# VICTORIAN BAR NEWS

No. 102 SPRING 1997

## FAREWELL: SIR DARYL DAWSON

**Welcome: High Court Justice Hayne, Appeals Court Justice Kenny, and Federal Court Justice Finkelstein**

**Introducing the 1997/98 Bar Council**

**Interview: Judge Warren Fagan talks with Dr. Philip Opas, OBE, Q.C.**

**The Continuing Story of the Silver Cigarette Case: Mark E. Dean**

**Canada and Quebec — Justice Peter Heerey**

**The Law and the Internet: the future is now**

**How to Lose a Contested Matter without really trying**

**The stress-free Lawyer's Gown, à la Cardin**

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## Contents



*Welcome Justice Hayne*

*Welcome Justice Kenny*

*Welcome Justice Finkelstein*

*The Continuing Story of the Silver Cigarette Case*

*The 1997/98 Bar Council*

*Cover: Sir Daryl Dawson A.C., K.B.E., C.B., sat for the last time as a Judge of the High Court on 15 August 1997. His farewell is printed on page 13.*

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# WorkCover, Common Law, and Legal Aid

IF the Myer store Santa Claus can be a young non-Caucasian female, then why not abolish the common law rights of workers. Why not limit legal aid to a handful and pay lawyers (God forbid the use of the word) such a pittance that the poor will not be properly represented? While we're at it, make judges answerable to the Executive. After all, the Westminster system was only a British idea and we've got to get rid of all that stuff. Governmental separation of powers is as outdated as Christmas. Passing fads thought up by Dickens and Coca-Cola.

There has been a great deal of activity on behalf of the Common Law Bar Association and the Criminal Law Bar Association. Meetings have been held, a lot of parliamentarians approached. The Chairman and Vice-Chairman of the Bar Council held a press conference together with injured workers to demonstrate the injustice of the proposed changes to WorkCover. The aim was to ensure a fair and proper legal aid system in the criminal law, and to try to ensure that the right to damages for workers was not totally abolished.

But in the case of common law it was to no avail. On 7 October 1997, the State Government announced that injured workers' rights to sue their employers for negligence would be abolished. It was all too expensive and some lawyers were making some money out of it, which was disgraceful. At least there is to be a three-year run-off.

The new maximum compensation for an injured worker is to be $300,000 rather than $1.1m. Weekly benefits are to be cut from 95 per cent of wages to a maximum of 75 per cent after 13 weeks, instead of 90 per cent after 26 weeks. These decisions will be made by medical panels rather than courts. The medical panel's decision cannot be appealed to a court. An example of how this system benefits workers is that, under the old system, a widow of a deceased worker could have got up to $500,000, now she will get $300,000.

The whole system is to benefit employers' premiums, yet strangely their premiums will rise from 1.8 per cent to 1.9 per cent of payroll. Supposedly to pay for the rush of common law claims.

**The medical panel's decision cannot be appealed to a court. An example of how this system benefits workers is that, under the old system, a widow of a deceased worker could have got up to $500,000, now she will get $300,000.**

The reaction of members of the media has been interesting. They have been caught between two stools: their dislike of lawyers and envy of the legal profession's earnings, and their dislike of the Kennett Government.

The *Herald-Sun* of 8 October 1997 couldn't make its mind up. It reported that the unions had vowed to fight the radical changes to workers' compensation and yet had to list the "WorkCover legal cost payments" of the top earning ten firms in Melbourne, with the sub-line "MILLION DOLLAR LAWYERS".

The source of the figures quoted was never explained. Further, it is unclear whether the costs included disbursements such as medical reports, barristers' fees, experts' fees, the cost of issuing proceedings, and paying the daily court taxes for the right to litigate.

It was good to see that *The Age* of 9 October 1997, after some similar waxing and waning, came out with an editorial which concluded that injured workers' "common-law rights should be defended, not abolished". The editor also included an excellent article by Patsy Toop of Holding Redlich, detailing the profound detriment to workers' lives to be caused by the changes.

What has emerged from the Bar's efforts in regard to WorkCover and common law is an air of futility. Prior to the announcement it became clear that the vast majority of backbenchers did not know what was going on. There was no consultation. No-one wants to listen to the legal profession. The notion that conservative governments support the professions is long dead.

It is to be hoped that the Criminal Bar

Association and the Bar Council have more success in fighting the changes to legal aid. Recent figures based on legal aid fees show that a barrister working flat out would earn a pittance. It is now proposed that there should be a Legal Aid Panel of barristers who will do what they are told.

### NEW BAR COUNCIL

On a brighter note there is a new Bar Council elected. Neil Young Q.C. has been re-appointed with David Curtain as his deputy. A notable retiree from the council is Graeme Uren Q.C. who served the Bar well for many years, lately as vice-chairman.

### WE WERE WRONG

In the Winter issue of *Bar News* we published a Farewell to the Honourable Mr. Justice O'Bryan. We are delighted to discover our action was premature. His Honour, although he has ceased to be a full-time member of the Supreme Court, continues on in his role as a Reserve Judge of that Court. We apologise for our error.

It was not our intention to drive His Honour into an early retirement. We are very happy that the rumours of his demise (which we helped promote) are grossly exaggerated. We hope that he will continue to grace the Bench for many more years. In our defence we should add that the rumour in fact commenced as a result of an apparently ambiguous and misconstrued remark made by His Honour to the author of the Farewell.

The farewelling of Judges has become a complicated affair. Our dilemma is that practically all "retired" Judges on the County Court seem to be sitting as Reserve Judges. We will sort this problem out so as not to farewell a face who appears the next day as a sitting Judge.

### MR. JUSTICE BATT

In a welcome to Mr. Justice Batt in the Winter 1994 issue of this journal, mention was made of his "intelligence, learning and conscientiousness". Since his initial appointment those qualities have been manifested in a number of tightly reasoned and logically impeccable judgments. Mention was there made also of his "personal qualities of courtesy, tact and patience". They also have been much in evidence over the last three years.

His Honour was elevated to the Court of Appeal on 7 May 1997. We welcome his appointment and congratulate him on his elevation.

The Editors

# Legal Aid funding crisis continues to dominate Bar Council business

### LEGAL AID

OVER the last few months the legal aid funding crisis has continued to dominate the business of the Bar Council. It is now widely recognised by the courts and the profession that legal aid cuts have had, and will continue to have, a profound effect upon the public's access to justice. Moreover, many members of our Criminal and Family Law Bar rely heavily on the modest legal aid fee scales for their incomes, which unfortunately have been affected by the cuts.

One of the Bar Council's most recent responses to the Victoria Legal Aid (VLA) fee scale reductions has been the commissioning and publication of an accountant's study into barristers' incomes at the Criminal Bar. Accounting firm Price Waterhouse Urwick completed a comprehensive review of barristers' fee scales set by VLA for criminal cases. The report shows that VLA is offering fees to barristers ranging from $15.80 to $45.00 per hour in the Magistrates' Court, from $20.00 to $46.50 per hour in the County Court and from $26.67 to $88.00 per hour in the Supreme Court. In criminal cases, fee scales have fallen in real terms since 1984. They are presently 12 per cent behind CPI movements since 1990 and will be 26 per cent below the CPI by 2001. A majority of VLA cases are, of course, heard in the Magistrates' Court. The Price Waterhouse review was well received by the media, and the Bar provided an extensive briefing on the review to both the Attorney-General and to VLA. The Bar Council awaits their considered response.

The Price Waterhouse review highlights just one of many flaws which have emerged in recent months in VLA's response to the Commonwealth funding cuts announced last year. VLA has recently attempted to unload the burden of arranging representation for needy litigants onto the courts, which are not equipped to bear the burden and cannot be expected to do so. In recent months, the Court of Criminal Appeal was placed by VLA in the embarrassing position of having to ask the Criminal Bar to donate its services for almost 50 per cent of litigants in the Court. While the Bar has always operated a pro bono service for the large number of people who are rejected by VLA, the Bar has taken the view that VLA should not be able to use this service to avoid its statutory obligations. The President of the Court of Appeal has publicly supported the Bar's stance in this regard.

More recently, VLA has made the extraordinary statement that it will refuse to pay a barrister for agreed trial preparation work if, for some reason outside the barrister's control, the trial does not proceed. VLA is also trying to lock barristers into agreements to finish cases for a set fee no matter how long the trial takes. These unconscionable policies are yet another reason why barristers who have high professional and ethical standards will be deterred from dealing with VLA.

The latest item in the list of unacceptable VLA proposals is the institution of "limited practitioner panels", whereby

barristers would be required to give a number of undertakings to VLA before they will be considered for VLA work. These undertakings would compromise the independence of barristers, and potentially constitute an incursion into legal professional privilege. Again, the Bar Council has objected strenuously, and called upon VLA to withdraw this proposal. A similar view was taken by the Criminal Bar Association which unanimously resolved to reject VLA's proposal for limited practitioner panels as inimical to the interests of an independent and fearless Bar. The Bar Council will continue its active media campaign on behalf of the public and on behalf of the Criminal Bar against unreasonable legal aid cuts.

## LAW REFORM

The Bar has also recently made submissions and expressed its views in relation to a number of law reform initiatives. Some of these initiatives include the Australian Law Reform Commission's Issues Paper on the adversarial system (Issues Paper 20), the ALRC's report on the awarding of costs in litigation (Report 75), the suggested curtailment of common law rights for workers in Victoria, and the civil litigation reforms proposed by the County Court. The Bar has always supported law reform measures which would increase access to justice and the efficacy of the justice system, but some of these State and Federal initiatives have not, in the Bar's view, taken adequate account of the importance of ensuring access to the courts and supporting an independent, competitive legal profession in the administration of justice. In particular, the Bar Council has strongly and publicly opposed any further restriction upon the common law rights of seriously injured workers. Despite these efforts, the State Government appears to be intent on abolishing common law rights, without engaging in any proper consultation with affected groups.

## INTERNAL DEVELOPMENTS

In the past few months, the Bar Council has addressed its own role in relation to its members, its committees and its associations. The Council recognises that, as a result of the Legal Practice Act, the Bar would be in great danger if it were to take its membership for granted. The Bar has always offered a range of services to its members, and this range is in the process of expansion. The Bar Council is actively working towards the position where it can offer to its members income disability insurance, discounted air travel, an improved telephone system, an Internet legal research service, and a larger library with better reading-room facilities.

The Council is also seeking to improve its communication with the constituent committees and associations. As the Australian legal environment becomes progressively more complex, and as it becomes more critical that the Bar have a strong and coherent media presence, the Council will increasingly rely on the co-operation, advice and initiative of these bodies. For this reason, the Council is putting in place a system of regular consultation with the Bar's associations, a system which builds upon the existing Bar Council portfolio system. With the active co-operation and support of the Continuing Legal Education Committee, the Readers' Practice Course Committee and the various associations, the Bar Council is also looking at establishing a more centralised and comprehensive continuing legal education program.

## JUDICIAL APPOINTMENTS

Happy episodes in the life of the Victorian Bar have been the recent appointments of Justice Hayne to the High Court, Justice Kenny to the Court of Appeal, and Justice Giudice to the Federal Court and to the office of President of the Australian Industrial Relations Commission. The Bar Council is particularly pleased that the position of Sir Daryl Dawson on the High Court has been taken by another eminent member of the Victorian Bar.

## NEW BAR COUNCIL

Lastly, I would like to thank members of the last Bar Council for their tireless efforts in what has been another challenging and successful year for the Bar. I also congratulate those new members of the Bar Council on their election. The Bar Council is continuing its process of internal restructuring, and it would be unwise not to anticipate further external pressures on the Bar in the months to come. For these reasons, I am delighted that there is, once again, a strong Council which I am confident will prove itself equal to the tasks which lie ahead.

Neil J. Young Q.C.,
Chairman

# The new Children's Court and new Regulatory System for Introduction Agencies outlined

I was very pleased to announce a few weeks ago that a new Children's Court will be constructed on the former Peter McCallum Clinic site replacing the inadequate facilities of the current building. The Court is expected to be completed by early 1999. I would like to take this opportunity to inform members of the facilities the new court will offer and the new technology being introduced to improve efficiency.

Donning my Fair Trading hat, I also provide information about the new regulatory system for introduction agencies, the standards they must adhere to and the consequences and penalties which follow if they do not.

