nor would he acknowledge its origins for my wife's benefit.

However, his kind gift last December brilliantly anticipated things to come: that is, the great Wig debate.

The wig, possible alternatives tradition, continuity, and change — are the issues I wish to pursue with our honoured guests this evening.

Consider the G string.

My view is that there remains a role for the "full-bottomed" wig.

We might call this alternative "the unmentionable in pursuit of the unattainable". Alternatively — and with apologies to Virginia Trioli — I give you: "Generation G".

If such an alternative were introduced, imaginative Counsel could develop the idea. Blood-red for crime. A pale shade of cream for equity and the civil side. Black for the Coronert's Court. An extravagant smorgasbord of bright colours for the Practice Court, so you'll be noticed, and get on quicker.

Then there are gender considerations. I would not dare to suggest which gender should wear the frilly version! And those of uncertain gender could further confuse the courts by changing at lunch time.

For special-leave applications in the High Court, where their Honours have adopted the irritating custom of flashing lights at Counsel when time is up, we could engage in some flashing of our own! Say the laser-light variety with in-built-direction-finders to enable Counsel to zap the offending presiding Justice with a penetrating beam in reply.

THE RESEARCH

You may well ask: What has this got to do with our honoured guests and Mr. Junior Silk. I too am puzzled. I am puzzled by the expression "Junior Silk", which seems to me self-contradictory.

You might well ask: So what's new about this new Silk?

In order to research the source and nature of the Mr. Junior speech tradition, I wrote to the Chairmen (they are *all* men) of each of the Bars in Australia, the United

1. *His Excellency Sir James Gobbo.*
2. *Mr. Junior Silk in funny wig.*
3. *Mr. Junior Silk in another funny wig.*
4. *Justice Goldberg in his funny wig.*
5. *Hal Hallenstein, A.M. in hard wig.*
6. *Justice Chernov in his funny wig.*
7. *Mr. Junior Silk in yet another funny wig.*
8. *Mr. Junior Silk in G-string wig.*

Kingdom and Ireland. I delivered some penetrating questions, and received some interesting replies. Bennett Q.C. from Sydney, who is with us tonight, was mercifully short. He answered my interrogatories: "No, No. Does not arise", wished me luck, asked for a copy of my speech, and the name of my haberdasher!

As best I can ascertain, there is no precedent anywhere for our Victorian tradition — a speech by "Mr. Junior" to an annual dinner of the entire Bar.

Frank Clarke, Senior Counsel —whose intriguing postal address is the Law Library, Dublin— describes a number of other traditions which "place a burden upon the most junior member present". This included "pouring coffee for his or her more senior colleagues" during dinners at the King's Inn (but no speech — now this could be applied to your tables this evening); reversing seniority in court on the last day of each legal term (this would go well in our Practice Court); and, "on one or two occasions where major functions have been organised by the Bar . . . the most junior barrister has been asked to make a speech along with (say) the Chairman of the Bar or other senior persons". Clarke continues: "However, this is not rigorously followed in all cases" and arises from "the long standing tradition of imposing upon the juniors some menial tasks".

So there it is. In terms of a regular speech by "Mr. Junior" to an annual dinner, there is no tradition, I can find, beyond our own Bar. Our tradition reaches back merely to 1919, that being the earliest mention I can find of this Mr. Junior Speech. On that occasion, Sir Arthur Deane records that J.B. Tait "accepted the responsible position of Mr. Junior" at a dinner of the whole Bar at Scott's Hotel.

It is striking that each of the Bar dinners which immediately followed the two world wars has been recalled as especially significant.

And all this seems to be based on performing "menial tasks" as devised by the Irish. Make no mistake, I am not being critical. My grandmother was Irish.

This leaves the institution of Mr. Junior exposed to abandonment, wholesale change, or at least some cautious adaptation. Released from the bonds of precedent, like the High Court in recent times, I have decided to retain the "skeletal structure" of this particular custom, but engage in some modest reforms in response to changing times.

First, as a Silk of the traditional mode, I never appear without a Junior. Thus, tonight, in this most important jurisdiction of my peers — I announce that I appear with one of my surviving readers, Haydn Carmichael of Counsel. I acknowledge his splendid assistance. *Second*, I reject "menial tasks" be they Irish or otherwise. *Third*, this speech will involve some audience participation. In particular, without their prior consent there will, I hope, be participation by our honoured guests. Gentlemen, please ponder your options as I proceed!

Many here tonight have delivered this speech. Chernov, as he then was, enjoyed it so much, he gave it twice, Your Honour obviously never looked back. The same applies to our Chairman — Young Q.C. — who gave it in 1991. No woman has yet had the pleasure[1]. This is clearly discriminatory, so I offered this opportunity to the appointee next in seniority to me, Molyneax Q.C. She said No — meaning No!

CHERNOV J.

Speaking of Mr. Justice Chernov I am reminded of our honoured guests who are, I trust, firming up their options. Your Honour has participated so extensively in so many Bar activities I thought you might be a natural first candidate for some participation this evening.

Your Honour was appointed to the Supreme Court in the first week of May this year.

Your Honour was born in 1938 in Lithuania of Russian parents. This was a momentous year for the Bar and the administration of justice, for in that same year, Your Excellency, Sir James Gobbo, arrived in Melbourne from Italy, aged seven. I have it on good authority that neither of you in 1938, spoke a word of English. Despite your outstanding multicultural credentials there is no truth in the rumour that Your Excellency will make the laws in Italian, and Your Honour interpret them in Russian — just so that each may show the other who's boss!

Your Honour's working habits are as prodigious as is your reputation for legal excellence, personal charm and outstanding contributions in various official and unofficial capacities to the Bar, and to the profession throughout Australia.

Such devotion to duty has sometimes meant your absence from family occasions. However, you *were* present at the happy event of the birth of your youngest son. On that occasion, and on your son's birthday ever since, you commemorate the event by donning the surgical hat and mask you wore in theatre at your son's birth. We are delighted that despite your busy schedule and appalling workload, you are with us tonight. To commemorate Your Honour's attendance this evening I commend to all, the Chernov wig-option: a surgical hat and mask!

Don theatre cap and face mask — (Speak through mask) mf ung xxj rdt xxxx! (muffled noises)

To commemorate Your Honour's attendance this evening I commend to all, the Chernov wig-option: a surgical hat and mask!

We might call this alternative "the Gag".

Your Honour might compel such court attire for Counsel who are inarticulate, lengthy, boring or plain wrong! But are these qualities not the prerogative of the Court of Appeal! My friends, does this wig remind you of something — or somebodies? We anticipate watching Your Honour's Court for the forensic battle sub silentio par excellence! We will have to watch because we won't hear a thing!

I fear the Chairman may be tempted to offer to Your Honour a right of reply, so I had better move on.

One of the many capacities in which Your Honour served the Bar was as the officially appointed Fire Warden for the 17th floor, Owen Dixon Chambers West. This much sought-after position brings with it the obligation, in times of conflagration, to wear yet another type of wig — the "Fire Helmet"!

Don fire helmet on top of the surgical cap.

Suitably encumbered, I continue

As you can see, upon your appointment, Your Honour accidentally left your helmet in Chambers. This was unwise. Your Honour may need it again — especially if you send a bomb to the Court of Appeal! They might lob it straight back!

I regret that Your Honour's self-interested devotion to clients and lengthy conferences has, on at least one occasion, sharply conflicted with your important duties as fire warden. During one such conference, settling the ubiquitous affidavit was interrupted by smoke billowing under the door. Costigan Q.C.'s faint cries of "Fire! fire! Get the painters and dockers!" could just be heard from chambers next door. Your Honour's junior, with clients and solicitors in tow, evacuated the danger

1. An error, Sue Crennan Q.C. gave the speech in 1990. My profound appologies!

area. They bolted out the door and down the stairs. Your Honour, oblivious to this commotion, and in dereliction of your fire duties to "co-ordinate the attack" — kept on settling the affidavit. Perhaps you couldn't find your helmet in a hurry. Certainly it took the Bar staff several days to find this one! When persons pretending to be the real firepersons burst through Your Honour's door they found you, still at your desk, still intently correcting syntax — AND with this helmet upon your head!

Such coolness under fire, such devotion to duty despite all distractions, such disinclination to hose down problems with quick and easy solutions, should be noted by those who appear in Your Honour's Court.

My friends, do not wear this fire-helmet-wig — not even in the most heated contest! — His Honour will simply ignore your smoking ears and flaming rhetoric. He will bring you back to basic principle and cool, detached, scholarly analysis.

So if Your Honour would rise, my Junior will now assist you to robe! I hope Your Honour has eaten enough this evening, and said all you wish to say. Your Honour, of course, may choose to break with tradition and proceed unrobed.

And Carmichael, when you fit the mask — tie the knots really tight!

Face mask, surgical cap, helmet delivered to Chernov

HAROLD RUPERT HALLENSTEIN, A.M.

This brings me, in no particular order, to His Worship, H.R. Hallenstein, A.M. On 26 January last, you were made a Member of the Order of Australia. This was for "Service to the Community as State Coroner for Victoria and involvement with the Victorian Institute of Forensic Pathology".

Tonight we celebrate with Your Worship the public recognition of your extraordinary services to the community.

Your Worship read with Allan Goldberg and practised for 14 years at the Bar, eventually specialising in Magistrates' Court work. In 1986, you were appointed Victoria's first State Coroner, a position you held for eight years.

Your Worship's discharge of coronial duties was characterised by attendance at the scenes of death of the inconveniently deceased at all hours of the day and night. Those of you who watch TV, even occasionally, will have noticed, at various crime scenes, a strangely emblazoned but otherwise shadowy figure, lurking in the foreground, dressed in gum boots, King-G overalls and a crown of office. I have here its replica: the Coroner's Crown!

Don helmet

This also ensured that in your frantic travels to many strange places, you never got lost!

Suitably labelled, I proceed again.

Helmet-wigs labelled with names create a world of alternatives. Black tin for the Crown, fitted low to obscure the eyes and shield the ears. Gold Greek Crowns for the Grollo team. A flap of elastoplast for Counsel appearing for that rare and disappearing beast — the legally aided. And bonnets for Baby-barristers suitably labelled so that they may be quickly identified.

Your Worship worked so hard as State Coroner that you were forced to do your gardening at night. Well, we've thought of everything. We have a light on this helmet to assist Your Worship's nocturnal activities — like so!

Switch on flashing red light

This version must surely be known as "the red flasher".

We trust that your flashing red light brings new life to your roses and daffodils or at least that they experience better luck under Your Worship's loving care than all those unfortunate former clients.

Would your Worship rise and accept this wig with our heartiest congratulations. Again, the decision as to robing is yours.

Deliver helmet to Hallenstein. Turn on light

ALAN HENRY GOLDBERG Q.C.

Our next guest is His Honour Justice Goldberg.

In case anybody didn't catch the CNN News, BBC World News, Foxtel's World Movies and that liberal organ, the *Centralian Advocate*, His Honour was banished to the Federal Court by the Commonwealth Executive Council on or about 20 December 1996, to take effect from 3 February 1997. These dates are important: they mean that we — the hard-pressed taxpayers — saved huge amounts, being Your Honour's holiday pay.

You studied law at Melbourne University, where you encountered numerous others who have also demonstrated high achievement. Suffering a strong dose of undergraduate impecuniosity, Your Honour took part-time employment at the Veterinary Research Institute in Melbourne. Your task was to clean out the post mortem rooms, after rhesus monkeys had been dissected. On one occasion someone brought in a heavy bag. You put your hand in, felt something soft and pulled out — a horse's head. I know this to be true, since I have it from the horse's mouth!

You took Silk in 1978. At that time, applying for Silk was a sensitive and confidential process. But then, as now, there were certain unmistakable signs. Applicants were required to call upon the Chief Justice for a cup of tea and a chat. In 1977 when your first application was rejected, Rupert Balfe offered his commiserations. You said: "What makes you think I applied?"

"Easy", said Balfe. "I saw you, one day, walking across William Street. It was November, you were studying Wisden, you had a suit on, you'd shaved off your beard, and you'd left your hand-bag in Chambers!"