## NEW CHILDREN'S COURT

In January 1998, construction will begin on a new purpose-built Children's Court which will deliver a state-of-the-art court complex to its many users. For the first time in Australia organisations associated with the Court such as Human Services, the Salvation Army and Legal Aid will be located in the same complex.

The building will provide for eight courtrooms of various sizes to achieve maximum flexibility. They will be constructed to take advantage of natural light and views, creating a calming environment. Adequate space will be provided to the various parties, reducing the tension often associated with hearings.

The Family and Criminal Law divisions will be segregated and there will be significantly improved security for magistrates, staff and court users.

Other features of the Court will include a secure area for children; child minding and baby changing facilities; outdoor courtyard areas; special withdrawal areas for distressed people, and improved public access, especially for disabled people, achieved through good design and a location close to public transport.

Improved technology and a new case management system (JurisLink) in the Children's Court will also benefit users of the Court, magistrates and staff.

In most matters it will be possible for court orders to be produced prior to the parties leaving the courtroom. This will assist to alleviate misunderstandings and confusion that can result between the parties when they have to wait long periods for the production and authentication of orders. This will also enable parties to leave the court premises soon after the hearing, reducing the number of people congregating in the public waiting areas and hence reducing the stress experienced by court users.

Enquiries regarding listings and previous orders will be answered by staff in seconds via access to the extensive search capabilities of the new system. Currently, enquiries require staff to search manual registers over a number of court dates to extract the information pertinent to the enquiry.

Court lists will be managed much more accurately through automated scheduling of court resources and by providing the Court with detailed management information relating to the court case load. Better management of court lists will mean that parties can have greater certainty that the matter will be dealt with at the time nominated.

The new technology infrastructure will provide magistrates with access to extensive reference materials on-line, whether in chambers or in the courtroom. Access to these materials will reduce the need to interrupt proceedings while legal references are called for or checked.

The Court will be able to assist parties and practitioners in the administration of the matters they are involved in by providing reminders, by letter or e-mail, of significant events requiring action or follow up.

Reports required by the Court, to assist with making determinations, may be able to be lodged electronically. This would provide a cost and time saving to the people responsible for the preparation of the reports.

Real-time transcripts, remote witness links and video conferencing will be available in the Court.

## INTRODUCTION AGENCIES

In 1993, in response to a rapid escalation of problems within the introduction agency industry, I established a working party to identify problems and make recommendations. As a result of the working party's report, the industry was warned that if no improvement in trading standards occurred, government intervention would be considered.

A report on the industry, completed in 1996, found that trading standards had declined further, notwithstanding a voluntary Code of Conduct, the development of a consumer information strategy and increased emphasis on enforcement strategies.

The Introduction Agents Bill was introduced in the Autumn Session of Parliament and is lying over for public consideration. It is expected to be passed in the Spring Session.

The major objective of the Bill is to eradicate unethical practices by firstly, placing restrictions on who can operate as an introduction agent; and secondly, setting standards to ensure that both agents and clients have clear, enforceable rights. Many of the standards set relate to

information which must be disclosed to a client prior to and upon entering an introduction agreement. This fulfils a secondary though no less important objective which is to ensure that consumers have adequate information to enable informed decision making.

The Bill is aimed at agents which match individuals or groups of individuals and who do this as a business. Excluded are persons who provide an introduction service on a non-profit basis or for a community purpose. Also excluded are listing services, which make available to the public (whether by magazine or electronic bulletin board or on a telephone database) names of people from which any person can make a selection usually for a nominal administrative fee or the price of the telephone call.

The Bill requires existing and newly commencing introduction agents to give notice of their intention to operate. However, certain categories of persons will be disqualified from trading as introduction agents, for example persons convicted of a serious offence within the previous five years and persons licensed under the *Prostitution Control Act* 1994.

The Bill prohibits certain trading practices, for example agency staff pretending to be clients and particular forms of false advertising, such as falsely advertising particular individuals as available for introduction.

The Bill seeks to protect the privacy of client information by restricting its use to the purpose sought, that is to facilitate an introduction agreement and limit access to the information.

Before entering an agreement, the Bill requires detailed information to be disclosed to the client, for example, the type and levels of service offered and the price. Agreements must be in writing and must contain a notice that a cooling period of three days applies to all contracts, that no more than 30 per cent of the contract price can be sought prior to the provision of a service and that unless the agreement complies with these requirements, it is void. In the case of a void agreement, the introduction agent must refund all money paid by the consumer within 21 days of receiving a notice. Generally, such a notice would be served by either the consumer, his or her legal adviser or the Director of the Office of Fair Trading and Business Affairs (OFTBA). The Bill provides a procedure whereby an introduction agent can apply to the Magistrates' Court to have an agreement declared not void.

The Bill contains substantial penalties ranging from 500 penalty units (or imprisonment for 12 months) for the most serious offence, to 20 penalty units for breach of the Regulations. The Bill will be administered and enforced by OFTBA with prosecutions taking place in the Magistrates' Court. OFTBA will also continue to receive and conciliate consumer complaints relating to the introduction agency industry as will the SCT continue to receive applications.

Jan Wade, M.P.,
Attorney-General

# The Victorian Bar Inc.

## RENEWAL OF PRACTISING CERTIFICATES FOR 1998

APPLICATIONS for practising certificates for 1998 have been issued to members and other regulated practitioners of the Bar. The current practising certificates will expire on 31 December 1997 and the new certificates will commence on 1 January 1998.

Applicants for practising certificates must return the application form, insurance declaration, proof of insurance and a cheque for $200 to the Victorian Bar Inc. prior to 31 October 1997. If applicants have any questions regarding the renewal process they should contact the Executive Director, David Bremner, on 9608 7990.

## RULES OF CONDUCT

The Bar's Rules of Conduct have been reviewed in the light of current practice and the impact of the *Legal Practice Act* 1996. The Bar Council recorded its appreciation to members of counsel who assisted in the review and particularly to Michael Colbran for his contribution.

The revised Rules have been submitted to the Legal Practice Board and the Legal Ombudsman for their consideration. It is anticipated that the new Rules will come into effect on 19 November 1997 and, at least 21 days prior to then, members will be given notice of the change and a summary of the revised Rules. Copies of the new Rules will be distributed to members and other regulated practitioners.

## BAR NEWS SUPPLEMENT 8/97: CLERKS' (AUDIT AND TRUST MONEY) PRACTICE RULES

On 15 August 1997 Bar News Supplement 8/97 was issued to practitioners regulated by the Victorian Bar in order to provide at least 21 days, notice of a change to the Practice Rules of the Victorian Bar Inc.

The change related to Rule 5.8 (1) of the Clerks' (Audit and Trust Money) Practice Rules which was amended to read as follows: "A separate ledger shall be opened for each matter and shall contain:". This amendment was requested by the Approved Clerks and came into effect on 8 September 1997.

## BAR NEWS SUPPLEMENT 9/97: DETERMINATION UNDER DIVISION 1 OF PART 7

On 23 September 1997 Bar News Supplement 9/97 was issued. The Supplement included a copy of the Determination which applies to Approved Clerks, registered interstate practitioners, holders of practising certificates authorising the receipt of trust money and holders of employee practising certificates. The holders of practising certificates issued by the Victorian Bar Inc. are not subject to the Determination because they are not authorised to receive trust money. As required by the *Legal Practice Act* 1996 the Determination is set out below for the information of members.

### *LEGAL PRACTICE ACT* 1996

### Determination under Division 1 of Part 7

The Legal Practice Board, acting under Division 1 of Part 7 of the *Legal Practice Act* 1996 has determined that the classes of persons required to pay a contribution under Division 1 of Part 7, and the contribution payable by members of each class, for 1998 are as set out in the following table. Approved clerks and Registered Interstate Practitioners must pay any contribution to the Legal Practice Board by 31 October, 1997 (see S. 202(4)). **Persons who do not fall within these categories are not required to make a contribution.**

### CLASS OF PERSONS

**Authorised to receive trust moneys and no nominee mortgage practice**

1. An approved clerk or the holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who:
   (a) received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money exceeding $500,000 in total during the year ending on 31 March, 1997; and
   (b) did not receive at any time during the year ending on 31 March, 1996 money from a client to be lent on the security of a nominee mortgage.

   **Contribution: $400**

**Authorised to receive trust moneys and a nominee mortgage practice**

2. The holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who at any time during the year ending on 31 March 1996; received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received money from a client to be lent on the security of a nominee mortgage.

   **Contribution: $600**

**Interstate Practitioner**

3. A registered interstate practitioner or an interstate practitioner otherwise required by the Act to make a contribution (not including a body corporate) who received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money in Victoria, exceeding $500,000 in total during the year ending on 31 March, 1997.

   **Contribution: $200**

**Employee practising certificate and not authorised to receive trust money**

4. The holder of a practising certificate that authorises the person to engage in legal practice as an employee or as a corporate practitioner who:
   (a) holds a practising certificate that does not authorise the receipt of trust money; and
   (b) is employed by a legal practitioner or firm that is authorised to receive trust money.

   **Contribution: $100**

**Employee of community legal centre**

5. If an employee of a community legal centre falls within one of the categories set out above (but not otherwise), he or she shall only be required to pay $100: (see S. 201(1)).

Where an applicant for a practising certificate or for a variation of a condition of a practising certificate the holding or variation of which, or an applicant for registration as a registered interstate practitioner the granting of which would make them a member of any of the classes set out above, makes their application after **31 January 1998**, the contribution payable by the applicant shall be calculated in accordance with the following formula: $\$|((n/12) \times C) - P|$ where this figure is greater than 0. **n** is the number of whole months of 1998 after the date of the application; **C** is the contribution payable by members of the relevant class and **P** is the amount (if any) already paid under this determination as at the date of the application.

# Sir Daryl Dawson, A.C., K.B.E., C.B.

DARYL Michael Dawson, of the Victorian Bar, a graduate of Melbourne and Yale Law Schools, Fulbright Scholar and former Solicitor-General for Victoria, sat for the last time as a Justice of the High Court on 15 August 1997.

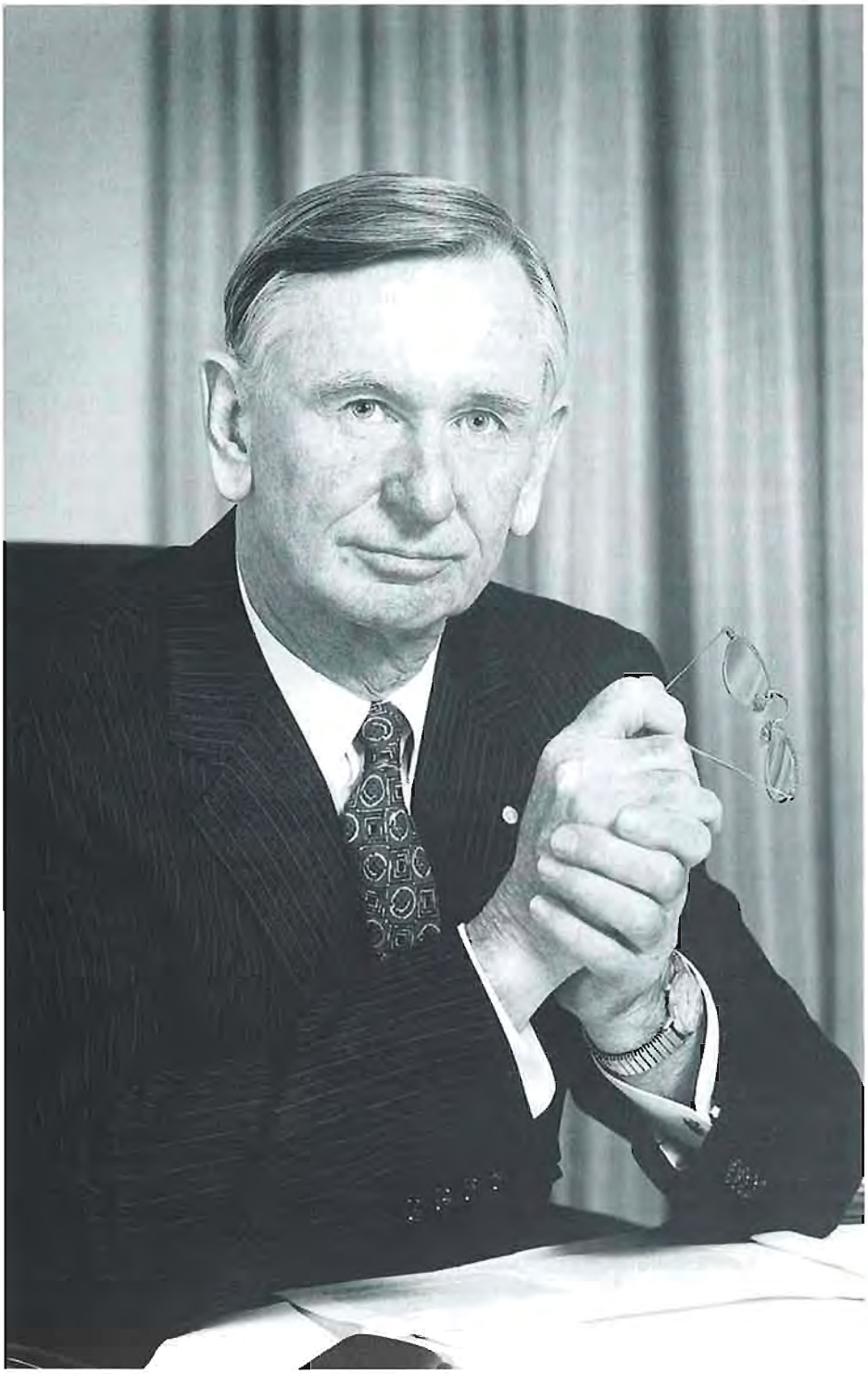
His Honour, who signed the Roll of Counsel in 1957 and was appointed one of Her Majesty's Counsel for the State of Victoria in 1971, served from 1974 until 1982 as Solicitor-General for the State of Victoria. He also served actively as a member of the Council of Legal Education and particularly, while Solicitor-General, as a very active member of its Rule 12 Committee. He was a member of the Standing Committee of Convocation of the University of Melbourne and a member of the Ormond College Council. For 12 years he taught in the course conducted by the Council of Legal Education at RMIT, until that course was discontinued in 1974.