Your Honour was for two years an outstanding President of Melbourne's Hebrew Congregation. Your office required regular attendance at services at the Melbourne Synagogue, dressed in the customary grey striped trousers, coat tails and a Top Hat! Like this!

Don top hat

So dressed-up, Your Honour would look very much at home in any number of Federal Court jurisdictions — and it has the virtue of adaptability. Your Honour could slip out, still robed, at lunch time for a quick punt at the Casino. This alternative will thereafter be known as "The Top End of Town".

As an alternative to horsehair, for those of small stature, high podia and soft elocution (Ray Finkelstein, Gavan Griffith and Simon Wilson) the Top Hat provides a "Rush" of gravitas. Jack Rush, this one is for you!

Your Honour's appointment was warmly welcomed by us all — it might be described as absolutely Tip-Top!

Rumours abound why Your Honour recently imposed the impressive fine of $1.25 million. There is no truth in the rumour that this figure naturally flowed off your pen as you were contemplating, with some nostalgia, the Coles-Myer entries in your former Fee Book.

Would Your Honour, as a man for all seasons and all occasions, rise and accept this wig — and our congratulations!

Deliver top hat to Goldberg

GILLARD J.

Our next humble guest is Mr. Justice Eugene William Gillard Q.C.A.C., meaning Quiescent Captain of Australian Cricket: Justice Gillard has not denied that he has made himself available.

1. Wendy Harris, David Lloyd and Andra Lazarescu.
2. Neil Young Q.C., Catherine McMillan and Graeme Uren.
3. Judge Smith, David Curtain Q.C., His Excellency the Governor, and Mr. Justice Chernov.
4. Ross and Mary Ray Q.C.
5. Chief Judge Waldron, Prof. Douglas Williamson Q.C., Sandra Davis and Justice Peter Heerey.
6. Michelle Williams, Judge Walsh, Betty King Q.C., Rose Weinberg and Ramon Lopez.
7. David Fanning, Julie Spehr and Carmella Ben-Simon.
8. David Colman and Mirella Trevisiol.
9. Heather Gordon, Maurice Phipps, Lesley Fleming and Murray McInnis.

Your Honour developed a wide-ranging practice in every conceivable jurisdiction including juries. Two weeks ago, like Goldberg J. Your Honour contributed to State revenue. You fined a lady, who arrived late for jury service, the sum of $100. The dear lady's protestations about work obligations impressed you not at all. You were considering a steeper fine — but she finally admitted she'd been up all night watching the cricket. Shortly after, concerned that you might not be sending a clear enough message you fined a second reluctant juror — $150! Your Honour and Goldberg J. may wish to swap notes — but not, I fear, quantums.

I have been told that Your Honour sometimes played cricket. Like His Excellency the Governor, I was a rower and don't understand these things. However, I do fear that with feelings running very high throughout the Empire, and with a state of war about to be declared, protective headgear is necessary at this dangerous time.

I just happen to have procured, for this evening only, a funny green and gold helmet — like this!

Don Australian helmet

This has to be the chosen wig of the advocate who, although deeply wounded at Edgbaston, will bat on regardless, so that truth, justice and the Australian way "shall not perish from the earth".

But I am not xenophobic — my mother is English!

Suitably protected, I take the field.

This may be described as "the sports man" — like the "Chairman", a gender neutral term.

As Your Honour can see, this is, in fact, the genuine article. It was worn by Tony Dodomaide when, inexplicably, he was selected ahead of Your Honour in the Australian squad from 1987 to 1995.

Like Your Honour, Dodomaide was a fast-medium bowler of some renown, and an all-rounder. Like Your Honour, he is a generous sportsman, for he has loaned this precious article to me for the purposes of this speech.

Unlike Dodomaide, who toured New Zealand, Sri Lanka and Pakistan, Your Honour toured the West Indies about ten years ago with a motley lot of alleged cricketers,

10. Ian Mawson, Declan Hyde, Susan Borg, Fiona McLeod, Ian Sutherland Q.C. and Ceide Zapparoni.
11. Caroline Kenny Q.C., Robin Brett Q.C., Elspeth Strong and Julie Dodds-Streeton.
12. Kingsley Davis, Nunzio Lucarelli and David Chan.
13. Jane Patrick, Rachel Doyle, Iain West, Linda West, Andrew Panna and Gerry Butcher.
14. Gary Maloney, Samantha Burchell and Albert Monichino.
15. Debbie Mortimer, Jenny Richards and Ian Gourlay.
16. Geraldine deFina and Daniel Gurvich.
17. Andrew Willis, Peter Gray, Fiona Phillips, Trish Riddel and Gerrard Mullaly.

drawn in the main, from the solicitors side. That is to say, Your Honour was the only barrister in the team. Rumour has it that Your Honour bowled at Desmond Haynes, to have him caught in slips by your old friend Huan Walker, now a senior solicitor. Haynes walked from the crease muttering — "lousy ball, brilliant catch!"

Meanwhile, Your Honour is reputed, since this achievement, when discussing cricket, to have never said much about anything else!

The unkind controversy surrounding this seminal episode in Your Honour's cricketing life needs to be resolved. Unfortunately for Your Honour, I have procured a copy of a vital exhibit: the official score card. Here it is.

Hold up score card

Your Honour toured the West Indies about ten years ago with a motley lot of alleged cricketers, drawn in the main, from the solicitors side. That is to say, Your Honour was the only barrister in the team.

It reads:

On 4/4/1978, Barbados. Australian Lawyers v. Carlton Cricket Club. Innings of 40 overs. Desmond Haynes, bowled Gillard, caught C. Walker, for 8.

It seems your friend Huan Walker was never there. "C" Walker took the critical catch. So the mystery deepens. As you have the right of reply, perhaps you will be good enough to explain who C. Walker was.

As I have said, Your Honour's generosity is notorious and extends far beyond the cricket field. There is no substance to the rumour that when Junior Counsel entered your chambers to seek your assistance, they had to climb over piles of $3 watches that you had purchased in Bangkok, plus the very expensive specialised equipment which enabled you to change the batteries from one to the other!

Perhaps you could donate some of these batteries to Hallenstein to assist him with his rose garden!

Despite earnest endeavours, Your Honour's Chief Justice has refused your reasonable proposal that during this Ashes

tour, you tint your wig green and gold. The Chief Justice has promised to review the matter if we go two down!

Despite this unsporting attitude, and in appreciation of Your Honour's unparalleled legal and cricketing career, especially the great pleasure and assistance that you have provided in both areas to many friends and colleagues, you deserve the ultimate accolade: that you wear the green and gold, for the final session this evening. Would Your Honour allow Carmichael to do the honours.

Carmichael attempts to robe Gillard. It won't fit.

What's the problem Carmichael? The helmet is too small for Gillard's head! Oh dear, what a shame! This is not in the script!

Your Honour, it's Dodomaide's helmet and your head. We're in your hands.

Should you abandon the green and gold? Can we enlarge the helmet?

Alternatively . . .

Gillard dons helmet.

Well done Gillard, have a good innings.

SIR JAMES GOBBO

I now mention His Excellency, the Governor of Victoria, Sir James Gobbo.

Your Excellency joins us tonight because, last April, you were sworn in as Victoria's 25th Governor.

Your Excellency, I wish, at the outset, to make one thing perfectly clear. I adore the Monarchy! I should like you, and Her Majesty to know, that I have devoted my entire professional life to the greater glory of the Empire!

Do not listen to that rabble — this is true!

Given my outstanding service to the Empire, and since we are here all good friends, would you be kind enough to convey this information, personally, to the Palace — say just before Her Majesty's next birthday. And Ron Castan, A.M., Q.C. who is overseas, sends his warmest regards.

Your Excellency, I have one further problem. On one view of the indivisibility of the Crown, Your Excellency *is* Her Majesty. I am, as directed by Francis Q.C., very concerned this evening not to offend you in the slightest way. Yet, according to the rheems of royal protocol which accompany you here, I am directed, should we meet, not to curtsy!

Clearly, desirable reforms can throw up unexpected problems.

Your Excellency has, indeed, had a long interest in matters Vice-Regal. As to vice — as one who publicly wears G strings on my head — I say absolutely nothing.

As to matters regal I thought an appropriate wig might look something like this!

Don Empire hat.

This is "the Empire for Ever" alternative, not to be worn by Republicans; but definitely to distinguish all those Counsel who take the Queen's shilling: prosecutors, Solicitors-General, Counsel acting for State, Commonwealth or Territory parties indeed, the executive branch generally.

If Your Excellency will excuse a mere commoner, I always wanted to be corrupted by absolute power, so I'll just exercise the prerogatives of Mr. Junior Silk and wear this for a few moments longer.

Suitably adorned, I move on.

Like me (remember my mother is English) Your Excellency has had a long association with royalty which should prepare you well for your latest retainer. Your parents came from Italy, but you were born in the Royal Women's Hospital in Melbourne. You were an early achiever. At the age of eight you re-connected with royalty by working in your father's all-night café at the Queen Victoria Market!

In 1952 you were Victoria's Rhodes Scholar. You studied rowing at Oxford, where you maintained your interest in matters regal. Indeed, as President of the Oxford Boat Club, you rowed for the Royal Henley crew in the Regatta.

Unable to resist some real rowing at the Melbourne Olympics, Your Excellency returned to Australia in 1956. You signed the Bar Roll in 1957, and thereafter developed a major practice in various fields, especially, in land acquisition and compensation.

This expertise will no doubt be of great utility in these days of "native title".

We trust that your tenancy agreement concerning your new residence — not to mention your back garden — is satisfactory and that the rentals are not too high. After all, your house and home is constantly overcrowded with hordes of citizens including (unlike the High Court) on weekends. There's absolutely no privacy and the whole house needs a coat of paint. And according to the *Herald-Sun* it seems that your grandsons delight in playing kick-to-kick in that extravagant ballroom! May I, on behalf of Victorian taxpayers, make a plea for the chandeliers.

Your Excellency took Silk in 1971. You were appointed to the Supreme Court in 1978 at the age of 47 years, and retired from that Court in 1994.

Upon retiring from the Supreme Court, you said, amongst other things:

> It is important that good lawyers know the roots and origins of the law. It is at least as important to know about Magna Carta and Habeas Corpus as it is to now about the Racial Discrimination Act or like legislation. The amenity of the common law is a deep well. If we are to go forward with good reforms we must . . . know . . . our inherited strengths. Put simply, you cannot really know where you are going if you don't know where you have come from.

Sir Ninian Stephen, when speaking as Governor-General at a function to mark the Centenary of the Bar in July 1984, said the following:

> The Bar unlike any other profession, is at present and has long been a crucial element in our democratic way of life because it provides for individuals, and nowadays perhaps even more probably for interest groups, however unpopular the cause or allegedly subversive the activity, a wide choice of representation before courts and tribunals, representation which is entirely and vigorously free from government influence and sectional pressure. Without such representation constitutional guarantees of human rights are worth little; it is as important to our democracy and to our concepts of the rule of law as the existence of an independent judiciary. It is, then, appropriate enough that the Bar provides the prime training ground for that independent judiciary. The traditions which support the Victorian Bar in this role are those of independence and of obligation to act for all-comers equally . . .

May I add, this evening, might not these sentiments apply to:

Facing as a nation, the full truth of the Stolen Generation; ensuring the survival of the doctrine of separation of powers; upholding the values of our profession as part of a multicultural society; or securing the role of independent, fearless and impartial Counsel, available to all, especially the unpopular, the maligned or the impecunious.

May I translate this fine rhetoric into two practical examples.

First, is the speech you are listening to, and the tradition of Mr. Junior. Here, the debate is much rehearsed and well understood.

The second requires application of these well established principles to new circumstances. Here the Bar is well placed to inform the debate, perhaps to lead it.

Whether or not you consider *Mabo No. 2* correct in law, or desirable as a matter of legal policy, many indigenous communities assert that their traditional connections to their ancestral lands were never "washed away by the tide of history", but continue in many parts of this country

today. The truth or otherwise of this assertion is irrelevant for my purposes tonight. Melbourne *was* occupied, prior to Colonisation, by the Kulin Aboriginal Nation, and its descendants live amongst us to this day. Throughout the community, these aspects of our history are being acknowledged.

For example, when people gather together, just as we are, for formal or traditional occasions, frequently, as occurred during the recent Aboriginal Reconciliation Convention in Melbourne, visitors are welcomed by the traditional owners, and that hospitality is acknowledged. Thus, as was said by many Convention speakers, including the Prime Minister, I wish, now, to pay my respects to the Kulin Nation upon whose traditional lands I deliver this speech.

Your Excellency's career has been told and re-told so often, that, for the rest, I am forced into a little poetic licence. With apologies to W.S. Gilbert, may I offer:

An Ode to Governor Gobbo

Your family came from Italy
From ancient Cittadella —
They said: "Forget Mussolini —
But bring the Mozzarella.
And so you come to Melbourne
But seven years of age,
And not a word of English
Could you write upon the page.
But as with Oscar Wilde
(now there's a pompous ass)
You had nothing to declare but your
gen-i-us.

At Xavier the Jesuits tried
To talk to you of heaven
But you did win a greater prize
In Nineteen Forty-Seven,
For in that year and later on
(when you were an Oxford Don)
You won the boat race — Oh praise the Lord!
You did it of your own accord.

You studied legal theory
and did your parents proud.
You ascended to the judiciary
And argued long and loud
In the court rooms of the nation
and on Boards where ethnics meet —
Where at least you'd get ovations
When you'd bored them off their feet!

Gongs aplenty for such a star
Have come your way, from near and far
An Order of Merit in '73
From the Republic of Italy —
A Knighthood you scored in '82
Showing your neutrality, through and through
In that difficult debate —
Whether we should re-state our State.

In 1980 — they gotcha again —
A Knight of Rhodes, Malta and Jerusalem
And finally, in '83,
When the rest of us could hardly see
Your Honour in all this Regalia —
A final Gong — You Beaut —
The Order of Australia!

Now you are the very model
of a multicultural Governor,
You represent the masses, be they
black or white or otherer.

Your pedigree is interesting, your intellect
superb, but
Do you despise the pointless chatter
Of the pseudo-social herd? —
Because for things that really matter —
Well — you can't get in a word.

Now you regulate us all as
The Governor in Council,
Where everybody listens
To your wise and learned counsel.
You appoint the judges, and silks and others
too —
If they didn't listen years ago
Well now they're in the poo!

Now you hold the biggest brief
Of all — Her Majesty!
But *we* ask *you* to remember
Amongst this pomp and pageantry,

And whenever these new burdens
Become far too much to see, to
Be comforted — for *we* remember
The way *you* used to be.
How you toiled in search of justice —
(And as well a daily fee!)
How once you were a member —
Just a junior — just like me!

May I now pass the prerogative and this ridiculous hat to Your Excellency and, on behalf of the Bar, warmly congratulate you and Lady Gobbo upon your richly deserved appointment.

Gobbo is crowned.

My friends, may I conclude by saying this.

For my part, based on my research for this speech, recalling my roots in England, Ireland and Australia (but not China), and noting (in roughly chronological order) my Jewish, Catholic, Presbyterian, Anglican, existential and indigenous Dreamtime spiritual influences, I ask: What tradition? Whose tradition?

I reject tradition, "menial" or otherwise, for its own sake. Rather, as His Excellency has suggested, and as the Chief Justice Sir Gerrard Brennan — who is with us tonight — stated in *Mabo No. 2*, let us retain the skeletal principles, and the underlying values that connect us with the past, bind us together as Counsel, and provide guidance for the future, and let us, so prepared, move into that future.

And so, my friends, I declare: "Mr. Junior Silk is dead: Long Live Mr. Junior Silk".

Ladies and Gentlemen, would you now charge your glasses, be upstanding, and drink the health of our honoured guests.

Thank you, C'est finit.

The Changing Face of the Bar

The scene at Leonda.

MR. Junior Silk began his speech by putting a pair of black ladies' under pants on his head. No-one could remember this being done in the past. Some thought it was just the changing face of the Bar. The Bar must keep up with the times. Must not get bogged down with traditions such as wigs, the Crown, and governors. That sort of thing. Mr. Junior Silk then put on some more funny hats, and gave us a bit of a sermon on things. Nobody could remember this being done in the past. Ah the changing face of the Bar.

What was a highlight was the improvement in the food. Tasmanian Salmon, Seared Scallops and Yabbie, Char-grilled *Plump* Chicken Breast, followed by Coconut Bavarois and Cheeses washed down by some really excellent wines. Those choosing the wines never got identified — in the past for their own safety — but on this occasion congratulations are due. Presumably to the wine committee of the Essoign Club.

Unlike the previous year Mr. Junior Silk had only to welcome five guests. Poor old Kim Hargrave Q.C. had to welcome 20 honoured guests in 1996. This caused the start of a competition "How Long Will Mr. Junior Speak?". There was much discussion about times being much shorter this year. It had to be shorter — there were only five guests. Forty-two minutes was the winning estimate in '96. Should 1997's speech be half as long? Even a quarter? Bets were laid. Someone must have had some insider information. Who could have predicted 49 minutes!

But there was a winner — and much argument as to how anyone could have picked that one!

As for the standard of dress — can one comment on these things? Is it politically correct — what with the changing face of the Bar and all? At least Judge Campbell has put his 60s tuxedo in a Brotherhood bin (where it was snapped up by a junior barrister to play in a "funny band" at the Mentors' (nee Readers') Dinner).

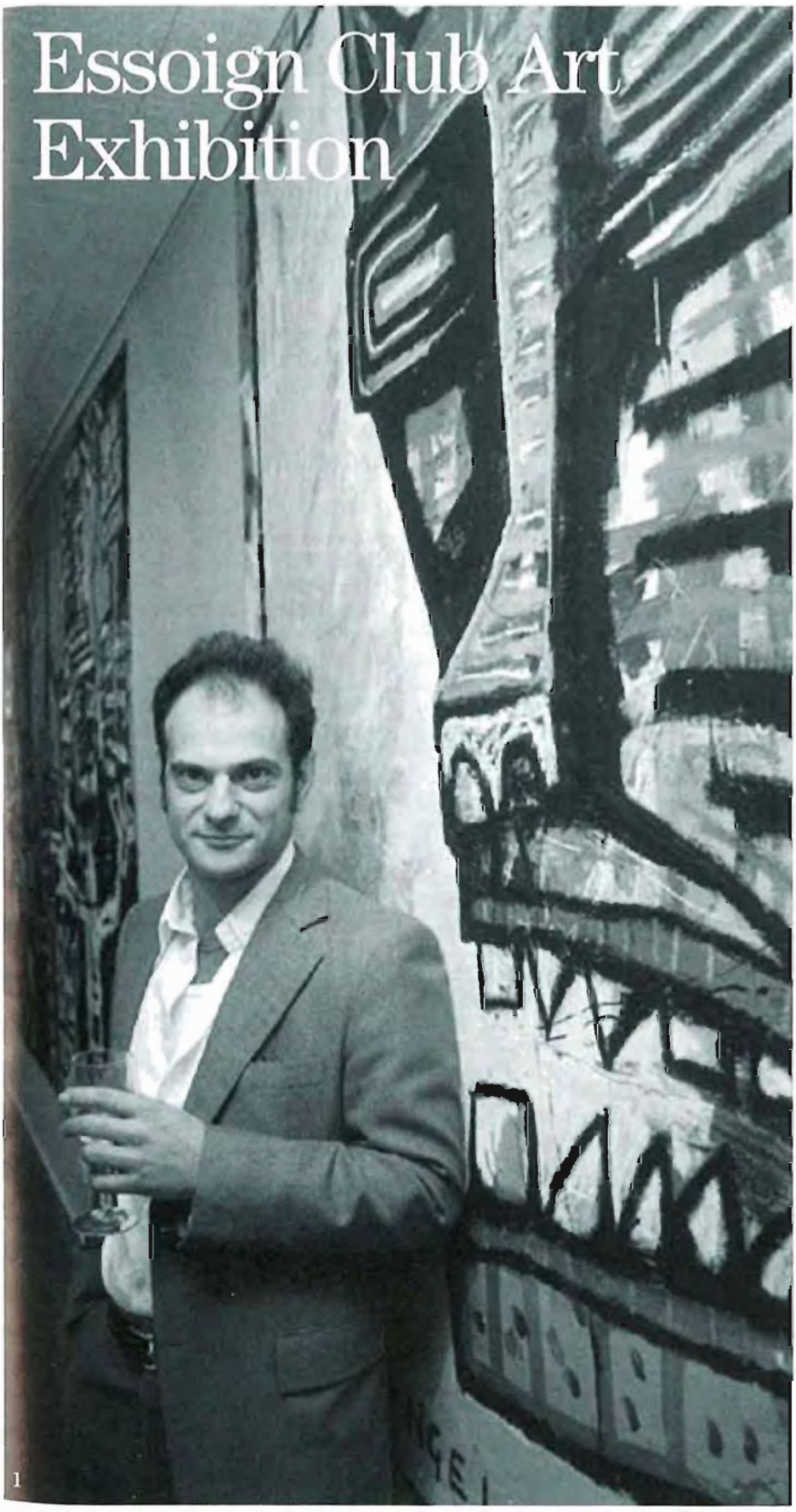
He has replaced it with a splendid double breasted tartan affair of a greenish hue. Evidently not Clan Campbell — more like Clan Dowling. Deborah Wiener said that she did not disapprove of fashion reporting. She looked stunning in an orange organza outfit. She told the reporter of its undoubted designer status — but alas the name in the notes got somewhat stained with port.

Judge Curtain scolded the *Bar News* for always printing unflattering photographs of Her Honour. And so alas we do not include a photograph. Such a pity, as she also informed her table that sequins are definitely *not* out but that black should be. It seems that Her Honour's very stylish plum-coloured sequined gown came from Las Vegas — and not Teena Varigas!

As well as the "Speech" Competition, there is the "Work the Room Competition". Ten points for a County Court Judge. Twenty for the Supreme. Twenty-two-and-a-half for the Federal. Fifty for the Court of Appeal, and a 100 for the High. Double the figure if the judge uses your first name. Simon Wilson Q.C. was way out ahead of the field until a High Court judge called him Peter (deduct 200 points), and a County Court judge called him Josh (go back to the start, do not collect a brief fee). The winner was David Curtain Q.C. in fact just one first name ahead of Ray Q.C. Of course all competitors had to acknowledge that the field was lacking that Grand International Master of Work the Room — the past Chairman — John Middleton Q.C., Q.C., Q.C. to the stars. He had upstaged Curtain (as usual) by working the room overseas with the Attorney-General!

And so the curtain began to fall (along with a few attendees), those safely ensconced in Jac's Bar after the show remarked that it had been a longer evening than most. It was also pointed out that Mr. Junior Silk had made one unfortunate slip. He said that in the history of Bar dinners there had never been a female junior silk. Of course this was wrong. It was only a few years ago that Susan Crennan Q.C. gave a marvellous speech as Junior Silk. But perhaps she does not fit into the changing face of the Bar . . .

Essoign Club Art Exhibition



TO the delight of members of the Essoign Club the Club Committee has once again started a series of art exhibitions in the Club dining room. Previous exhibitions have featured Ian Purvis, Nathan Wilkinson, David Hume, Deborah Halpern, Connie Mitropoulos, Kate Caish and Bjorn Holm.

The most recent exhibition featured works by Michelangelo Russo, born in Campobasso, southern Italy. Russo worked from the age of 12 as an apprentice with a local artist near Naples and thereafter moved to Rome to study architecture and graphic art. He moved to Melbourne two years ago with his Australian wife after living, painting and exhibiting in Naples, Rome and Berlin. The opening of his exhibition at the Essoign Club was very well attended by the Bar, Bench and guests with the Chief Justice, Mr. Justice Phillips, finding time to

1. *Michelangelo Russo.*
2. *A guest and Mr. Justice Hansen.*
3. *Colin Lovitt views with friends.*
4. *An Editor, Michael Ruddle and James Logan.*

drop in to view Russo's *Pussycats*. We all enjoyed drinks and nibblies to the jazz tunes of Andrew Ogburn (piano) and Adam Simmons (sax). The rumour has it that even the Bar Council meeting taking place that evening on the 12th floor was more enjoyable than usual as it was held to the tune of "Dixieland" played on the floor above.