Between 1951, when he first enrolled at the University of Melbourne, and his retirement from the High Court Bench, Sir Daryl has displayed a combination of perspicacity, remorseless logic and an ability to separate "what is" from "what ought to be". This has led to his being a "conservative" lawyer in the sense that he was prepared to allow the law to develop but unwilling to leap-frog established principle.

A small 'l' liberal, His Honour was concerned with the need to protect the individual from big business, big unions or, worst of all, an all-powerful executive. He believed strongly in the separation of powers and in the Federal system created by our founding fathers.

If the bureaucracy sought to exercise a power, it had to satisfy His Honour that it possessed that power, that the regulations upon which it relied were valid, and that the interference with individual freedom which it sought to exercise was justified by the legislation. This characteristic is illustrated by His Honour's dissent in cases such as *Clyne* v. *DPP* and *Mills* v. *Meeking*. One is tempted to say that Sir Daryl applied a contra proferentem rule to legislation which created criminal sanctions, imposed liabilities on individuals, or curbed the rights of the citizen.

His Honour was appointed to the High Court on 30 July 1982, following the tragic death of Sir Keith Aickin. He had the distinction of being, for the whole of his time on the High Court Bench, the only Victorian member of that Court. He is a "State's righter", who fervently believes in the distribution of power created by the Constitution. When he was first appointed to the Bench he was not the only non-centralist on the Court, but with the



*Justice Dawson*

resignation of Sir Ronald Wilson in February 1989 he probably achieved that distinction also. His Honour's sense of history and logic caused him to dissent from the majority view in the *Tasmanian Dams case* as to the ambit of the external affairs power and the corporations power.

He dissented in *Mabo*. His logic made it difficult for him to "re-write legal history" no matter how worthy the object might be. His Honour believed that he could not legitimately interpret the events of 1788 not in the light of what they represented at the time, but in the light of what they should have represented if the colonists had possessed our present knowledge of and

He was concerned, as are many more traditional lawyers, that the adaptation of legal history or legal principle to accord with current philosophy is to convert the rock of legal principle into a shifting sand of philosophy. In both instances it is hard to believe that history did not justify His Honour's minority view.

His Honour's judgements reveal a concern shared by many more traditional lawyers, that the adoption of legal history or legal principle to accord with current political philosophy is a rejection of the very basis of the common law. His Honour's judgments generally indicated belief that policy decisions are for politicians; that judicial decisions should be based on the law which, although it may change and adapt, must be both impartial and certain.

As a Judge, Sir Daryl was always courteous, though sometimes a little abrupt with those whose minds were significantly slower than his. He was always willing to listen to reasoned argument and to retreat from a stance prematurely taken. Whether on the Bench or socially he would acknowledge the force of a contrary argument. He did not suffer fools gladly but he was not intellectually or otherwise arrogant.

At one stage in his career at the Bar His Honour obtained the acquittal of an Egyptian sailor accused of smuggling drugs consisting of a banned aphrodisiac. His Honour achieved success in that case by pointing out to the jury that the small containers in which the drug had been found bore the inscription "for elderly gentlemen and those suffering from importance". His Honour certainly never suffered from importance in any sense of the term.

He has a great admiration for the intellectual capacity and judgments of Crockett J. Perhaps his one weakness as a Judge was his unwillingness to accept that "Bill Crockett" could possibly have been wrong. This to some extent stacked the Court against one if one were trying to upset a decision of the Full Court over which Crockett J. had presided or which had approved a decision of Crockett J. at first instance.

He is also a great admirer of Sir John Starke with whom he shared a passion for the rights of the individual and a dislike of a too-powerful executive or bureaucracy. Like Sir John, Sir Daryl was, and is, a man quick to defend the rights of the subject. His departure from the Court is a serious loss to the law and to the community.

The Victorian Bar will miss his presence in Canberra, and, on interlocutory applications, in Melbourne. We wish him and Lady Dawson an enjoyable transition whether it be to their farm or to their East Melbourne home.

"Retirement" is not an appropriate term. One suspects that the law has not seen the last contribution of Sir Daryl Dawson to Australia and to the Australian legal profession.

# No, there aren't as many Law Students as there are Lawyers

THE popular misconception among lawyers that there are as many law students as there are lawyers has been proved wrong.

In 1996 there were 20,558 law students in Australia's 27 law schools. In the States and Territories, the law societies and bar associations had 35,865 practising lawyers on their records at the end of 1996; that is, barristers and/or solicitors holding practising certificates. Thus law students were only 57 per cent of that number.

The statistics do show some anomalies. For example, in the ACT there were 514 lawyers with practising certificates but 1350 law students. This is probably largely due to the fact that the Australian National University has traditionally enrolled law students from across Australia and its course has tended to prepare many of its students for government service.

In the largest State, New South Wales, there were, at the end of 1996, 15,085 practising lawyers but only 6261 university law students. Students represented 41 per cent of lawyers with practising certificates.

The situation is somewhat complicated in New South Wales as there were, as well, about 2000 students undertaking the Legal Practitioners Admission Board course. Even including them, the percentage is still only 55 per cent.

These figures have been compiled in *The Australasian Legal Education Yearbook 1996*, published by the Centre for Legal Education. The Yearbook is a 200-page collection of nationwide statistics. It has chapters on law school students and staffing, university law libraries, practical training, continuing legal education, admissions to practise and lawyers with practising certificates. The statistics are reported nationally, State by State and, where applicable, institution by institution.

The fear that the legal profession is about to be overwhelmed by "hordes" of law graduates is largely unfounded. In addition, other research completed by the Centre for Legal Education shows that up to 50 per cent of final-year law students do not see the private legal profession as their first choice for a career destination.

The *Yearbook* is one-stop-shop of information on legal education and training, and related matters. It brings together information from various sources, and is probably a unique collection of information.

*The Australasian Legal Education Yearbook 1996* is available from the Centre for Legal Education for $35, including postage. Contact details are GPO Box 232, Sydney NSW 2001; tel: (02) 9221 3699; fax: (02) 9221 6280; email: cle@fl.asn.au.

# Justice Hayne, High Court

THE Victorian Legal Profession as a whole, and the Victorian Bar in particular, is immensely pleased and honoured by the appointment of the Honourable Justice Kenneth Madison Hayne to the Bench of the High Court of Australia.

Although Queensland born, His Honour is a very distinctive product of Victoria and of the Victorian Bar.

His Honour was educated at Scotch College in Melbourne and at the University of Melbourne. He graduated from Melbourne University with honours degrees in Arts and Law in 1967. He was awarded the Supreme Court prize in that year. Thereafter, in rapid succession, His Honour completed articles of clerkship at Grant & Co., solicitors, and was admitted as a barrister and solicitor of the Supreme Court of Victoria and went to Exeter College, Oxford as a Rhodes Scholar, graduating in 1970 with the degree of Bachelor of Civil Law, first-class honours.

After achieving such high academic honours His Honour signed the Victorian Bar Roll on 5 August 1971 and read with John D. Phillips, now a Judge of the Court of Appeal in Victoria. His Honour built a large practice in equity, company law, insurance, banking and public law. He was in high demand among readers at the Bar, of whom he had seven. His Honour took silk in 1984. He was appointed to the Supreme Court of Victoria in April 1992 and to the Victorian Court of Appeal upon its creation in 1995.

His Honour has appeared in the High Court many times. As a junior barrister, briefed with Sir Daryl Dawson, His Honour took part in a series of commercial and constitutional cases. He appeared in numerous commissions of inquiry in Victoria, including inquiries into the meat industry and newspaper ownership, and inquiries conducted in the 1980s by the National Companies and Securities Commission. He has taken part in some major arbitrations, including the Weeks Royalty Arbitration. It is worth recalling that, in the first rounds of the Weeks Royalty Arbitration, His Honour formed part of a formidable and successful legal team consisting of Gleeson Q.C., Charles Q.C., Hayne and Finkelstein (as they all then were).

At his welcome to the Supreme Court Bench, he referred to the mixture of friendship and contest at the Bar, and to the roller-coaster rides of practice at the Bar. His Honour enjoyed life at the Victorian Bar to the full. Indeed, he flourished in its heady mix of comaraderie, intellectual challenges, and plain old fashioned hard work. But there was nothing rough-hewn about the way in which his career progressed towards the high judicial office that always seemed to be his destiny. His Honour's services were eagerly sought by the largest firms for their most important clients.

*Justice Hayne*

Nonetheless, His Honour found or, more accurately, *made* time to contribute a great deal to the life of the Bar, as a practising member and as a Judge. His readers and juniors have always spoken highly of the generous advice and continued interest in their careers. His Honour served on one of the most important statutory bodies associated with the Bar, the Barristers' Disciplinary Tribunal. He acted as a trustee of the Victorian Bar Superannuation Fund

from 1978 until appointment to the Supreme Court. As a Judge, he devoted considerable time and energy to the Victorian Bar Readers' Course over a period of 15 years, contributing in no small part to the current national and international standing of the course.

Despite the concerns he expressed on appointment to the Victorian Supreme Court, that he was too young, and that he had not had the breadth of experience at the Bar that should have fitted him for that Court, he undertook to do his best. It is beyond doubt that as a Judge he has indeed done his best. It has always been clear to counsel that His Honour's legal experience was more than enough to equip him for the highest judicial office. At any rate, His Honour is not quite so young now, and we trust that any such self-doubt has entirely dissipated!

As a Judge of the Victorian Supreme Court, His Honour always displayed the discipline, sacrifice and sense of duty to the community that are demanded of a Judge. Colleagues from other States appearing in this Court will soon appreciate His Honour's knowledge of the law, and the speed with which His Honour seizes upon the decisive legal point. As a barrister, he had a great gift for expressing difficult points of fact or law in simple language, both to courts and to clients. This gift has stayed with him as a Judge; His Honour's judgments are always constructed with clarity and precision. His intellect is matched by an ability to master mountains of work. On the Victorian Bench, His Honour was renowned for efficiency in dispatching reserved judgments, and in dealing with the business of the Commercial List.

His Honour once remarked in the pages of the *Victorian Bar News* that the most annoying thing about being a Judge is "When somebody says to you, especially when they meet you socially, 'Oh well then I suppose you are working ten to four these days'". I am afraid that such remarks are rarely made to High Court Judges.