The Club Committee is continuing these art exhibitions with the next one being works by Philip Davey. The opening of Davey's show will take place on 19 June and once again there will be a "Happy Hour" and a jazz band. It is the Committee's hope that the Bar will support the Club and use it well. It is a very friendly place to have lunch with your colleagues and guests or just come up for a drink and "debrief" after a day's hard work.

Gunilla Hedberg

5. *Justice Hedigan & Mrs. Hedigan and Arthur Adams Q.C.*
6. *Michael Bourke goes arty.*
7. *Kingsley Davis receives instructions.*

Verbatim

Getting Physical

County Court of Victoria

Coram: His Honour Judge Gebhardt
Scanlon cross-examining Dr. Melvin Henry Fossberry

Scanlon: I suggest to you that there is no basis for suggesting that the arthralgia/myalgia or if it is fibro myalgia are caused by employment.
Witness: They are not conditions caused by employment are they? They are conditions most often caused by physical work either employment or work outside of work.
Scanlon: Arthritis develops in people who are engaged in non-physical work. Doesn't it?
Witness: Well, I have seen — you are talking about medicine that you expect me to teach you. There is a whole — you only know a minuscule of what you are talking about. Arthritis is about a whole range of things work related and not work related. I didn't come here to teach medicine. Is there anything else you want to ask me?
Scanlon: Yes there is.
Witness: Tell me about it.
Scanlon: And that is to answer some questions.
Witness: Then don't beat around it . . . about medicine you don't know very much about medicine and I am not in a position to teach you medicine now.
Scanlon: I might make some convenient time with you.
Witness: Yes about seven years if you have got time.
Scanlon: No!

Trouserless Communication

County Court of Victoria

R v. *Vass*
Coram: His Honour Judge McInerney
16 April 1997
Heath for the Prosecution
Prideaux for the Defendant

Extract from Record of Interview

Okay. Tony, I must also inform you of the following rights. You may communicate with, or attempt to communicate with, a friend or relative to inform that person of your whereabouts. You may communicate with, or attempt to communicate with, a legal practitioner. Tony, you may also communicate with or attempt to communicate with the consular office of the country of which you are a citizen. Do you understand these rights?

Yes.

Do you wish to exercise any of these rights before the interview proceeds?

I'd like my trousers. That's all.

Doubling-Up

Supreme Court of Victoria

Athedim (Vic) Pty. Ltd v. *Evan*
Coram: The Honourable Mr. Justice Gillard
11 June 1997
G. Hardy for the Defendant
Clarke for the Plaintiff

Hardy cross-examining Director of Plaintiff Company.
Hardy: How about the desk, that they were always Rhonda George's?
Clarke: Your Honour, why do we need to go through everything twice? I thought we had covered the solariums. I thought we had covered the desk. Do we have to just go through everything twice until we get a different answer?
Hardy: It has worked so far, Your Honour. I didn't think I should change it.

Acquired Disease

Cremona v. *Phillip Morris & Ors*
Coram: Hedigan J.
25 March 1997

His Honour: And that hasn't been pleaded yet?
Nash: Yes, Your Honour. As the pleading stands, that appears as lung disease.
His Honour: You haven't pleaded it specifically?
Nash: No, it hasn't been pleaded specifically.
His Honour: You have suddenly got it now someone has looked up the literature, have you?
Nash: Yes, Your Honour.
His Honour: You acquired that disease not by smoking, but by looking up the dictionary, apparently.

Nash: I acquired it in that way, Your Honour, the plaintiff acquired it otherwise. And certainly Your Honour . . .
His Honour: If paragraph 8 was purely an allegation of the foreseeability of the risk of lung disease, why are 2 and 3 in there?
Nash: A question, Your Honour, with respect, which I asked myself last night.
His Honour: And what answer did you give yourself?

Personal Best

County Court of Victoria

Deep Bay Pty Ltd v. *Knox International Trading Co. Pty Ltd and Anor.*
Coram: Judge White
6 June 1997
G. Lucas for Plaintiff
L. Watts for First Defendant
M. Wise for Second Defendant

Lucas examining Director of Plaintiff Company
Lucas: If you do not understand the question, please, Mr. Ji, do not answer it. Just tell me you don't understand it. You have had a conversation about the sample being acceptable to the Chinese buyer. Is that correct? . . . Yes.

I'm asking you what then did you do about the sheepskin contract with Knox? . . . Can I be reminded or can I have more prompts?
His Honour: Doing the best that you can, Mr. Lucas.

Lucas later in evidence in chief:
Lucas: Sorry, I'll repeat the question. I'll withdraw that question and rephrase it. Could you tell His Honour what your understanding is of what happened to the sheepskins could not go past the customs of China. Do you have any further understanding of what occurred in respect of the sheepskins? . . . Whatever I say seems to be always objected by the other party's barrister.

Mr. Ji, please just answer the question. We will deal with those issues, all right. Just tell the court what your understanding of what happened to the sheepskins — you've told the court that you believe they didn't get past customs. Do you have a further understanding of what happened to the sheepskins? . . . And my understanding is that the sheep will be destroyed.

Watts cross-examining same witness:

This $20,000 payment, why was that made? . . . According to the requirements from the purchasing party.

What requirements? . . . That is, we cannot ask too many questions and we should not ask too many questions.
His Honour: I don't know whether that's Freudian at all but . . .
Watts: Mr. Ji, you knew that the request was that it go to your sister-in-law, is that right — that the payment go to your sister-in-law at the first instance, to then be paid back on? . . . As requested, I sent this to the designated person.

Being your sister-in-law? . . . Correct.

And you understood when you sent it to your sister-in-law that it was then to be onsent to someone else? . . . Yes, according to the Chinese culture, the common Chinese culture, that is the case.

Mr. Ji, perhaps in Australian language that was money that you had to pay in order to get this contract through, was it not? . . . The time was all upside down.

Learned Friends

County Court of Victoria

Coram: His Honour Judge Higgins
8 April 1997
G. Horgan prosecuting
Mr. Rush defending

Argument about the propriety of the prosecution using record of interview to allege that the defendant has in the record of interview attempted to make the complainant out to be "a slut".
Rush: Your Honour, if my learned friend was right in what he has said to the jury, then there has been evidence received as to the general reputation.
His Honour: Where is the evidence?
Rush: I say there's none, but for my learned friend to be permitted to make a statement to a jury saying that what came through in the record of interview was an attempt to make her out to be a slut, then "slut" or "general reputation as to chastity" is one and the same. What I say, Your Honour, is that there is no evidence, and that's why this man should be required to withdraw it from the jury.
Horgan: I'm not "this man", I'm your learned friend, so observe propriety.
His Honour: Just calm down.
Horgan: I'm not "this man", Your Honour, at all. There's a way of properly addressing a colleague at the Bar table.
His Honour: I agree with that.
Rush: Then I'll withdraw it, Your Honour. I'd ask my learned friend not to call my submission absurd in the future either. Your Honour, it's one or the other.

Passing the Interruptus Test

Supreme Court of Victoria

Coram: McDonald J
Day 18 of trial, day 2 of address

His Honour: That is where he took premature requirement?
Beaumont: Yes, your Honour and we refer your Honour just to the next sentence as well. It is clear your Honour from this that it makes the test as to novus actus interruptus . . ." [General Mirth].

Possible Correctness

Coram: Deputy Registrar Moore
Section 81 Examination of a Difficult Witness

A. Nolan: "All right, but just let me make it abundantly clear. You had provided no money to Kwana prior to becoming a director of Kwana? . . . That's possibly correct, yes.

Portful Nominees had provided no money to Kwana, is that what you are saying? . . . Possibly correct.

What do you mean possibly correct; is it correct or not? . . . Well without actually going through the books, I would have to qualify it.

Yes. Is there going to be any unqualified answer you give me this afternoon, Mr. De Groot? . . . Possibly.

Breakfast Russ-elled

Supreme Court of Victoria

Coram: Smith J
Murphy & Allen v. *Lew & Ors.* ("Estate Mortgage")
Numerous Counsel for numerous parties, including Peter Clark for a Third Party

On 15 April 1997 Counsel for the Plaintiffs had referred, in the course of an extended opening, to an alleged conflict of interest in a certain transaction being "as big as Russ Hinze". On 16 April 1997 Peter Clark, in the course of a much more abbreviated opening of his client's case said, in regard to the alleged conflict:

"We say that the conflict [was], as my friend said yesterday, as large as Russ Hinze, although I should say, Your Honour, I had to share a plane seat with him on occasion. I managed to survive but he ate my breakfast".

Is a *Haitch* as Good as an *Aitch*?

"I am told on good authority that in schools of a certain denomination, and in those schools only, it is pronounced invariably as *haitch*, an oddity I cannot explain" (Arnold Wall *The Queen's English*, 1958). Perhaps it would be more accurate to say that the pronunciation *aitch* is hard to explain. The pronunciation of the letter *H* is one of Australia's great social shibboleths: not just the way it is sounded as the first letter of a word, but more particularly the way the name of the letter itself is said. Some people say *haitch*, others call it *aitch*.

Although the spirit of our times is generous, forgiving and tolerant, the choice between *aitch* and *haitch* can cause a good deal of anxiety and even hostility. Generally speaking, *haitch* is used by those educated in that part of the Roman Catholic system which traces its origins to Ireland. *Aitch* is preferred by the rest. Some apostates deny their origins by abandoning *haitch*; but there is little traffic in the other direction. When I was a child, I was forbidden to say *haitch*; friends who said *haitch* were appalled that I ate meat on Fridays.

It is not at all surprising the issue is so confused, since the pronunciation of *h*, when used as the initial letter of a word, has changed significantly over the past couple of millennia.

Although nothing much is certain in matters of language these days, the prevailing view, perhaps illogically, supports the pronunciation *aitch*. The Oxford English Dictionary gives it thus, and does not recognise *haitch* as an alternative. I say this is illogical, because it might be expected that the name of a letter of the alphabet would give a clue about the sound normally associated with it. In this matter, *h*, *w* and *y* stand isolated from the rest of the alphabet, although the names of *c*, *e* and *g* represent only the lesser part of the work done by those letters.

The issue is manifested in at least three ways: how is the name of the letter to be said; is the *h* sounded or not before a vowel; does a word beginning with *h* accept *a* or *an* as the indefinite article?

The sound represented by *H* was known in the Semitic, Greek and Latin alphabets. In the Semitic it was a laryngeal or guttural aspirate, and remained so in the Greek and Latin. It passed from the Latin into the Germanic languages as a simple aspirate, that is, the sounded breath. It has been variously called *ha*, *ahha*, *ache*, *acca*, and *accha*. These earlier forms of the name explain the current form, and are clearly referrable to the sound represented.

In late Latin, and in early Italian and French, the aspirate gradually ceased to be sounded. In Italian, the *h* was progressively dropped in the written form of words, so that it is now absent from words which, in the French, retain it without sounding it: *eretico* (*hérétique*); *istorio* (*histoire*); *oribile* (*horrible*); *osteria* (*hôtel*).

In Anglo-Saxon speech, *h* was always sounded, but since the Norman Conquest, the English pronunciation of words with an initial *h* gradually adopted the French manner: the English language has always been something of a trollop, pursuing advantage where it can. So for hundreds of years, the *h* was seen but not heard in "proper" speech, at least in words which derive from the Romance languages.

If the initial *h* of a noun or adjective is not sounded, then the word naturally takes the indefinite article *an*. At least from the 11th century then, it was natural to refer to *an (h)istory, an (h)otel, an (h)our, an (h)onourable woman, an (h)umble person*. The ambivalence of usage survives in words like *hostler/ostler*.

However, from the 18th century on, English usage began once more to aspirate the initial *h*. This coincides with the arrival of the Hanoverian monarchs, whose native language had always sounded the *h*. Thus words which had come into English via French began to be said with aspirated *h*s, although the change was gradual and patchy. Published in 1828, Walker's Dictionary says that *h* is always sounded except in *heir*, *heiress*, *honest*, *honesty*, *honour*, *honourable*, *herb*, *herbage*, *hospital*, *hostler*, *hour*, *humble*, *humour*, *humorous*, and *humorsome*. Since that time, those underlined have also changed, but in the USA *herb* is still said with a silent *h*. *Abominable* was originally *abhominable* at least from Wyclif's time, and was explained as deriving from *ab homine*. It lost its *h* in pronunciation and then in spelling, and remained unaffected by shift in the wake of the Hanoverian kings.

One of the oddest anomalies of this process is *habitué*, which is an unassimilated French word but which is generally spoken with a sounded *h*. By contrast, *an (h)abitual liar* is commonly said with a silent *h*, although it would be odd not to sound the *h* in *habit*. *Homage* is likewise anomalous

As the shift back to aspirating the *h* was slow and illogical, it is not surprising that it provoked uncertainty in the choice of indefinite article. The choice is made the more difficult by a dread of dropping an aitch, which in many circles is a shocking thing if done incorrectly. The unhappy result is such usages as: *an hotel*, *an historic occasion*, *an hypothesis*, *an heroic effort*, *an hysterical outburst*, &c. If the *h* is sounded, the result is silly and indefensible.

The rule is simple enough: a word which begins with a vowel sound takes *an*; a word which begins with a consonant sound takes *a*. So, *an honest person*, *an hour*, *an heir*, *an unusual event* &c.; *a hypothetical case*, *a historic occasion* (but colloquially *an 'istoric occasion*), *a useful suggestion* &c. Before initials, the choice of article depends on the way the name of the letter is sounded: a UN resolution; an S-bend, an HB pencil, an X-rated film, an MP. But if the collection of letters is a recognised acronym, then the choice of article depends on how the acronym is said: a UNICEF official, an UNCITRAL official; a NATO resolution, a SALT meeting, a HoJo restaurant.

Postscript:

Since the publication of my article about the word *fuck*, I have received many comments, mostly complimentary. That article attracted far more comment than any other I have written, which shows where the market is! Readers will remember that I identified *subagitate* as the only polite word in the English language which has as its primary meaning *have sexual intercourse*.

However, correction comes from the least expected quarter: Robin Brett Q.C. drew to my attention to the OED entry for *swive*, which reads as follows:

swive, *v. Obs.* or *arch.*

1. *trans.* To have sexual connexion with, copulate with (a female) . . .

2. *intr.* To copulate . . .

I had always believed, without checking it, that *swive* was a slang word. In fact it is a sturdy Old English word, related to the

Old High German *sweib* (meaning sweep or swing). But for the fact that (apparently) its primary meaning is not gender neutral, it deserves to be ranked alongside *subagitate*.

Chaucer used it in *The Miller's Tale*, *The Reeve's Tale* and also in *The Manciple's Tale*:

For all your watching, bleared is your bright eye
By one of small repute, as well is known,
Not worth, when I compare it with your own,
The value of a gnat, as I may thrive.
For on your bed your wife I saw him swive.

Chaucer's use of the word may not be enough to ensure its respectability. Later in *The Manciple's Tale*, the episode above is referred to again:

Masters, by this example, I do pray
You will beware and heed what I shall say:
Never tell any man, through all your life,
How that another man has humped his wife;
He'll hate you mortally, and that's certain.

On balance, it may still be advisable to prefer *subagitate* in genteel company, where clarity of meaning is traditionally subordinated to elegance. But *swive* is justifiable on historical grounds, and *hump* will not cause too many problems, as long as you sound the *h*.

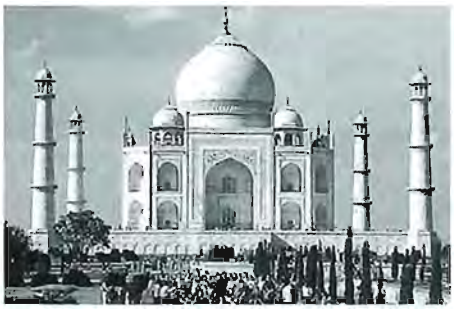
Julian Burnside

New Delhi Plays Host to International Bar Association Conference

MORE than 3000 lawyers from regions as diverse as Africa, Europe, Australasia and the United States will meet in India later this year for the International Bar Association Section on Business Law and Section on General Practice 1997 Conference.

The Conference, to be held from 2–7 November, will bring together lawyers from jurisdictions around the world along with representatives of the IBA's 173 member organisations. The event takes place in New Delhi during the IBA's 50th Anniversary year, and coincides with the 50th Anniversary of India's independence.

IBA President Desmond Fernando P.C., a leading Sri Lankan lawyer and a renowned civil rights activist, says the event aims to attract both senior lawyers and younger members of the legal profession. "The New Delhi Conference programme will offer all lawyers the opportunity to look forward to the 21st century," says Mr. Fernando. "The Asian region is developing very fast — notably in the infrastructure, information technology and telecommunications fields — making this a very apt time for the IBA to visit India. The Conference will undoubtedly be the leading international legal event of 1997. It will provide delegates not only with an excellent working programme, but also with unrivalled networking and social opportunities."



The Taj Mahal – one of the Seven Wonders of the World

SOMETHING FOR EVERYONE

The specialist committees of the International Bar Association cover topics in every conceivable practice area so regardless of whether you are a general practitioner or an expert in your field, the New Delhi Conference programme will offer something for everyone.

Sessions addressing subjects such as criminal law, civil litigation, medical law and professional conduct, will run alongside meetings on business crime, environmental law, banking, and maritime and transport law.

Presentations from a number of VIP speakers have been included in the programme as well as addresses from senior IBA representatives. Sessions will be run by all of the two sections' 50 committees, covering issues as wide-ranging as child labour, litigation and practice management for the law firm in emerging countries. A general interest programme, "Equality: Making it Happen", has been planned for both delegates and non-lawyer guests.

Topics will be viewed on a multi-jurisdictional basis by acknowledged experts from both legal and non-legal backgrounds, and each session will be opened to debate from the floor.

A Basic Course in the Fundamentals of International Legal Practice — previously held in Johannesburg, Mexico, Paris, Berlin and Buenos Aires — will be held immediately before the Conference, and will be open free of charge to all young lawyers in the region as well as to Conference delegates.

AUSTRALIA AN "ACTIVE" IBA SUPPORTER

Canberra lawyer Michael Phelps, the immediate past president of the Law Council of Australia, and senior IBA member, says Australia — the third-largest national

group of members of the IBA — is a "strong and active supporter of the Association". "We recognise and accept the valuable role that the IBA plays in our professional lives and as our representative body in the international arena," says Mr. Phelps. "An effective international body assumes even greater significance today with issues such as cross-border practice and multidisciplinary practices having an increasing intonation profile.

"With Desmond Fernando P.C., President of the IBA for the next two years hailing from the Asia region, the staging of the Conference in India is both timely and appropriate.I expect the New Delhi Conference will have enormous appeal for Australian lawyers. With the ever-increasing globalisation of legal practice paralleling the rapidly developing trade and investment linkages between Australia and its partners in the Asia region, the Conference represents a wonderful opportunity for Australian firms to develop contacts with our friends in this part of the world as well as to foster more broadly based international liaison with so many of our colleagues from the northern hemisphere.

"Undoubtedly, an added bonus is the chance to visit a most interesting and exciting country where delegates and accompanying partners are certain to be made most welcome."

IBA conferences are renowned worldwide for the excellence of their programmes and for the variety and scope of the topics addressed. In New Delhi sessions will be presented by the specialist committees, subcommittees, working groups and fora which each play an active part in the Section on Business Law (SBL) and the Section on General Practice (SGP). The IBA Section on Energy and Natural Resources Law also presents sessions of particular interest to the region.

Social functions are scheduled to run throughout the week, providing delegates with the chance to establish and maintain legal and business contacts on an international level. Delegate lunches, included in the registration fee, will be held each day, in addition to events for specific groups such as women lawyers, Latin American lawyers and new members and first timers.

A variety of locations and venues have been selected for evening events, each offering a taste of the real New Delhi. Among the planned functions is an Opening Ceremony at the Ashok Hotel, followed by a spectacular open-air party, Son et Lumiere over the Red Fort, and a Gala Dinner at the Taj Palace Hotel. A highlight of the social programme will be Home Hospitality, when local lawyers in New Delhi invite delegates into their homes for a first-hand experience of Indian life.

REDUCTIONS, DISCOUNTS AND SCHOLARSHIPS

Non-members who take a full registration for the Conference will receive free membership of the IBA and either the Section on Business Law or the Section on General Practice until the end of 1998, and the SBL is also offering a limited number of scholarships to lawyers from the region.

The scholarship covers the cost of the Conference registration fees, return travel costs, and hotel accommodation and also includes three years' free membership of the IBA and the SBL and free membership of the Scholars' Alumni Group.

The SBL 25th Anniversary Fund — established in 1995 with contributions from Section members — has subsidised registration fees for lawyers from Indian Subcontinent countries, and all registrations made before 11 July qualify for a reduced registration fee. Discounts are also available for lawyers from developing countries with a low income level.

"Whether you are an Indian lawyer or a practitioner based in any one of the IBA's multitude of other member countries, you will be attracted by the vast array of topics which will be covered at this event," says Mr. Fernando.

"I am confident that, regardless of whether you are a regular IBA Conference attendee, or considering attending for the first time, the New Delhi Conference will broaden your views and knowledge and give you an opportunity to make new contacts, form new friendships, and renew old acquaintances."

For further information about the International Bar Association Section on Business Law and Section on General Practice 1997 Conference you can approach your own Bar Association or Law Society, or contact the IBA direct at 271 Regent Street, London, United Kingdom, W1R7PA. Tel: +44 (0) 171 629 1206; Fax: +44 (0) 171 409 0456.

Gabriele Cannon's Winning Entry in *Bar News* Autumn Issue Competition

HE knew he should have taken the stairs! But five sausage rolls and a malted milk for lunch had weighed heavily upon him, and the middle lift dinged at him seductively.

The doors snapped shut . . . then nothing. The lift was stuck. Mr. Clueless Q.C. broke out in a lather, for he was going to be horrendously late for Judge Wherethehellareya — that infamous Beak who had sentenced an unsuspecting barrister to three months' imprisonment for arriving at Court ten seconds late, having been locked in the toilets by his disgruntled "learned friend"!

What else could go wrong? Quite a bit actually, for Mr. Clueless was not alone.

He turned to face his worst nightmare — Mr. Torch, the mentally challenged flame thrower who Clueless had successfully prosecuted for arson some years before. Torch glowed with delight — not only did he have his persecutor confined to a lift with lockjaw, he also happened to have with him his flame throwing equipment direct from his latest act. He had an overwhelming urge to treat Clueless to a private show.

Silk caught in hair raiser

He did so, and was in the process of billowing his finale when the lift jolted back to life.

Clueless was last seen putting himself out in a horse trough in Bourke Street. Sadly, only a tuft of his wig was found, smouldering at the scene of the crime.

Mr. Torch has become a fierce advocate for the abolition of wigs — hence, his protest in the constipated lift; well, that's what his defence counsel told the trial judge. Privately, Torch will tell you that the fire retarding qualities of horse hair perverted his course of justice.

Jeanette Richards receives Mont Blanc prizes for her winning Summer *Bar News* Competition entry

Jenny Richards uses her pen.

Enter the Autumn *Bar News* competition now — and you could win these handsome and useful prizes.

Enter New Competition

What you have to do to win

Readers are invited to:

- provide a caption for the photograph.
- provide a short (and apocryphal) explanation as to the circumstances in which this Silk finds himself.

The entrant who provides what the editors believe to be the most entertaining caption and explanation will receive a Mont Blanc Ballpoint Pen, and Mont Blanc Leather Notebook, supplied by Pen City, having a combined retail value of $365.00.

No member of the Editorial Board or Committee of *Victorian Bar News*, and no relative of a Committee or Board member, is eligible for the prizes.