His Honour has the confidence, support and best wishes of those with whom he shared camaraderie and contest, the members of the Victorian Bar. We warmly congratulate His Honour on his appointment.

# Justice Kenny, Court of Appeal

DR. Susan Kenny Q.C. was appointed a Judge of Appeal of the Supreme Court on 15 July 1997. Having become a mother shortly before, Her Honour will have much to remember 1997 for. At her welcome on 29 July 1997, Her Honour observed that her undertaking of a legal career instead of that of an academic historian was due to her father's insistence that Her Honour have "a competence". The result of Her Honour having taken that extremely sound advice has been a career more interesting and varied than she could have envisaged at the time.

Her Honour obtained the degrees of BA (1976) and LLB (1978) from the University of Melbourne. Her articles were served with Henderson and Ball. She was admitted to practise in 1979, and then became Associate to Sir Ninian Stephen, then a Judge of the High court. During that time Her Honour was fortunate (in view of her own cooking skills) to marry Melbourne's most gifted amateur chef (also a teacher, historian and musician). She came to the Bar in 1981 and read in the chambers of Peter Heerey, now Mr. Justice Heerey of the Federal Court. Practice at the Bar followed, together with tutoring at St. Hilda's College, at Ormond College and at the Leo Cussen Institute. In 1985, academia again beckoned, and Her Honour returned to Oxford, the place of her birth where (with the aid of a Sir Robert Menzies Memorial Scholarship in Law) she completed a doctoral thesis in constitutional law, and obtained the degree of Doctor of Philosophy. Her thesis was on a comparison of the treatment of constitutional facts in the United States Supreme Court and in the Australian High Court. The thesis is marked by erudition, clarity and thoroughness.

Its general burden is to express the view that the High Court should, in determining constitutional issues, follow the US Supreme Court and undertake much more of a fact finding exercise than it currently does. No doubt such views show the hopeful aspect of Her Honour's nature. It is, however, thought that one would not want to put much money on the High Court actually adapting Her Honour's thesis in that aspect, no matter how correct. Her judgments will certainly get a better reception there than the thesis might have done. While in Oxford, Her Honour was a member of the Committee on Executive Government of the Constitutional Commission, headed by Sir Zelman Cowan. In 1993 Her Honour became a part-time President of the Commonwealth Administrative Review Council (until 1995) and in 1996 became a part-time Commissioner of the Human Rights and Equal Opportunity Commission. She served on numerous boards and committees, including the Bar's Ethics Committee. She took silk in 1996.

After Oxford, Her Honour returned to the Bar for a short period, but in 1991 undertook a two-year appointment as Counsel assisting the Commonwealth Solicitor-General. A grateful Commonwealth provided Her Honour with work which took her to the International Court of Justice, Paris, London, Oxford, Cambridge, Boston, Washington, Atlanta, St. Louis and San Francisco. The Commonwealth also ensured that it obtained Her Honour's services in a number of significant cases in the High Court, in the areas of administrative law and constitutional law. Her Honour appeared in, inter alia, *Victoria* v. *The BLF* (whether a State Royal Commission was in contempt of the Federal Court), *Polyukhovich* v. *The Commonwealth* (the validity of war crimes and retrospective legislation), the *Tasmanian Dams case* (involving constitutional points too numerous to mention), *Free* v. *Kelly* (regarding electoral laws), *Australia Tape Manufacturers Association* v. *The Commonwealth* (validity of royalty provisions of the Copyright Act), *Leeth* v. *The Commonwealth* (validity of differential minimum terms of imprisonment imposed on Commonwealth prisoners, applying State law), *Precision Data Holdings Ltd* v. *Wills* (the judicial power of the Commonwealth, in respect of the ASC's power to declare conduct as unacceptable), *Re Australian Education Union* (validity of Commonwealth indus-

*Justice Kenny*

trial laws applying to employees of the States and their agencies). Victoria got a look-in in *Capital Duplicators*, involving the constitutionality of business franchise fees. All this is a long way from appeals against sentence and appeals involving the Transport Accident Act, which will now occupy much of Her Honour's time, until Victoria develops (hopefully again) as significant a civil trial jurisdiction as that in New South Wales.

At Her Honour's welcome, much mention was made of ear plugs (as an aid to concentration). They probably won't be worn on the Bench, and hopefully Her Honour's sense of humour will not be evidenced on the Bench either, as Her Honour's laugh is an extremely significant event when heard for the first time. In the days before Her Honour had a secretary, or an associate, she once posted her purse instead of a university assignment. This was certainly not an attempt at bribing, but hopefully the delivery of judgments will take a more usual course.

The State is very fortunate indeed to receive Her Honour's services in the Court of Appeal. It is also significant, from the Bar's point of view, that talent is being attracted to the Bar, both for the Bar's own benefit and so that it can carry out its traditional role of supplying quality office holders of the State. The Bar's provision of accommodation and its organisational and professional structures are important in those regards, and Her Honour's career to date provides a happy example of the personal and community benefit it provides.

# Legal Aid

THE recently enacted s.29A of the Legal Aid Act permits Victoria Legal Aid (VLA) to establish panels of practitioners for different classes of matters in relation to which legal assistance may be provided.

VLA has proposed a scheme, supported by draft documents, for the establishment of limited practitioner panels in the area of indictable criminal trials. VLA has sought submissions from the Bar Council to be received prior to VLA's next board meeting on 15 October 1997.

At its meeting on Thursday 9 October 1997, the Bar Council resolved that it was of the view that the scheme currently proposed by VLA for the establishment of limited practitioner panels is inconsistent with the Bar's Rules of Conduct and incompatible with the duties which members of the Bar owe to their clients, to the court and to the administration of justice.

Aspects of the scheme of grave concern to the Bar Council include:

1. The selection criteria for appointment to the panel.
2. The performance standards required of advocates appointed to the panel.
3. The grounds for removal of an advocate from the panel.

The full text of VLA's letter containing its proposal and attaching draft documents is available for inspection at the offices of the Victorian Bar Council, 12th Floor, Owen Dixon Chambers East, and at each of the Clerk's offices.

The Victorian Bar Council has today made a detailed written submission to VLA, and anticipates a response from VLA shortly after VLA's meeting on 15 October 1997.

The Bar Council will keep members of the Bar fully informed on developments.

Neil J. Young, Chairman
Victorian Bar Council

# Justice Finkelstein, Federal Court

ON 21 July 1997 Raymond Anthony Finkelstein was sworn in as a Judge of the Federal Court of Australia. His Honour was born in Munich and settled in Australia in 1950. He was educated at Elwood High School and Monash University. He was admitted to the Supreme Court of Victoria in 1971. He worked as a solicitor at Sackville Wilkes until signing the Bar Roll in 1975. His Master was Michael Black, now Chief Justice of the Federal Court.

At the Bar His Honour's ability quickly asserted itself. He developed a broad commercial practice spanning company law, trade practices, industrial law, equity and many other fields.

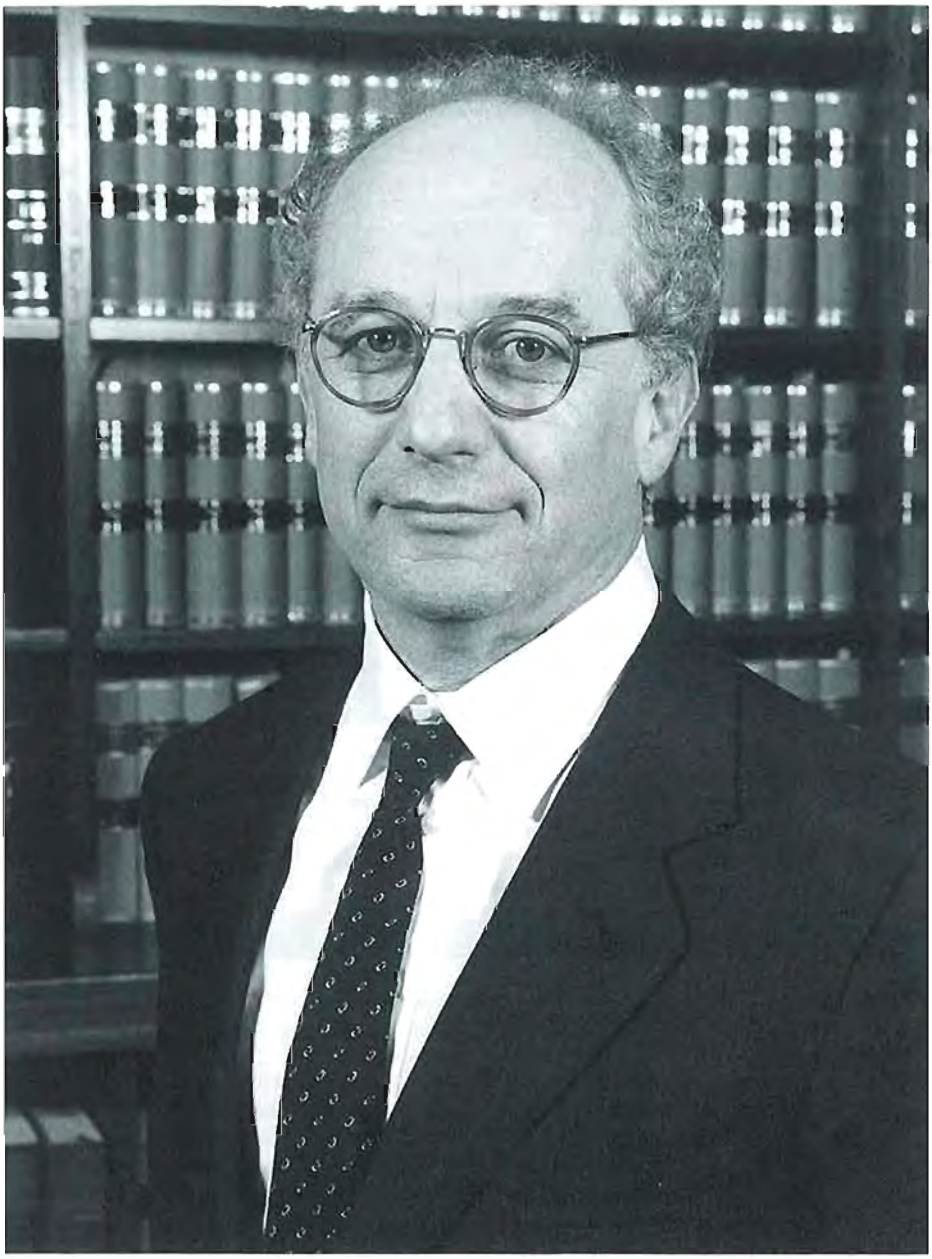
His practice was massive. It is the opinion of many that His Honour's practice was one of the busiest at the Victorian Bar. His Honour was even known to accept a brief to Answer his own Interrogatories!

Anecdotes about His Honour's practice abound. On one occasion His Honour is said to have run up to six conferences at once, skipping lightly from room to room in a series of powerful cameo performances. It is said that His Honour has conducted successful and productive conferences in art galleries, over a billiard table and even in the back of his Ford Thunderbird!

His Honour had five readers: David Clark, Trevor McLean, Susan Morgan (now Morgan J. of the Family Court), Justin O'Bryan and David O'Callaghan.

All of His Honour's readers testify there was much to be learned from their Master, if only they could catch him between conferences and appearances. Ever generous with his time, the standing rule was that if they needed to speak to him urgently they could reach him at home after 10.00 p.m. His readers testify that none ever came across any evidence that His Honour felt the need for sleep!

His Honour took silk in 1986. His practice quickly assumed the frenetic pace of his days as a Junior. When appearing in *BHP* v. *Oil Basins Arbitration* one part of the case was heard in the Full Court of the Supreme Court. His Honour's leaders were Gleeson Q.C. (now Chief Justice of NSW) and Charles and Hayne JJ. (now Justices of the Supreme and High Courts).