Entries to Gerry Nash Q.C., c/- Clerk S, Owen Dixon Chambers West by 1 September 1997.

Kids on Collins
working with the law

The constantly changing business environment requires all industries to look inwardly and consider the impact of this constant change on staff. This is particularly relevant in the legal community, as the number of female professionals continues to increase and will continue to grow, as over 50 per cent of students studying law are female. This, in conjunction with the increase in awareness of the balance required between work and family life, means businesses need to address the changing requirements of their staff.

To ensure the infrastructure is in place for this constant change many large corporations are developing work and family policies, which cover such issues as childcare, aged care and flexible hours. **Kids on Collins** is a childcare centre assisting the "big six" accounting firms develop policy specifically for childcare.

Kids on Collins is Australia's leading childcare centre in the heart of the legal precinct, at 600 Collins Street, Melbourne. Caring for children aged from six weeks to six years, **Kids on Collins'** programmes include an eight hour kindergarten, and language, gym and music facilities.

Kids on Collins believes flexibility and a service mentality are the key to their success. They have: a purpose built facility including a qualified chef, over-ratioed carers, and to make it even easier, a hairdresser visits once a month. A dry cleaning service is available, and once a week the family's meal can be supplied.

Marshall Dessau, Manager, and Marlene Lewis, reception manager.

Hours of 7 am to 7:30 pm are well suited for busy working parents, and casual childcare can also be catered for. **Kids on Collins** has worked with Court Network providing childcare for people involved in various court matters.

Barrister William Lye, whose son Joshua has attended **Kids on Collins** since it opened in January 1996 says: *"We were looking for a quality and caring childcare centre and we have certainly found that. **Kids on Collins** provides quality service and the staff are excellent. My son is happy, and you can tell, if your child doesn't want to go to a childcare centre they're not happy there.* **Kids on Collins'** *qualified and friendly service assists in our busy working schedule."*

If you would like to more information **Kids on Collins** can be contacted on 9629 4099.

Rupertswood, Birthplace of the Ashes

AN Origin of the Ashes match comprising past and present Australian and English Test players was played in January 1995 at Rupertswood in Sunbury (see *Bar News*, Autumn 1995). Rupertswood is the former family home of Sir William and Lady Clarke. After the match, discussions commenced between Bob Lloyd, MCC Vice President, and John Jordan, the foundation President of Rupertswood Cricket Club, concerning an annual fixture to be played between the Rupertswood Cricket Club and the famous Melbourne Cricket Club XXIX'ers. The idea sprung partly from the connection between Sir William Clarke's dual role as the owner of Rupertswood and Melbourne Cricket Club President in 1882 when he hosted Ivo Bligh (later the Earl of Darnley) and his English team at Rupertswood over that Christmas.

Toss of the coin.

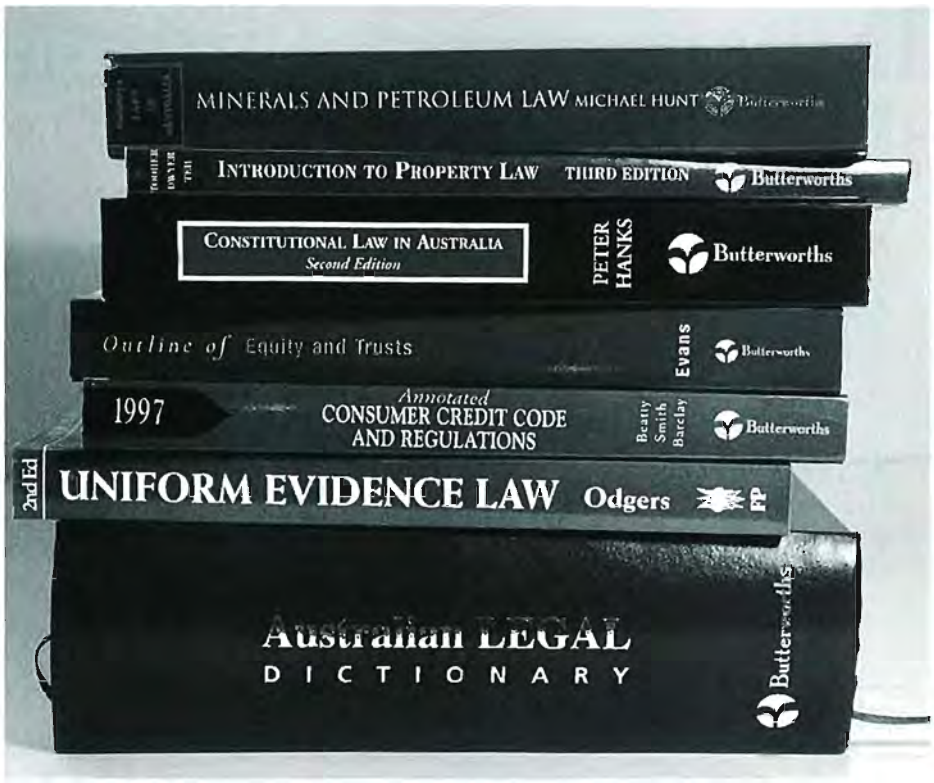
On Christmas Eve a social match was played in the grounds, after which Lady Clarke burnt the bails and presented the now famous urn to Ivo Bligh, the victorious skipper. He took it back to England and after his death in 1927, his widow presented the urn to the Marylebone Cricket Club, where it now remains at Lords. His widow was Florence Morphy who Ivo met at Rupertswood over that Christmas. She was the music governess at the Clarke home and was to become Lady Darnley.

Peter French on behalf of the XXIX'ers and John Jordan organised an inaugural game between the two clubs and it was played at the Albert Ground on 5 February 1997. The teams were captained by John Jordan and Peter Anderson. A tray has been struck and is known as the Sir William Clarke trophy. It is intended that a match will be played between the two clubs each year, alternating between Rupertswood and the Albert Ground. Rupertswood 162 runs defeated MCC Club XXIX 150 runs.

Presentation of the tray.

Minerals and Petroleum Law

By Michael Hunt
Butterworths, 1997
pp. i–vi Contents vii, Table xi–lxxxii, Index lxxxiii–cviii, Words and Phrases cixi, 1–529



THIS book contains material from *Halsbury's Laws of Australia* Volume 11 "Energy and Resources" specifically Parts I and II of the volume being "Minerals" and "Petroleum". The "Energy" section dealing with the regulation of gas, electricity and other renewable energy sources is not yet available.

Consistent with the division found in the *Halsbury's Laws of Australia* volume, this book is broken up into two main sections. The first section (Part I) deals with "Minerals". In this part the law in each Australian State and Territory is covered separately under various headings such as "Land Available for Exploration and Mining", "Exploration Titles", "Mining Titles", "Ancillary Titles", "General Provisions Relating to Mining", and "Administration of Justice".

In addition there are separate chapters dealing with "Offshore Mining" and "Uranium Mining". Offshore mining is partly regulated by the *Offshore Minerals Act 1994* (Cth) which generally relates to the exploration for and mining of minerals other than petroleum from the sea and seabed. Offshore mining within coastal waters remains within the sole control of the States and Territories but there is at present no specific State or Territory legislation dealing with offshore mining within coastal waters.

Uranium mining is also dealt with in a discrete chapter. This is necessary because of the intensely political nature of uranium mining which has led to specific legislative enactments in relation to uranium such as the *Atomic Energy Act 1953* (Cth) and the *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* (NSW).

Part II of the work deals with "Petroleum" under various State, Territory and Commonwealth legislative regimes relevant to the exploration for and recovery of oil and natural gas both onshore and offshore. This Part also contains chapters dealing with aspects peculiar to oil and gas such as "Pipelines", "Production of Petroleum" (both onshore and offshore) and "Royalties and Fees".

Both parts of the book are set out so that under broad headings the various legislative regimes are discussed and footnoted separately. This enables the user of the work to locate within the text the part specific to the particular enquiry and appropriate legislative regime in question. The text can then be used without being limited by generalisation or over simplification or the need to cross-reference it to other parts of the text as could happen if the author sought to cover all State, Territory and Federal mining law collectively rather than individually.

The work is comprehensively footnoted and in addition the footnotes refer the user to other parts of the *Halsbury's Laws of Australia* series where appropriate (i.e. overlapping matters such as environment, native title, natural and cultural heritage etc.).

Minerals and Petroleum Law is sure to become the first point of reference for all those involved in mining and petroleum exploration and production. It will be a necessary resource for many and its availability as a discrete text within the *Halsbury's Laws of Australia* series is a commendable innovation by Butterworths. This publication is a notable step in providing a specifically Australian text in this important area of law and business.

P. W. Lithgow

Introduction to Property Law (3rd edn)

By J.G. Tooher, B.M. Dwyer and G.L. Teh
Butterworths, 1997
pp. i–iv, Contents v–vi, Preface ix, Tables xi–xxv, 1–202, Index 203–213

THE authors note in the Preface to the third edition that their book is intended as an introduction to the law of real property and is directed primarily to students in Victoria and New South Wales. Because of the "technical" rather than "general" nature of the text, it is clear the work is aimed at tertiary students who require a detailed, albeit concise, introductory text to the law of real property in Australia.

As an introduction, the book is an excellent starting point that provides in a concise form a clear and detailed exposition of real property law. The book is cross-referenced to relevant cases, statutes and texts devoted to particular aspects of real property law such as Sackville and Neave *Property Law Cases and Materials*, Sykes and Walker *The Law of Securities*, Voumard *Sale of Land in Victoria* and Megary and Wade *The Law of Real Property*.

Matters central to the law of real prop-

erty in Australia such as the Torrens System (Chapter 8), Leases (Chapter 10), and Mortgages (Chapter 14) are discussed. In addition there are chapters devoted to such other important incidents to the mainstream of real property law as Fixtures (and fittings) (Chapter 2), Adverse Possession (Chapter 4), Gifts (in relation to real property) (Chapter 9), Co-ownership (Chapter 11) and Easements and Profits à Prendre (Chapter 13).

The work is relatively short, however this does not detract from its craftsmanship. For instance the discussion of the law in Victoria in relation to caveats and unregistered interests in light of the decision in *Classic Heights Pty Ltd* v. *Blackhole Enterprises Pty Ltd* [1994] V Conv R 54-506 is illuminating.

The authors are to be commended on the third edition of *Introduction to Property Law*. Students are sure to be pleased with the concise and accurate exploration of the intricacies of real property law and indeed many practitioners will find this work a useful starting point in seeking guidance towards resolving difficulties in the area of real property law.

P.W. Lithgow

Outline of Equity and Trusts (3rd edn)

By Michael Evans
Butterworths, 1996
Price: $65.00 (soft cover)

MICHAEL Evans, in the third edition of this book entitled *Outline of Equity and Trusts*, has attempted to provide a comprehensive discussion of the principles of equity and trusts.

Michael Evans' name may not come easily to some readers, however he is a barrister of the Supreme Court of New South Wales and the High Court of Australia, and a senior lecturer in the Faculty of Law and Legal Practice at the University of Technology in Sydney.

In his Preface to the third edition, the author states that he hopes to provide a "concise, but comprehensive discussion of the principles of equity and trust". The author notes the student of equity will find this a system which "provides remedies for those who suffer from sharp practice, which helps the weak when oppressed by the strong and which insists on each case being considered on its merits, with due regard for questions of conscience and good faith".

The author also notes a number of significant changes in some areas of the law of equity, since the second edition of the work, and the author especially noted that the law of estoppel had developed and the law as it concerned trust for legal purposes had been reworked by the High Court in *Nelson* v. *Nelson*.

The work is divided into 26 separate chapters, dealing with such themes as Equitable Assignments (Chapter 3), the Duties and Powers of Trustees (Chapter 18), Injunctions (Chapter 23), and Minor Remedies (Chapter 26).

The chapters are then split up into subheadings, for example Chapter 1 which deals with the nature of equity, is split up into the following sub-headings:

1. the history of equity;
2. the relationship between law and equity prior to the Judicature Acts;
3. the judicature systems;
4. the maxims of equity.