*Justice Finkelstein*

The American lawyers of His Honour's client had travelled to Melbourne for this part of the case. They succeeded where few local lawyers had in the past of extracting a promise that His Honour give full attention to the case and not take any other work that would interfere with their case. The promise had barely escaped His Honour's lips when the phone rang and the solicitor asked for Mr. Finkelstein to obtain an injunction for one of his all-time heroes — Bruce Springsteen. The case related to

t-shirts bearing the likeness of Springsteen. His Honour artfully arranged for the injunction to be heard at 4.45 p.m. At 4.15 p.m. His Honour left the Full Court ostensibly to go and change before attending the usual after court conference. In the meantime, His Honour obtained the injunction and returned to the conference. The next morning His Honour was dismayed to find that Mr. Springsteen's publicity machine had ensured that their counsel's identity was fully exposed in the press.

The American lawyers in the BHP case were puzzled and hard pressed to work out how His Honour had managed to appear on television as Mr. Springsteen's Barrister when he had been sitting in the Full Court all that day. Such are His Honour's talents!

His Honour was responsible for maintaining an extensive library in Aitken Chambers. His inquisitive nature is evidenced by the library's many volumes on US and Canadian law, the secession of the Republic of China and the Samoan Criminal Code.

**All of His Honour's readers testify there was much to be learned from their Master, if only they could catch him between conferences and appearances.**

His Honour was extremely gifted at achieving results for his clients in court. His reputation is of a barrister totally dedicated to his briefs and it would seem the secret of his great success was that he immensely enjoyed every minute of his life as a Barrister.

His Honour maintains a reputation as a keen Carlton supporter. Years ago Finkelstein regarded it as an honour to appear on behalf of the Carlton Fooball Club in an application to restrain *The Age* newspaper from publishing an article about its financial affairs. An amusing side to the story is that when he and his leader, then Goldberg Q.C., walked into court his opponents Winneke Q.C. and E.W. Gillard remarked that "two good men will always beat two good little men". One wonders if the same proposition holds good for State and Federal judicial office.

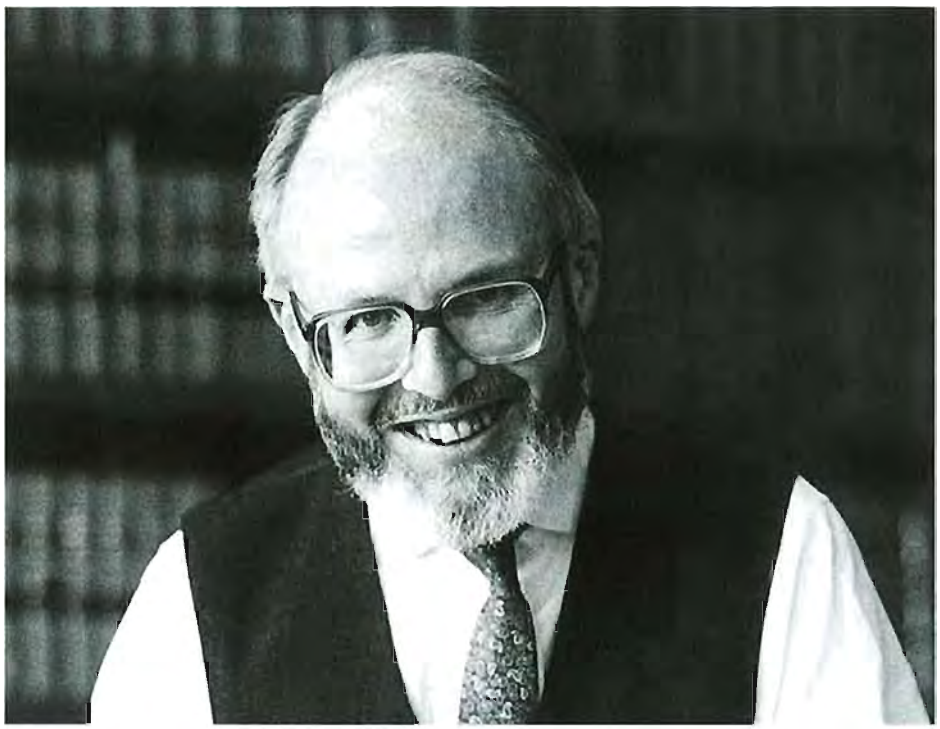
His Honour's departure from the Bar is a matter of regret to us all. "Fink" as he is widely known at the Bar is one of the most friendly, warm-hearted and generous of our members. He has a wonderful sense of humour, a vast knowledge of the law and an abiding interest in its development. He will be remembered as one of our finest advocates, a master of all aspects of the law, with a memory like a computer, a lightning-fast legal mind and graced with the powers of intuition. We wish him every success in the next stage of his career.

# Neil Harry Mark Forsyth Q.C.

NEIL Forsyth Q.C. was a true leader of the Victorian Bar and the Australian legal profession. In his long career he played a key role in some of Australia's most important litigation and legal developments. He was immensely learned, personally charming and incredibly generous to his family, colleagues and to the community.

Neil's commercial and taxation law practice was massive and was of national reputation, but he was also briefed by the non-corporate community. One of the last major cases in which he appeared was the Kruger and Bray litigation in the High Court (the *Stolen Generations case*), as lead counsel representing the Aboriginal plaintiffs. He took this brief, like many others, at short notice and on a pro bono basis.

Neil Forsyth was born in Ararat and was educated at Ararat State School, Ararat High School and Brighton Grammar School. He attended law school at the University of Melbourne, working on a baker's cart during the university vacations. He shared the Supreme Court Prize and graduated with Honours in law in 1961, after which he won a scholarship to attend the law school at the University of California at Berkeley.



*Neil Forsyth Q.C.*

Neil signed the Victorian Bar Roll on 19 September 1963, reading in the chambers of R.G. Griffith. As a junior barrister his commercial practice quickly grew, which was not surprising given his powerful intellect, deep knowledge of the law and his strong work ethic. He was particularly famous in the Victorian legal community for the devastating speed with which he could master a brief and proceed to argue it in court. His practice moved into the area of taxation law, and he appeared in the High Court in the important case of *Federal Commission of Taxation* v. *Whitfords Beach* in 1982. At the same time he was gaining a reputation as one of Melbourne's leading barristers. Neil took the trouble to act as mentor to many young members of the Bar, including Justice Ron Merkel of the Federal Court, Bill Martin Q.C. and Ada Moshinsky Q.C. He took his role as mentor very seriously, giving his readers invaluable tuition in the skills of pleading, advice-giving, advocacy, and the ethical standards of the Bar.

Neil took silk on 22 November 1977. His practice continued to grow. He became Australia's foremost tax adviser, but his skills reached far beyond the law of taxation. The Australian legal profession recognised that he had a profound knowledge of all aspects of commercial law. The pity, perhaps, is that his advice practice became so prodigious that it tended to limit the number of appearances he made.

It is sad that Neil's prowess at taxation is linked to his early death. Between the middle of 1985 and February 1990, Neil had to fight criminal charges that he had conspired with certain tax scheme promoters to evade tax. In truth, Neil had done nothing more than provide a legal opinion as to the tax effectiveness of a proposed scheme. If the Commissioner of Taxation had sought his opinion about such matters, Neil would have given it with the same care that characterised all his work, no matter who the client was; he had, in fact, frequently appeared for the Commissioner during his career. After a committal, much publicity and years of worry, the charges against him were thrown out of court.

It was a mark of the man that this experience did not embitter him even though, as a result of being the target of unfair prosecution, it is likely that he was denied much-deserved judicial advancement. Through this period Neil remained, as always, the cultured and warm-hearted person that the Bar knew and loved.

The experience of being unfairly prosecuted did, however, take a heavy toll on Neil's health. For some years he bore the burden of serious illness with grace and dignity. He never lost his good humour, or his belief in basic human decency. He was generous beyond words in all his dealings with clients, solicitors and other barristers, whatever their seniority. Over many years he performed a wide range of services for the Victorian Bar Council and the Bar as a whole, including the organisation of continuing legal education at the Bar. He served on the Law Faculty of the University of Melbourne from 1988 until early this year. He tutored for many years at Trinity College as a resident tutor, and lectured at RMIT in constitutional law and taxation. He contributed regularly to the *Australian Law Journal*.

Neil will be sorely missed. He is survived by his wife Jannie, his daughters Miranda and Juliet, and his sister Catherine.

Neil Young Q.C.
Chairman, Victorian Bar Council

# Guy Newton Brown

GUY Newton Brown died on the 27 April of this year. He was admitted to practise in 1960 and in the same year signed the Bar Roll reading in the chambers of Brian Thompson. For many years he had retained Ken Spurr as his clerk. Upon Ken's retirement, Guy moved to List D.

He was born in Western Australia in March 1934. The family moved to Melbourne and he received his secondary education at St. Josephs, North Melbourne.

Guy graduated from the University of Melbourne. During his student days he was extremely active in student politics and in 1955/56 he became President of the SRC. while at the University he joined the Melbourne University regiment and continued his association with the Army by becoming a member of the Army Reserve.

On one occasion, he surprised his Army colleagues by regaling the mess with a trombone solo of some skill and gusto. This surprised his friends who had no idea that Guy possessed any musical talents, let alone for the trombone. What had not been appreciated at the time was that outside the open window of the mess was another person, unseen, who possessed all of those talents and who supplied the music to which Guy assiduously mimed. With such organisational ability the Bar was the only place for Guy.

Guy frequently appeared in common law jury trials, although his talents were far from limited to that area. Guy, good advocate that he was, would often seek to impress a jury with a dramatic flourish at the start of his closing address. On one occasion, having taken a particularly adverse view of the plaintiff, he startled his instructor, Lindsay Collins of Molombys, by commencing:

"Ladies and gentlemen of the jury, you have just witnessed the performance of a consummate liar."

Then, as he paused for effect, there came an unexpected response: "Yes," was the audible whisper from the jury box, "but who?"!

*Guy Brown*

Guy's early interest in student politics eventually bore fruit when in 1973 he was elected as a councillor with the municipality of Hawthorn. He came in at a time when there was a movement against what was seen as "the old guard". He was very concerned with the protection of historical buildings and during his terms in office did much to preserve the Victorian charm of Hawthorn. He served for council until 1944 when the councillors abolished and subsequently amalgamated into Boonandara. He was Mayor of Hawthorn on two occasions. The first being in 1978–79 and the second being in 1987–88. He was a very strong supporter of the need to maintain the municipal identity and did much for those who lived in Hawthorn.

He is survived by his wife Vivienne and his sons Justin, Clem and Damien. Regrettably he was predeceased by his third son Hayden.

John V. Kaufman

# The 1997/98 Bar Council

Back row: David Neal, Paul Santamaria, Jane Dixon, Andrew McIntosh, Richard McGarvie, David Beach

Seated: Samantha Burchell (Assistant Secretary), Robert Redlich Q.C., Ross Ray Q.C. (Honorary Treasurer)

Absent: Robert Richter Q.C., Jack Rush Q.C., Carolyn Burnside and Fiona McLeod.

**Stephen Kaye Q.C.** **Philip Dunn Q.C.** **Duncan Allen**

**Peter Riordan** **Robin Brett Q.C.**

**Bernard Bongiorno Q.C.**

**Neil Young Q.C.** (Chairman)

**David Curtain Q.C.** (Senior Vice-Chairman)

**Mark Derham Q.C.** (Junior Vice-Chairman)

# The continuing story of the Silver Cigarette Case

How six members of the Victorian Bar over the past 100 years have been given this artifact in acknowledgement of their particular contribution, and later passed it on to a fellow barrister whom they judged worthy of receiving it.

*IN June 1995 Justice Frank Vincent gave Dyson Hore-Lacy silver cigarette case. At that moment, a tradition that had existed at the Bar for 100 years was continued. Accompanying the cigarette case was a note in the following terms: "In recognition of your readiness to uphold the highest traditions of an advocate and to appear without fee for those unable otherwise to afford your services". On each occasion that the case has been handed on it has been accompanied by a note in those terms. The case is well worn and the following names and dates are inscribed upon it: Herbert Bryant 1895, Eugene Gorman 1924, John Barry 1935, John Nimmo 1962, Richard McGarvie 1975, Frank Vincent 1983, Dyson Hore-Lacy 1995.*

*First given in 1895 to Herbert Bryant by fellow member of the Victorian Bar, Walter Coldham, the names of the following recipients are engraved on it: Herbert Bryant, Eugene Gorman, John Barry, John Nimmo, Richard McGarvie, Frank Vincent and Dyson Hore-Lacy.*

## The case was given to Herbert Bryant in 1895 by Walter Coldham in recognition of his standards and ideals as an advocate.