Under the sub-heading "The Maxims of Equity", the author sets out a number of the well known and oft sighted equitable maxims, such as "equity will not suffer a wrong without a remedy", "equity assists the diligent and not the tardy", "equity regards as done that which ought to be done" and "equity will not assist a volunteer". Under the headings there is a short discussion of the particular maxims.

For example, under the maxim "equity will not assist a volunteer" the author notes that pursuant to this maxim, equity will not assist a party who has not provided consideration in a transaction, however the author also notes the major exception to this rule, the assistance provided by equity for beneficiaries of trusts who usually are volunteers.

The author has endeavoured and in the reviewer's opinion, succeeds in providing a discussion of equity and trusts, that is at once easily read and comprehended. For example, Chapter 12, which deals with the nature of trusts, has a very concise and clear discussion of the broad categories of trusts, including discretionary trusts, unit trusts and superannuation trusts. Furthermore, there is a very good discussion of the distinction between trusts and other institutions, for example the distinction between trusts and contract, trusts and debt and a trustee and a personal representative.

Further in Chapter 12, there is a good discussion of trusts and taxation, where the author does not attempt to provide an exhaustive text on the subject, however provides a clear introduction to the topic.

The work, *Outline of Equity and Trusts* (third edition) is a thorough, clear and comprehensible introduction to areas of law, which have bemused and baffled many a student of law and practitioner, the reviewer included.

Dominic Lay

Concise Legal Research (3rd edn)

By Robert Watt,
The Federation Press, 1997
Paperback.

THE first edition of this book, published in 1993, was based on the author's experiences with the Legal Research and Advanced Legal Research programmes at the University of Technology, Sydney where the author is a senior lecturer. This publication is the third edition.

The book accepts that much modern research is conducted electronically. To this end every topic is looked at using both traditional and electronic research methods.

Concise Legal Research commences with a discussion of the elementary rules of citation of cases, Acts and delegated legislation. This leads on to factors relevant to electronic citation of same. Also at beginner level is the chapter on the development of the current constitutional arrangements. The chapter on primary sources covers such basic concepts as the date of commencement of an Act and subject indexes of legislation.

Watt has an extensive look at secondary materials, including:

- legal encyclopaedias;
- legal periodicals;
- textbooks;
- precedents;
- law reform publications.

Throughout the book guidance is given in regard to English, New Zealand, Canadian and United States research.

Chapter 6 is devoted to New Zealand, Canada and India. The legal–constitutional environment in each country is discussed and the court system is explained. Primary and secondary sources in each nation are explored and research methods appropriate to each country explained.

The United States has a similar but much longer chapter devoted to it alone.

The pattern of introduction to the "jurisdiction" followed by appropriate research methods (both traditional and electronic) is again repeated in a chapter on international law and in the final chapter dealing with the European Union.

The book concludes with an extensive list of useful Internet addresses.

This is a book which will be most valued by the undergraduate student. It assumes very few research skills but a knowledge of the operation of precedent. For an undergraduate the book will be of immediate assistance and will continue to provide assistance as the student progresses.

The practitioner who needs to research the law in a number of overseas countries but who has little experience of such overseas research will also find the book of considerable help.

This reviewer has only two problems with *Concise Legal Research*. One is that the electronic research methods are insufficiently detailed (though this is my handicap, not the book's). What does one do with a CD when one has one? However, merely providing the names of the commercial suppliers for each product is helpful. They would no doubt be pleased to help prospective customers use their products.

The second criticism is that while Watt looks at both Commonwealth and State law his State references are distinctly NSW-centred.

David Bliss

Constitutional Law in Australia (2nd edn)

By Peter Hanks
Butterworths, 1996
Price: $72.00 (soft cover)

THIS is the second edition of Mr. Hanks' book of *Constitutional Law in Australia*, the first edition being published in 1991, and reprinted in 1992, 1994 and 1995.

Mr. Hanks has indeed written a book which we have all grown up with.

In his Preface to the second edition, Mr. Hanks states that the book explores the major themes and issues of the law relating to the structure and function of government in Australia, both in its institutional and federal aspects. Mr. Hanks indicates that the book reflects his understanding that constitutional law is concerned with the ways in which public power is institutionally organised and applied, with the relations between the institutions which exercise public power, and the relations between those institutions and other social interests. Further, it reflects his perception of the political dimensions of constitutional law.

Mr. Hanks indicates that it is his hope that the book will provide a source book for those who seek relatively quick answers to questions and signposts for further research, rather than be the more discursive introduction, which his other book *Australian Constitutional Law: Materials and Commentary* aims to provide.

It should be noted that this edition is considerably longer than the first edition, by over 100 pages; Mr. Hanks attributes this to the activism of the High Court since 1990. Mr. Hanks refers to some major decisions which have commonly been referred to as the "implied rights" decisions, and of course the new law on ownership and title to property.

The book is divided into 14 chapters, which range from an introduction (Chapter 1) to the various aspects of the Constitution. For example Chapter 9 deals with fiscal power in the Australian federation, Chapter 13 deals with the separation of powers and Chapter 14 deals with rights and freedoms.

The chapters are broken down into a number of sub-headings, which offer the reader signposts to enable him or her to move quickly to that part of the book which will be of most assistance to them.

For example, Chapter 9, on fiscal power in the Australian federation, is broken up into a number of sub-headings, dealing with the Commonwealth taxation power, government loans, and the Commonwealth's spending power, to name a few.

Under the sub-heading the "Commonwealth Spending Power", Mr. Hanks notes the narrow view of section 81 of the Constitution as reflected in the *Pharmaceutical Benefits case*, and then deals with the wider view, as expounded in the *AAP case*. Under the sub-heading "The Wider View Consolidated" Mr. Hanks deals with the High Court decision in *Davis* v. *The Commonwealth* which dealt with an appropriation of almost $20m for the purposes of the Australian Bicentennial Authority.

Chapter 13 deals with the separation of powers, and makes mandatory reading. No doubt a former Queensland Premier would have benefited from a reading of Chapter 13 of Mr. Hanks' book.

The reader will find this book to be a contemporary and up-to-date elucidation of the major themes and interests surrounding the Australian Constitution and its judicial interpretation in the late 20th Century. The final chapter, Chapter 14 which deals with rights and freedoms, examines the rights that have been implied by the High Court into the Australian Constitution, and a subsequent "judicial reaction against adventurism and creativity".

Mr. Hanks notes that due to a change to the membership of the High Court, the issue of whether the High Court will continue to imply rights into the Constitution is somewhat unclear, especially having regard to the first judgments of Gummow J. and Kirby J.

Constitutional Law in Australia (second edition) is a contemporary piece of work, which is easily read and understood, and fulfills Mr. Hanks' stated ambition to explore the major themes and issues of the law relating to the structure and function of government in Australia. It is a book which would be of great benefit to both students and practitioners alike, because of its relevance, and because of the wisdom and learning which Mr. Hanks, with the benefit of his many years in academia and at the Bar, brings to the writing of the book.

Dominic Lay

Butterworths Australian Legal Dictionary

Butterworths, 1997
pp. i–xxxii, 1–1344

THE first law book many of us purchased or borrowed as law students was a legal dictionary. For generations of Australian lawyers this was *Osborn's Concise Law Dictionary*. Many practitioners today keep *Osborn's* by their sides as a security against not knowing a Latin maxim or an obscure legal term.

The new *Butterworths Australian Legal Dictionary* is certainly far more compendious than the *Osborn's* we knew as students. Notwithstanding the differences in scope, a comparison of numerous definitions of the same words in both dictionaries leads me to the view that the *Australian Legal Dictionary* is generally more readable and more informative. An obvious advantage of the *Australian Legal Dictionary* is its numerous references to Australian cases and legislation.

Without confining itself simply to defining legal terms, the *Australian Legal Dictionary* includes: judicial and statutory definitions of everyday words and phrases; biographical entries of eminent judges, lawyers and jurists; definitions of technical words which lawyers may encounter in specialised fields of knowledge including medicine, economics and engineering.

The scope of the *Australian Legal Dictionary* is huge. Although some may say it tries to do too much, it is clear that what it has tried to cover, it has done well.

It contains a table of law reports and their abbreviations (although it does not indicate where some of the old English cases can be found in the English Reports). It also contains a table of popular case names with their proper names and citations, the Australian Constitution and tables of Australian Prime Ministers and Justices of the High Court. Its references to Latin maxims and phrases are legion: all are translated, some with explanations.

The quality and scope of the *Australian Legal Dictionary* make it an invaluable tool for practitioners. I have found the dictionary to be a handy starting point for research and a useful reminder of principles and their cases. This book should become part of most Australian lawyers' libraries.

Matthew Harvey

Ford's Principles of Corporation Law

By H.A.J. Ford, R.P. Austin and I.M. Ramsay
Butterworths, 1997
pp. i–lxxxvi, 1–1225

BEING asked to review *Ford's Principles of Corporations Law* is a bit like being asked to review the *Odyssey* or *War and Peace*: it is a classic. Professor Ford is Australia's most eminent academic in the field of corporations law. The fact this book is now in its eighth edition, with numerous reprints in between, bears testament to his status. When this book was first published, it was the author's intention that it service the needs of law students; however, it has since become a standard text on company law for practitioners.

After discussing introductory matters like the origins of company law, the book divides the law into six general areas: the nature of the corporate entity, the law of corporate governance, corporate liability, corporate finance, control and restructuring, and external administration.

The chapters on external administration are written in a clear and concise manner. The point-form approach, which is occasionally employed, makes reference and comprehension more easy for the busy practitioner.

The chapters about directors' duties present and analyse the principles and legislation succinctly. They provide considerable and useful information in relation to these somewhat "sinned against" sections of the Corporations Law. They also discuss policy considerations and the various processes of reform in this area.

The law relating to takeovers and elimination of minority shareholdings is explained in the chapters devoted to corporate control and restructuring. In relation to takeovers the paragraphs on Part A statements are thorough and methodical as are the paragraphs on the related concept of materiality, which summarise the principles in point-form style.

The book has been updated to include numerous references to the Second Corporate Law Simplification Bill 1996 and to recent court decisions. For any lawyer who practises in company law, *Ford's Principles of Corporations Law is* the first "port of call".

Matthew Harvey

Uniform Evidence Law (2nd edn)

By Steven Odgers
Federation Press, 1997
pp. Forward iii–vi; Contents vi; Table of Cases ix–xv; Table of Statutes xvi–xvii; Format xviii; Introduction xix–xxvi, 1–318, Appendices 319–365, Index 366–372

THE *Evidence Act 1995* (Cth) was described shortly before the Act received royal assent in March 1995 by the then Federal Minister for Justice as ". . . one of the most important reforms in the administration of justice in Australia". Although this statement contains the customary quantity of political hyperbole it is true that the Act will impact significantly on aspects of the judicial process in Australia.

The Evidence Act commenced operation on 18 April 1995 and applies to proceedings in Federal courts and the courts of the Australian Capital Territory. Corresponding New South Wales legislation commenced operation on 1 September 1995 and it would seem likely that all Australian jurisdictions will follow suit by introducing largely complementary legislation in the near future. Consequently the law as embodied in the *Evidence Act 1995* (Cth) is of immediate relevance to Federal courts sitting in Victoria and in the long run likely to be the foundation upon which Victorian legislation will model itself. Equally, Mr. Odgers' style and commentary on the Evidence Act as set out in *Uniform Evidence Law* is likely to become the model resource for practitioners.

The legislative sections are clearly set out and identified by a line next to the text of the section. Following each section (or in some cases sub-sections) there is commentary with comprehensive cross-referencing to other relevant legislation, cases, Australian Law Reform Commission references and other materials where appropriate.

In addition to the clear setting out, at the head of each alternate page a topic is noted being referable to the heading of the relevant part of the Act. Consequently when using the annotated Act, by reference to the page heading the reader can see at a glance the general nature of the sections. These headings cover topics such as documents, hearsay, tendency and coincidence (similar fact), credibility, character, identification, standard of proof, privilege, corroboration, etc. Further, at the bottom of each page reference to a section is provided and this enables the user to "flick" through the book to find a particular section.