A distinguished advocate himself Coldham came to the Bar in 1884. Coldham was a widely educated man who had training in engineering and chemistry. He appeared as junior counsel in the case of *Speight* v. *Syme*, two celebrated libel trials that were heard by the Supreme Court in 1894 and which occupied the unheard of time of 180 sitting days. Coldham died in 1908.[1]

Herbert Bryant was admitted to practise in 1882 and practised at the Victorian Bar for 42 years. He is described by Sir Arthur Dean[2] as a formidable man in court, a capable common lawyer and a man of strong and vigorous appearance and action. He was appointed King's Counsel in 1920, and he became Chairman of the Bar Council in 1922. In 1924 Bryant appeared for the editor of the *Geelong Advertiser* in a libel action brought against the newspaper by Alfred Ozanne. As the Labor MHR for Corio, Ozanne claimed the newspaper had defamed him in publishing an account of his service in World War I which alleged that he was absent without leave. The trial was notable for the cross-examination of Billy Hughes, the Prime Minister at the time, by Joan Lazarus (Rosanove) concerning an allegation that he had suppressed cables from Europe relevant to Ozanne's war service and which were relevant to his case.

## In 1924 Bryant passed the cigarette case on to Eugene Gorman. Bryant died in that year. His photograph hangs in the foyer in Owen Dixon Chambers.

Eugene "Pat" Gorman signed the Roll of Counsel in 1914. He was appointed King's Counsel in 1929 on the same day as Robert Menzies. In 1931 he was the leader of a group of barristers who established Equity Chambers. Among them was John Barry. Gorman was well known as a powerful advocate with wide interests in the community. For many years he was the editor of the *Truth* newspaper. He was awarded the Military Cross during World War I. In 1942 he became the Inspector of Army Administration. He served as Consul-General for Greece and also for the Netherlands East Indies. In 1953 he was knighted. Charles Francis Q.C. recalls Gorman delivering a lecture at the University of Melbourne titled "I only chose the happy hours". In the lecture he observed that he kept three notebooks. One contained case notes, another quotes that he regarded as useful and the third, racing results.

In 1924, the year that Gorman received the case from Bryant, he appeared for Angus Murray. Murray was charged with the murder of a bank manager during the course of a robbery in Hawthorn. Murray was tried alone as his co-accused, Buckley, had absconded. It was common ground that Murray had not fired the shot that killed the deceased. Murray's appeal to the Full Court was unsuccessful and special leave to appeal was refused by the High Court: see [1924] VLR 374. He was executed. Buckley

*Current holder of the Silver Cigarette Case, Dyson Hore-Lacy Q.C. (at right), and former holders Justice Vincent (left) and Richard McGarvie (centre).*

was subsequently arrested and convicted but not executed. A change in government is thought to be the reason as the ALP was opposed to capital punishment. The Victorian Law Reports do not record whether or not Murray had a solicitor; the notation is blank. Gorman is recorded as his counsel. Gorman died in 1973.

**In 1935 John Barry received the cigarette case from Eugene Gorman.**

John Barry signed the Bar Roll in 1926. He had a successful criminal practice in civil and criminal causes and was appointed King's Counsel in 1942. He became a Justice of the Supreme Court of Victoria in 1947. In 1948 Barry presided over the trial of *Morrison* v. *Jenkins* which concerned the paternity of two children born within minutes of one another at the Kyneton Hospital in June 1945. After the birth of the children allegations emerged that the nursing staff had inadvertently swapped the children. In accounts of the controversial case Barry is described as a champion of the individual's rights and a man not frightened to defend unpopular causes.[3] Barry declined to make the orders sought by the plaintiffs in the case.

Barry was a criminologist and keenly interested in the welfare of prisoners. In 1955 and 1960 he led Australian delegations to the United Nations Congresses on crime and offenders. In 1960 Barry was knighted. He was Chairman of the University of Melbourne Department of Criminology and was the first Chairman of the Parole Board of Victoria when it was created in 1957. Justice Frank Vincent, the current Chairman of the Parole Board, believes that Barry was greatly influenced by Alexander Maconochie who was the Governor of Norfolk Island in the 1840s. Barry wrote a biography of Maconochie and also a biography of William Price who was the first Governor of Pentridge Prison. Maconochie was an enlightened individual who was determined to remove the brutality from the penal colonies of the 19th century. He introduced the notion of earned parole at Norfolk Island and devised a system whereby prisoners would live and work in teams. Each member of the team was responsible for the others and the group's success would ensure parole was earned by all. William Price on the other hand was a violent and repressive man who was ultimately murdered by prisoners on the docks at Williamstown. Barry's biographies are in the Supreme Court Library and were used as source material by Robert Hughes for *The Fatal Shore*.

**Sir John Barry had an important and lasting influence on the administration of justice in Victoria and in particular the development of the Parole Board. He gave the cigarette case to John Nimmo in 1962.**

John Nimmo came to the Bar in 1933. He developed a broad practice although he specialised in criminal law prior to the outbreak of World War II. During the war he served with the Australian Red Cross and was primarily responsible for searching or organising the search for missing soldiers and the evacuation of wounded. He served in Syria, Palestine, Egypt and New Guinea. In 1944 he stood against Robert Menzies for the Federal seat of Kooyong, as the candidate for the Servicemen's Party. He came within 100 votes of unseating the sitting member. At the conclusion of the war he resumed practice at the Bar and became a member of the Taxation Board of Review. He was appointed Queen's Counsel in 1957.[4]

In 1962, the year Nimmo received the case, he appeared as counsel for Robert Peter Tait. Tait had been convicted of murder and sentenced to death by the Victorian Supreme Court, his defence of insanity having failed. Nimmo was first briefed to appear for Tait before the Full Court of the Supreme Court of Victoria on an application to stay Tait's execution. It is probable that all of the work Nimmo did for Tait was on a fee declined basis. The proceedings concerned the power of a superior court to restrain the execution of an insane person. At first instance Mr. Justice Gowans had held that the common law power of the Court to restrain such an execution had been subsumed by the statutory procedures of the *Mental Hygiene Act 1958*. The Full Court dismissed the appeal from the judgment of Justice Gowans and on 31 October 1962, the day before Tait's execution was to take place, proceedings were commenced in the High Court of Australia. The High Court ordered the stay which was sought, with Sir Owen Dixon observing that "I have never had any doubt that the incidental powers of the Court can preserve any subject matter, human or not, pending a decision".[5]

**Sir John Nimmo was knighted in 1972 and was appointed to the Federal Court in 1977. (He retired from the Bench in 1980 and died aged 88 on 7 July 1997.) He gave the cigarette case to Richard McGarvie in 1975.**

Richard McGarvie came to the Bar in 1952 and read with George Lush. He was appointed Queen's Counsel in 1963 and a Justice of the Supreme Court in 1976. In 1992 he became the Governor of Victoria. He enjoyed a long friendship with John Nimmo and wrote the obituary that appeared in the *Australian* on Nimmo's death. When he commenced reading, George Lush told McGarvie that a barrister should have only one standard, namely, to do his or her best at all times.

McGarvie was very proud to receive the case from Nimmo and regarded it as a symbol of the standards of the Bar which were built on sound ethics and community responsibilities. He regards the Victorian Bar as the institution which has had the greatest influence on his life and is very proud to be associated with those who have previously owned the case.

Like many barristers of his generation, McGarvie was keenly interested in the *Tait case*. He prepared a petition containing the signatures of 91 barristers which was submitted to the Attorney-General seeking the commutation of Tait's death sentence. The first signatory to the petition was Murray McInerney Q.C. who, at the time, was widely regarded as suitable for appointment to the Supreme Court. The petition was publicised on the front page of the Melbourne *Sun* the day after it was presented to the Attorney-General. McGarvie sat in Court during the application before the High Court and described it as a classic collision between the Executive and the Judiciary. He said he was never more proud of our judges' law and legal profession.[6]

Richard McGarvie's contribution to the administration of justice in Victoria is well known. As Queen's Counsel he had a particularly broad practice including appearing for the defence in a number of criminal trials. He regularly appeared on a fee declined basis. In 1952 Richard McGarvie established a legal aid scheme which was operated by a member of staff of the University of Melbourne Law School, Dr. Hans Leyser who had a practising certificate. McGarvie recruited junior barristers who were coming to the Bar and many cases were handled by them on a fee declined basis. In 1970 he was instrumental in seeking Federal intervention in the Victorian ALP. His letter to the Federal Executive was settled by Eugene Gorman Q.C. The Federal intervention in the affairs of the State Branch is credited with assist-

ing the election of the Whitlam Government in 1972.

## In 1983 Richard McGarvie gave the case to Frank Vincent.

In 1961 Frank Vincent signed the Bar Roll. He was appointed Queen's Counsel in 1980 and a Justice of the Supreme Court in 1985. He recalls signing a petition which was prepared for submission to the Attorney-General in relation to the proposed hanging of Robert Peter Tait. Justice Vincent is Chairman of the Adult Parole Board.

On New Year's Eve 1978 at Huckitta Station, 175 miles north-east of Alice Springs, a station manager was shot and killed. Three Aboriginal children, aged 12, 13 and 14, and a retarded Aboriginal woman, aged 23, were charged with his murder. Another woman, aged 28, was also charged but was found not guilty at trial. Frank Vincent and Dyson Hore-Lacy appeared at trial for two of the accused. Also appearing at the trial were John Coldrey and John Dee. Frank Vincent and Dyson Hore-Lacy both regard the trial as one of the most important conducted by them as counsel. The accused were convicted and in a divided court their appeals were also unsuccessful. The appeal is reported as *Collins* v. *R* (1980) 31 ALR 257. It contains the dissenting judgment of Sir Gerard Brennan concerning the admission of confessional evidence which has been widely adopted in subsequent cases on the issue.

In 1975 Peter Faris approached Frank Vincent and Geoff Eames to assist him in establishing the Central Australian Aboriginal Legal Aid Service in Alice Springs.[7] For the next ten years, Vincent appeared on a regular basis in the Northern Territory for Aborigines charged with serious criminal offences. The work necessitated lengthy absences from his practice in Melbourne and from his family. The fees paid to counsel were considerably less than they would be able to earn in Victoria. Dyson Hore-Lacy spent two years as an in-house lawyer with the Aboriginal Legal Service in Darwin and continues to appear as counsel on behalf of Aborigines in the Northern Territory.

## In 1988 the cigarette case was stolen from Justice Vincent's chambers in the Supreme Court.

It was located approximately two years later when a person telephoned his associate and informed him that the cigarette case had been located at Moonee Valley Racecourse. The judge arranged for his tipstaff to travel to the racecourse to collect the cigarette case and pay a reward. It is thought that whoever located the case recognised the names upon it including that of Eugene Gorman who was keenly interested in horse racing. It is not known who stole it from Justice Vincent's chambers.

## In 1995 Justice Vincent gave the case to Dyson Hore-Lacy in recognition of his continuing efforts in the law.

Hore-Lacy signed the Bar Roll in 1967 and was appointed Queen's Counsel in 1995. He has appeared as counsel in numerous important criminal cases in Victoria including the police shooting inquiry on behalf of the family of Gary Abdullah, the inquiry into the shooting of Colleen Richman and the first hearing of the application to imprison Gary David under the legislation devised for him. In 1990 Dyson Hore-Lacy appeared for Kevin Bugmy in the High Court in relation to an appeal against a sentence imposed upon him for murder by the Supreme Court of Victoria.[8] Bugmy was an Aborigine who had been removed from his family as a young child. When he was 13 years of age the family who he had been placed with returned to Holland. Bugmy was left to survive on the street and became an alcoholic and drug dependent. The application to the High Court was successful and resulted in a reduction in his sentence.

Dyson Hore-Lacy is a proud owner of the cigarette case and regards it as an honour to be associated with those who have owned it before him. It remains a symbol of the importance of the unity of the Bar and its ethical foundations. He is keeping an eye out for the next recipient.

Mark E. Dean

NOTES:

1. Dean, *A Multitude of Councillors* p.182.
2. *Ibid* p.184.
3. Duck, Colin and Thomas, Martin, *Whose Baby?* p.56.
4. McGarvie R.E. "Obituary Sir John Nimmo" the *Australian* August 1997.
5. Hulme Q.C., S.E.K. (1962) 108 CLR 620 at 623; (1997) "*Tait's Case* and Sir Owen Dixon" *Victorian Bar News* No. 101 p.34.
6. McGarvie, R.E. *ibid*
7. Faine, *Lawyers in the Alice* p.151 .
8. (1990) 169 CLR 525.

# "I've never run a Crook Race in My Life"

## Dr. Philip Henry Napoleon Opas, OBE, Q.C., interviewed by Judge Warren Fagan, approaching his 80th birthday

PHILIP Henry Napoleon Opas, OBE, Q.C. turned 80 on 24 February 1997. He signed the Bar Roll in 1946 on demobilisation at the end of the Second World War. He read with the late Mr. Justice Sir Robert V. Monaghan, and took silk in 1958.

Much of the career of this unusual man is described in his biography by Patrick Tennyson titled *Defence Counsel* published in 1976 by the Hill of Content Publishing Co. After conducting a wide and varied practice, Opas left the Bar in 1968 shortly after his client Ronald Ryan was executed on 3 February 1967. He then took an executive position with CRA Limited but returned to the Bar in 1972.

Thereafter he was appointed to a series of offices between 1973 and 1984: Chairman of the Environment Protection Appeals Board, Chairman of the Planning Appeals Board and Deputy President of the Victorian Administrative Appeals Tribunal.

Upon retirement from this office he resumed practice as an advocate specialising in town planning and local government law and he is still in active practice.

While Chairman of the various tribunals he headed, Opas conducted proceedings in an informal but forthright style, punctuating the proceedings and his decisions with populist bromides such as:
"Planning is for people"
"I'll cut through the red tape where necessary"
"The decision is made by my two technical experts. I'm just here to blow the whistle and award the free kicks"
"Advice is worth what you pay for it"
"You had an armchair ride, like Phar Lap in a bush welter"
"This is like a contest between Phar Lap and Radish"
"The witness was lbw, bowled and stumped"
"One of the few freedoms left in this world is the freedom to go broke".

The outstanding feature of Opas sitting on a tribunal was his absolute good humour and geniality on all occasions.

We interviewed him on 10 May 1996 in anticipation of his 80th birthday — we wanted to be sure of preserving his recollections — and an edited version appears here.

Perhaps we need not have worried because Turton-Turner published two autobiographies of him on his 80th birthday titled *Philip Opas — Throw Away My Wig* and *Philip Opas — Here's to The Next Man that Dies.*

Philip Opas was born on 24 February 1917 and went to school at Melbourne Grammar. In 1939, war broke out in September, Opas married Stella Sonenberg in October, and sat his final exams for articles in November. To complete an eventful year he joined the Royal Australian Air Force in December. He was admitted to the Bar in 1942 while on leave from New Guinea, and left the Air Force in 1946.

*What went on between the time you first joined the Air Force and signed the Bar Roll and the time that you became Judge Advocate General in 1958?*

**Dr. Opas:** Well, I muddled my way through practice and I learned quickly that you had to have a good case to win it, because the Judge wouldn't let you if you had a bad one, and if you had a bad one, no matter how brilliant you were, you weren't going to win that either. So I had a couple of lucky breaks. The most important was I was reading with Rob Monahan — he later became Sir Robert and a Supreme Court Judge. So I was sitting in his chambers, in Equity Chambers, when a solicitor came in with his knees knocking and I was the only one around, and he asked me if I'd accept a brief to draw a brief for Dr. Coppel. Dr. Coppel was very supercilious and everybody was frightened of him, and he'd thrown the brief at this solicitor and said, "Bring it back when it's a brief." So with the valour of ignorance I said that I'd take it on, and as soon as the solicitor got out of earshot I went into Coppel and asked him what he wanted in his brief. He was very helpful to me. I'd been at the Bar three months by then. It was a High Court case, and it might as well have been written in Sanskrit, I didn't understand it. But he told me what was wanted in the brief. When he got it redelivered he couldn't have been more eulogistic to the solicitor. He said, "That's what I call a brief", and as a result of his praise I got a junior brief to Coppel and I was in the High Court within six months. And from then on I had a couple of breaks

and that was it. I first went to the Privy Council in 1950 on a s.92 case — I was junior to Greg Gowans on that occasion, and while we were there we were given the brief at no fee, for John Brian Kerr, who was the Middle Park murderer down on the beach. The problem was concerning the time frame for an alibi. He had an alibi for a couple of hours, but the coroner, or the pathologist, wouldn't fix the time of death at less than six hours . . . and on the third trial he was convicted.

Defence Counsel, *a biography of you written by Patrick Tennyson, mentions a number of notable cases in which you appeared, such as the so-called* Refrigerator case*?*

**Dr. Opas:** It was '46. The first time I put a wig and gown on I nearly succeeded in getting my client sent to gaol without a chance of pleading not guilty. I'd looked up this point — I was junior to Rob Monahan in this trial — and I thought it was a good idea that instead of being asked to plead guilty or not guilty he should say "I demur", which meant that he was challenging that the offence — even if the facts were right — constituted a crime. Rob managed to get himself jammed and he left me to argue the point before Sir Norman O'Bryan, and although I knocked out seven or eight of the charges out of 26, there were about 18 or 19 left on which I failed. The prosecutor, who was Trevor Rapke, moved that sentence be immediately passed, and that created a lot of trouble . . . In the end the Attorney-General directed Rapke to withdraw his application. The trial went on and he was duly convicted on all counts . . .

*In retrospect, with a bit more experience under your belt, what would you have done in the same situation now?*

**Dr. Opas:** I would have still said demur, but I would have sought leave in advance to plead over, as it's called, in the event that the demurrer failed . . . I wrote a very learned article in the law journal, *ALJ*, on demurrers in crime. I knew a lot more after the case than I did before it.

*How did you come to be involved in s.92 transport cases, Hughes and Vale and* Deakin's case*, and McCarter and Brodie as such a young junior?*

**Dr. Opas:** I think it's just the breaks. Never say you don't know. Find out. Apparently I'd acted for somebody charged with stealing tarpaulins and tyres off a parked semi-trailer outside the Victoria Market and I got him off . . . the corroborating police and McCarter who owned the truck, were all as full as state schools. They'd been boozing in the pub waiting to catch him . . . Well, they hadn't learned their lines and they hadn't compared their notes and you could drive a horse and cart through their evidence, and my fellow got off. So McCarter rang me from Adelaide and he said, "Do you know anything about s.92?" He said, "You did a good job against me, will you do one for me?"

*So you have immediately gone from the Magistrates' Court to the High Court.*

**Dr. Opas:** That's right. So we set up a route for this truck to travel carting beer from Adelaide to Sydney via Mildura, and I said, "You're to pull up at the police station, go in and say 'I'm here and I haven't got a permit to carry commercial goods in Victoria', and then when you get your summons let me know, because you've got no business in Victoria except to get from South Australia to New South Wales." I'd written it all out, what he had to say, and in due course he rings me up and says, "I did what you said. I'm outside the police station. I told them all about what you said and they told me to piss off. What do I do?" I said, "You stop there until you get your summons and park right across the entrance where the police drive in." So that happened, he got his bluey, I appeared at Mildura, raised s.92. I had a lot of trouble with the Magistrate. He said, "I agree with you." I said, "Can I see you in your chambers?" I said, "You've got to convict on the law as it stands." So he comes back, "With great reluctance I feel compelled to convict and it's only a nominal matter." I said, "Can I see you in your chambers? You've got to fine us ten pounds or we can't appeal." So he, with reluctance, fined us ten pounds. Then I could take it straight to the High Court, and then I panicked. No sooner had I lodged the appeal than every State, and the Commonwealth, intervened, because all their Transport Acts were in jeopardy. I demanded a leader. I nominated Dr. Coppel. He was on the Bench in three weeks. I then nominated Ted Hudson. He was on the Bench in six weeks. The next one I nominated was Tom Smith, and he was on the Bench, and my client is saying "I want you to do it." I said, "I'm not experienced enough, I can't do it against all the silk." Eventually we got Greg Gowans and we finished up in the Privy Council. After that I got retained by the Long Distance Road Hauliers and it graduated from there into . . . we set up companies on both sides of the borders. I was involved in egg cases. Every egg that left the orifice of a hen immediately belonged to the Egg Board unless it was the subject of an interstate contract, so naturally we had a lot of interstate contracts. We challenged the validity of that. The Onion and Potato Board, I had a client, Deakin, who fitted a flamenwerfer that he'd got from disposals to his truck so that anyone trying to toss his onions off going up the hill at Colac, he could give them a squirt with this. It throws fire. It was a military weapon and a pretty lethal one. If he'd given anyone a decent lick with this he would have been on a murder charge. But he thought he was entitled to defend his property.

*You were close to homicide cases for most of your life as a barrister. Do you remember the case of the baby in the rubbish shute?*

**Dr. Opas:** That was a very tragic case. There was a lovely young nurse at Ballarat who was pregnant and managed to hide it, strangely enough. She was a fairly fat girl and she wore loose-fitting garments . . . She gave birth to her child, sitting on a toilet. And she took the child, wrapped it in paper and stuck it down the shute into the incinerator which, in the nurses' quarters, was only lit about once a week. But the other shute would have taken it to a permanently burning incinerator where waste from operating went off. Well, nobody suspected her of anything and she went back on duty on Monday morning as though nothing had happened, and they were stoking up the fire to start it on about the Tuesday and they found the baby. Police were called in and they started to ask a lot of questions, and she blurted it out and she was charged with murder . . . All I knew was that the umbilical cord was still attached to the child and the placenta. The placenta weighed two-and-a-quarter pound, and the umbilical cord was about eight-and-a-half inches long. And of course the child was born head-first into water, and I knew that the autopsy must have shown that there was air in the lungs, otherwise there would have been no charge of murder. They had to prove that the baby was born alive and had a separate existence outside the body of the mother.

Well, I couldn't find out anything about this from anybody until I decided to go and have a look at the Women's Hospital and Professor Townsend put a gown and mask on me and I watched a few births. And the thing that surprised me was the length of the umbilical cord. I said to the doctors — well, you know, some of these cords were three feet long . . . I said, "What does an eight-and-a-half inch cord mean?" And he

said, "It's too short, it's dangerous." "What happens?" He said, "Well, the child travels down like a yo-yo and it gets jerked . . . It opens its mouth and it swallows the amniotic fluid in which it's floating", and I said, "Well, that gives a picture of drowning", and he said "Of course." I said, "Then it has breathed before it is born." He said "Yes." And I said, "It could be born dead." "Yes." Well . . . she was never committed for trial, but that was one that worried me.

*The following year in 1950 you were involved in another murder case where the accused was Steven Kolacz. Do you recall him?*

**Dr. Opas:** He was the first migrant-killing case down at Broadmeadows. He was one of 1100 migrants brought out from Ukraine and other places. He was Ukrainian. There were seven women among the 1100, because they always brought out single males if they could in those days — factory fodder or whatever. And the seven wives were married to seven of the men, including Kolacz. He suspected his wife of having an affair with a Ukrainian bloke and he pretended to go to work, according to the Crown. He doubled back on his tracks, found his wife in bed with this Ukrainian fellow, and parted his hair with an axe. And they had a lot of trouble with getting a statement from him, because in those days they couldn't find anyone who spoke both Ukrainian and English, so they got a Polish. They first of all got a Russian whose English wasn't too hot. He questioned him in Russian, got answers in Ukrainian and translated it into English. Well, even the police thought that wasn't good enough, because he signed something he couldn't even read. His statement is in English and he signs it. So they then got an Irishman who spoke German and this fellow had been in a camp in Germany and had a little lager German, sort of a pidgin German. He was questioned in German and gave some sort of answers, but again the statement is written out in English and he signed that. By the time I got to him he said he'd talk to God but he wouldn't talk to anyone else, and he never uttered a word to me. All I had to go on was the photograph of the deceased, who was modestly wearing pyjamas, and lying on his face in a pool of blood with his head practically chopped in half, he'd been hit about seven times. The only thing I had to go on was that my fellow had a cut on the leg consistent with having been caused by the same axe, and I was just working out a theory that the first blow must have been struck by the deceased, because he was in no position to strike a blow after he'd been hit. So the theory I was working on was that my bloke had been hit first: dispossessed the attacker, and then used the same weapon on him. The fact that he'd hit him seven times was unimportant if it was truly self-defence, and all I had to go on was that there was a trail of blood down the back of his pyjama coat which showed that the first blow was struck while he was standing, and the rest of it — as I had to put to the jury — it didn't matter if they chopped his head off, if the first blow was struck in self-defence. So at the end of it all he was acquitted of murder, convicted of manslaughter — he hadn't opened his mouth — and he got seven years. I thought I'd done a pretty good job, it was my first real trial . . .