The author has usefully provided in appendix form various matters relevant to the new Commonwealth and New South Wales regimes such as various regulations including the regulations dealing with transitional aspects arising from the new law.

As with all annotated legislation, the work is primarily a tool for practitioners. In this case the user is likely to be those persons principally concerned with the resolution of disputes within a trial format. Accordingly, the work will be of undoubted use to barristers and solicitors and it will be a particularly useful tool because of its concise index, clear and comprehensive commentary and a format which allows the user to quickly scan parts of the work to find a relevant section and commentary. Students will also find the text useful. This edition, and future editions are sure to become standard tools for those involved in the trial process. It is a work commended to all those concerned with the intricacies of the law of evidence

P.W. Lithgow

Economic Union and Federal Systems

Anne Mullins and Cheryl Saunders (eds)
Federation Press (Annandale), 1994
pp. 283

IT may seem a little belated to be reviewing a book published three years ago, especially when the ten essays it comprises are based on papers delivered at the 1992 Conference of the Association of Centres

for Federal Studies. However, much of what is addressed in *Economic Union and Federal Systems* is of interest and is still topical, particularly in light of the movements of various federations and unions around the world, from our own experience of economic federalism during the annual verbal battles in Canberra at the Premiers' Conferences, to the drive towards monetary union occurring at the moment in Europe.

As Cheryl Saunders notes in the Introduction the chapters are grouped around four themes. They are mobility, equality, economic management and finally the emergence of supra-national organisations. No doubt it is the last of these which will attract most readers, in light of the growth of such bodies as APEC and the "new" Europe.

There is an optimistic streak which sometimes emerges, overtly in the chapter by Daniel Elazar entitled "The Federalist Revolution and the Way to Peace", which presents federalism as a practical product of reconciliation between warring states embarking on a prosperous future. He points to the experience of France and Germany in post-war Europe, and notes the emergence of the United Nations as one of the very first stages of a closer international community.

However, the chapter by Daniel Wincott dealing with monetary union in Europe is laced with foreboding. As Wincott explains, in Europe the cause of economic union is racing ahead of political union, producing a great disparity between the strength of the Central Bank which will administer the new monetary system and the political weakness of the European Union itself. Presumably, Wincott is suggesting that without a radical rethink of the Maastricht Treaty a Europe ruled by a *bank* is a real scenario for the future.

Other chapters in this volume examine many other experiences, including Canada, Spain, Germany, as well as the peculiar situation of the long established Swiss Confederation, which is surrounded by the growing European Union.

The ten authors cover much in this volume. And yet, notwithstanding there being no claim that this is a comprehensive work, perhaps it could have profited from a greater reference to the past experience of federalism, maybe by adding an extra chapter. Unions of nations have risen many times in past centuries for primarily economic purposes, and have then fallen. Surely their experience has some relevance. Although the economic systems which exist in our age may be of unprecedented complexity, the nature of the people who create and have created the environments in which these systems prosper is surely largely unchanged through the ages. The value of the past experience should not be underestimated nor neglected.

Andrew Field.

Brett, Waller and Williams, Criminal Law, Text and Cases (8th edn)

By L. Waller and C.R. Williams, Butterworths, 1997 paperback, $95

THIS book will be familiar to most practitioners as the standard first year Criminal Law text. Indeed, my last experience of this book was the fifth edition of 1983 as a first year law student. Formerly known as Brett and Waller the text now has C.R. Williams (the Dean of Law at Monash University) in the writing team.

The book is widely regarded as authoritative and covers all Australian jurisdictions. Jurisdictional points of similarity are noted and differences discussed.

For the eighth edition the text has been completely revised. It contains chapters on the substantive offences of assault, sexual offences, murder, manslaughter, property offences and traffic offences. Both the common law and the various descendants of the English *Theft Act 1974* are studied. The general doctrines of attempts, participation in crime, conspiracy, strict liability duress, mistake, insanity and substance abuse are discussed.

This edition was written after the passage of the Northern Territory's *Rights of the Terminally Ill Act 1995* but before that same Act was nullified by Federal Parliament. It therefore makes some predictions about the spread of pro-euthanasia laws which have so far failed to eventuate

The first chapter sets out the general background of criminal law which any practitioner should find interesting. Some philosophical difficulties with the concepts of mens rea, recklessness and negligence are exposed. The aims of the criminal law are glanced at.

Criminal Law is primarily for undergraduate students. It often teaches by provoking thought and it expects the student to seek out cases for further exposition of an idea. While this is appropriate in a pedagogical setting, it may annoy a busy practitioner who wants an answer now. Despite this difficulty it is still a useful staring point for non-criminal law practitioners who find themselves involved in a criminal matter.

The index is comprehensive and easy to use. The writing is generally clear and easy to follow.

One facet I regard as a failure is the authors' surrender to politically correct/gender inclusive language. This never improves clarity and usually destroys the rhythm of a sentence.

David Bliss

Annotated Consumer Credit Code and Regulations

By A. Beatty, A. Smith and A. Barclay
Butterworths, 1997
pp. i–xvi, Tables xvii–xxxviii, Consumer Credit Code 1–249, Regulations 250–342, Index 343–361

AS of 1 November 1996 various "consumer" money lending and financial accommodation arrangements entered into in all States and Territories (except Tasmania which became part of the national scheme on 1 March 1997) are subject to the national regulatory regime embodied in the Consumer Credit Code. The Code applies in Victoria by virtue of the *Consumer Credit (Victoria) Act 1995*.

The Consumer Credit Code is part of a national legislative regime to provide uniform credit laws in all Australian jurisdictions. As part of this task and as the result of the Uniform Consumer Credit Code Laws Agreement 1993 the incorporation of the Consumer Credit Code into the law of each State and Territory provides uniform consumer credit laws Australia wide.

Essentially the Code applies to all credit provided to individuals for personal, domestic or household purposes. The Code applies whether any charge is made for the credit and regardless of the amount borrowed or interest rate applicable. The Code regulates related mortgages, guarantees and insurance contracts incidental to the consumer credit arrangement.

The Code regulates the form and content of the loan documentation of various types of consumer credit transactions as well as making numerous provisions in rela-

tion to fees and charges, the termination of the contract, the commencement of enforcement proceedings, consumer credit insurance and the unilateral variation of the arrangement. There are penalties for non-compliance which are generally civil penalties, however the Code creates almost 60 specific criminal offences. The Code also provides for relief to a debtor on a variety of grounds including hardship, the re-opening of unjust consumer credit contracts and applications for compensation where the credit provider has breached the Consumer Credit Code.

From the foregoing it can be seen that the Consumer Credit Code will have wide ramifications and provides unexpected burdens as well as advantages for both the credit provider and the debtor.

The *Annotated Consumer Credit Code and Regulations* is a splendid work for those who seek access to and guidance through the new Consumer Credit Code regime. It will be useful to all those working within the consumer credit field, and who require quick access to the Code together with some assistance in interpreting its provisions.

The format of the book provides for ease of use. The authors provide immediately under each section an outline and/or explanatory note relevant to each section together with, where appropriate, further annotations including specific footnotes relating to parts of the section.

There is also a side note reference to the section of the *Credit Act 1984* (New South Wales) to which the Code section most closely corresponds and when read in conjunction with the comparative table this side note enables the user to identify comparative provisions between, for instance, the *Credit Act 1984* (Victoria) and the provisions in the Consumer Credit Code.

To further assist the user the relevant part and section are found on the top of each page. This allows the user to quickly find a Part of the Code and specific section without recourse to the Index or Table of Contents.

A book in this form is an extremely useful tool for legal practitioners and for those who need quick, succinct and accurate reference to the provisions of the Consumer Credit Code. The annotations provide great assistance in understanding the sections and appropriate cross-references further enhance the book's usefulness. It is surely a work which will have further editions as developments, both statutory and judicial, impact upon the operation of the Consumer Credit Code. This is a work of high standard and yet retains a convenient and accessible format. It is a book to be commended to all those involved in the field of consumer credit Australia wide.

P.W. Lithgow

Adela Pankhurst: The Wayward Suffragette 1885–1961

By Verna Coleman
Melbourne University Press, 1996

THIS book traces the life of an activist. Adela Pankhurst might be described as one of the "lesser" Pankhursts. She never achieved the profile of her famous mother, Emmeline, or sister, Christabel, partly, this book suggests, because of their efforts to keep her out of the centre of suffragette action in London. Adela's contribution was mainly in the mill districts of Yorkshire and Lancashire. In 1914, Emmeline and Christabel, suspecting her of challenging the leadership of, particularly, Christabel, effectively, banished Adela to Australia. Her strongly held views against militancy and in favour of socialism in the suffragette movement brought her into opposition with their leadership.

In Australia, Adela continued her suffragette activism for women and the poor. During World War I, she became a household name as the result of her passionate and electrifying speeches in favour of pacifism and against conscription.

The fundamental threads of her life were then set — women, the poor and pacifism. These concerns always remained at the heart of Adela Pankhurst's activism although the views she espoused in support of them were often contradictory. She was, for example, anti-British during World War I but supported British imperialism in World War II.

Verna Coleman paints a picture of a tireless, passionate and captivating activist who held her views fiercely and single-mindedly, often to her cost. The book has been meticulously researched and carefully traces Adela Pankhurst's involvement in a string of movements and organisations throughout her life. One is not drawn into the life and times of Adela Pankhurst, so this is not, in the end, great biography, but the story of her life is well presented for the reader wishing for information about a significant historical figure.

Helen Symon

Conference Update

10–15 August 1997: Reading, England. International Mergers and Acquisitions Seminar. Contact the Study Group for International Commercial Contracts. Tel. 0181 785 7050, Fax 0181 785 7649.

10–16 August 1997: Mt. Hotham. Australian Bus & Transport Management & Law Conference. Contact Karen Prior, Tel. (07) 3354 1696, Fax (07) 3358 4196.

11–17 August 1997: Mt. Hotham. The Eye and The Law — A Medico-Legal Conference. Contact Karen Prior, Tel. (07) 3354 1696, Fax (07) 3358 4196.

22–24 August 1997: Sydney. ALJA Asia-Pacific Courts Conference. Contact Carol (02) 9241 1478, Fax (02) 9251 3552.

26–31 August 1997: Manila, Law Asia Conference — Law in a Changing Asia. Contact Roslyn West, Tel. (08) 8946 9500, Fax (08) 8946 9505.

27–31 August 1997: Manila. Fifteenth Biennial Law Asia Conference. Contact Law Asia Secretariat, Darwin. Tel. (08) 8946 9500, Fax (08) 8946 9505.

1–7 September 1997: Florence. Thirty-Fifth Annual Congress and International Association of Young Lawyers. Contact Michelle Sindler (02) 9210 4444, Fax (02) 9235 2711.

18–21 September 1997: Melbourne. Thirtieth Australian Legal Convention. Contact Nat Hogan, Law Institute of Victoria, Tel. (03) 9607 9311, Fax (03) 9607 9558.

23-25 October 1997: Newcastle Australian and New Zealand Sports Law Association Inc. Conference. Contact Tel. (049) 262433, Fax (049) 265103

25 October—1 November 1997: Cape Town. Eleventh CMJA Triennial Conference. IBA Tel. 44 171 629 1206, Fax 44 171 409 0456.

26–31 October 1997: Cape Town. Eleventh Triennial Conference — Commonwealth Magistrates' and Judges' Association. Contact D.B. Armati, Tel. (02) 9289 8701, Fox (02) 9289 8819.

27–31 October 1997: Heron Island. Pacific Rim Medico-Legal & Industrial Law Conference. Contact Karen Prior, Tel. (07) 3354 1696, Fax (07) 3358 4196.

10–16 January 1998: Cortina. D'Ampezzo, Italy. Europe Pacific Medico-Legal & Industrial Law Conference. Contact Karen Prior, Tel. (07) 3354 1696, Fax (07) 3358 4196.

17–23 January 1998: Cortina D'Ampezzo, Italy. Europe Pacific Business Law, Business, Management and Accountancy Conference. Contact Karen Prior, Tel. (07) 3354 1696, Fax (07) 3358 4196.