*Judge Warren Fagan interviews Dr. Philip Opas Q.C.*

**You only need to read two books if you want to be well read, the Bible and Shakespeare. You've got a quotation for everything, but never use that quotation twice before the same Judge in a month.**

*In those days, the late forties and early fifties, there were some very famous barristers around. Do you remember George Maxwell K.C.?*

**Dr. Opas:** I do. He was blind . . . I remember George Maxwell appeared for two boys, two brothers, who'd been brought out by their uncle who ran a wine shop in the extension of William Street, near the market . . . He, instead of facing the jury, turned to the opposite wall, and his junior tugged his gown and pointed him in the direction of the jury. But he made some magnanimous gestures. He was a tall man and he had a Scottish burr to his voice and was very impressive, and he'd gesture,

"These young boys in the dock", you know, and he got them off, and they were ultimately convicted of wrongfully disposing of the body because they tried to burn it, and they got six months for that.

*Eugene Gorman was at the height of his fame about that time?*
**Dr. Opas:** He was the best of the lot, I think. He had a wonderful flow of language and he was the best orator I've ever heard. He sat me down one day and he said, "Listen, son. You only need to read two books if you want to be well read, the Bible and Shakespeare. You've got a quotation for everything, but never use that quotation twice before the same Judge in a month."

*Freddie Gamble. Was he one of your acquaintances of that era?*
**Dr. Opas:** He was one of my drinking mates to be honest. I thought he was a very good Judge on the Bench. He always looked the part. He was like a matinee idol with a black Homburg and striped trousers and cutaway coat, and he used to like to shock people. His father was a doctor and in charge of the Kew Cottage place out there, and Freddie, while he was a Judge, wandered in there one day to where there was one of these ladies' auxiliaries going on with pink cakes and cups of tea, and he burst in and beamed on them and he said "Good afternoon, ladies." They thought one of the nuts was loose, and he said, "Do you know where you're sitting?" and they're looking more bewildered than ever, and he said, "You're in the room where I was circumcised."

*You took silk in 1958 after 12 years as a junior barrister. Was that unusual at that time?*
**Dr. Opas:** Well, I was the only one that year. Now they seem to have a Melbourne Cup field, but I was the only one that went through, and at that time I was very dubious about whether I could hold it and most people were frightened to take silk, because it's going a long step . . . And I went in to see Coppel who had seven years, I think, as an Acting Judge, and disgracefully he was thrown back into the pool, and he was back in practice and I went in to see him. I said, "I'm terrified. Why should anyone brief Opas when they can get Coppel for the same money?" He burst out laughing and he said, "I can only be on one side", so that frightened me even more. And strangely, he said, "You go for it." Well, the first brief I had was in the High Court against him and I must have had a good case because I won.

*You appeared before your old mate, Freddie Gamble. Do you remember the case of Glasscock and Balls.*
**Dr. Opas:** This was a funny one. He was on circuit in Mildura and I was on one side or the other in every case before him. [After a night of drinking together] . . . the next morning I'm facing up to him in an involved legal argument. I'd done all my homework before I'd left town, and I'm putting this quite seriously and he just leant forward, looked at me and said, "Tell me, Dr. Opas, what have you got to say about the case of *Glasscock* v. *Balls*?" Well, there is such a case — had nothing to do with this — and he put that to me and I said, "Well, drawing on an imperfect memory, Your Honour", I said, "wasn't that overruled in the spooneristic case of *Bunt* v. *Kent*?" "Oh", he said, "you're quite right." Nobody in the court except us knew what we were talking about and the case went on.

*You appeared for a murderer who was the first in Victoria, if not Australia, to plead guilty.*
**Dr. Opas:** Yes. I had to persuade Mr. Justice Barry that he could accept the plea.

*These were in the days of the death penalty, mandatory.*
**Dr. Opas:** Yes, this was before Ryan, and this man killed three, and there wasn't a single syllable you could say in his favour, but he did plead guilty, a man called David, and he didn't hang.

*Twenty-five-year Executive Council sentence. That must have come to your mind from time to time during the Ryan saga some time later.*
**Dr. Opas:** Well, you know, Ryan was an assignment because the Bar had a rule. We drew up a roster that we would provide a silk in a capital case, in every capital case. They didn't have Legal Aid then, they had the Public Solicitor. It was my turn to draw

this one, and I thought when I started this was hopeless.

*Well before the* Ryan case *which was in 1966, you appeared in a number of very interesting civil cases of the time. Do you recall* Cameron *v.* McManus*?*

**Dr. Opas:** That was the case where the DLP and the ALP were at odds, and I had the brief for the DLP in extraordinary circumstances, because I had once been a member of the Liberal Party. The DLP was regarded as a break-away group, mainly Catholic in composition . . . they came as a last resort to a Jewish silk with a Liberal affiliation, to take part in a war against the ALP. It was a very involved thing and it concerned trust property where all the trustees had defected from the ALP and were members of the DLP, Frank McManus leading them . . . We won, we stuck to the property and it was sold before an appeal could take place.

*As a child you had a ride on Phar Lap. Did that lead you to an interest in the racing industry?*

**Dr. Opas:** Well, I've been riding horses since I was three. I lived in Caulfield close to the course. I used to go round to the course before school to do a bit of riding . . . the trainers were interested in a kid who didn't want to get paid, and would work the horses and not knock them about. The fat was in the fire when Vin O'Neill, the leading trainer, came to see Dad to see if he could apprentice me, and that was the end of a promising jockey's career. But I only rode Phar Lap in a bullring about twice the size of this room where Tommy Woodcock let me have a ride on him, and I just walked him, a little trot and a walk. I did that about three times.

*That might have been good training for the jockeying you did on a number of racing cases. Do you remember the case of the kryptorchid?*

**Dr. Opas:** Yes. That comes from two Greek words, *krypto* meaning hidden, and *orchid*, testicle . . . This is a horse where the testicles have never descended and the question was whether it had been wrongfully sold in the description of a colt, as a yearling. It was out of the first and second horses in the Melbourne Cup . . . by Comic Court out of Chicquita, and it was called Comicquita, and it ran second, in Even-Steven's Cup. But we were having this argument before Sir George Pape, who wouldn't know which end you fed a horse . . . There've only been two kryptorchids in racing history and they're both good horses . . . We had two vets who swore that a colt was a horse capable of reproducing. And the other side . . . said a colt was an uncastrated male, and as this has not been castrated at that time it couldn't be said they wouldn't descend and there was no misdescription. So we lost on that, because Pape preferred the two vets on that side.

**I've been riding horses since I was three. I lived in Caulfield close to the course. I used to go round to the course . . . I only rode Phar Lap in a bullring about twice the size of this room where Tommy Woodcock let me have a ride on him, and I just walked him, a little trot and a walk.**

*Do you remember another racing case concerning High Octane and Sartorial Splendour?*

**Dr. Opas:** That was Phil the Pill. He put together some concoction in a dandelion or something, and he bribed the stable hand to administer this before the race, and hyoscine was the drug. And it was unknown on Victorian racecourses at that time but it sent a horse slightly blind. In order to be effective it had to take effect during the race, but not while it's in the mounting yard because the horse wouldn't be allowed to start and all the bets would be off, it had to take place while it was in running. It was a very cruel thing, I take no joy from it. The stable hand who administered the drug pleaded guilty and gave Queen's evidence, but he had a record and I hopped into him. We had a mistrial — at least a hung jury — and at the second trial he was acquitted . . .

*You had a substantial civil practice at the time including cases that involved disputes that tore apart, rent the Greek Orthodox Church?*

**Dr. Opas:** Yes . . . It was a question of an archbishop who'd been defrocked in America for adultery and pinching the church funds. He turned up in Victoria and said he was the highest ranking archbishop and he was going to take over the Greek Orthodox Church in Victoria Street. I got a ring on a Sunday morning that there was an army marching behind the archbishop in his full sacerdotal robes, marching on the church. "What do we do?" I said, "Lock the door, bar it. We don't want another murder in the cathedral. I can't do anything about it until Monday, when we get a writ out and an injunction." So in the end they held a church service out on the tram tracks out there, and we took action — we had to take it under the Companies Act, because the church was a company limited by guarantee, adhering to the tenets of the Holy Synod at Constantinople. And the archbishop and his followers attacked the jurisdiction of the Synod to defrock him on the ground they were controlled by communists under the set-up in Greece at that time, but we eventually won the case before Sir Edmund Herring, and affirmed the right of the church to determine whom they admitted as priests or bishops. However, the archbishop had his way because he just raised the money and built a new church out at Sunshine.

*And the Serbian Orthodox Church was split shortly after and you appeared in that case also.*

**Dr. Opas:** That's right, and we traced back through these other bishops and archbishops of the Eastern Orthodox groups; the Syrian Orthodox, Russian Orthodox. We traced back apostolic succession. It was a fascinating exercise for me because naturally I knew nothing about it, but I learned a lot about it in both those cases. We won that one too, the same result. The rebel who'd been defrocked just raised the money amongst his adherents and built another church.

*It was in 1966 that you launched into the Ryan trial which is a pretty well-known story, such was its fame and its consequence.*

**Dr. Opas:** . . . In all honesty, to my dying breath, I don't believe he fired the fatal shot. He was no saint and he didn't pretend to be, but I came to like him and you couldn't help it. I mean I had to tell him frankly when I was going to the Privy Council that "Look, I'm playing for time, but we're not going to win. I'll do my best. Time is on your side, if we can get enough of it, because public opinion is opposed to your hanging, but I'll just have to do my best", and he smiled and shook hands with me. He said, "You know, mate, we're playing time on. If you don't kick a goal soon we're going to lose this match." You couldn't dislike a fellow who was like that . . .

*After the Ryan trial you left the Bar. Why?*

**Dr. Opas:** Well, it's funny. At the time I was, I think, sick. It took a lot out of me, a

lot more than I thought it would. But Arthur Rylah had told me some three or four months before the Ryan trial, after I'd completed an inquiry as government-appointed inspector into a number of companies, he said, "Well, you've got the next Supreme Court appointment", and Arthur Rylah and I were quite friendly, until this Ryan case, when he took it very personally that I was trying to stop my client being hanged. And I met him in Menzies Hotel which was then next door to Selborne Chambers — probably about five or six months after the *Ryan case* — and he called out across the bar, and said, "Opas, as long as I'm Attorney-General you'll never get another brief from the Crown." He said, "If you're looking for a Bench you'd better pick one out in Fitzroy Gardens", and I left immediately. But shortly after that I was charged by the Bar Council with unprofessional conduct, and called upon to show cause why I shouldn't be struck off, because I had gone to the committee, the Ethics Committee, at the time when Bolte had withdrawn my brief. He'd instructed the Public Solicitor to withdraw my brief so that he could hang him before I could get to the Privy Council. I had no instructor. So I went to the Ethics Committee and said, "Can I go public on TV or through the media and call for another solicitor to instruct me?" And they told me, "You can't do it. That's advertising. You're touting for business." I did it [anyway]. And there was a flood of applications, and Ralph Friedman, who was at Ridgway Pierce and Friedman, he became the solicitor and took it over. When my client was hanged and it was all over I was charged. I didn't want to take any part. A lot of barristers waited on me and said, "You can't let them get away with it", and I said, "Look, if they think as little of me as that, I don't want to belong to this club." And finally, Dick McGarvie and Ivor Greenwood, who became Attorney-General in the Liberal Commonwealth Government, they were my leader and junior, and Ninian Stephen, as the junior silk, prosecuted. There was a public hearing in which I took no part. I was present. I don't remember what happened, except I was acquitted. And I think Lou Vermard at the end, who chaired it, said, "We need more Phil Opases, not less", but anyway I'd had enough and I decided to leave the Bar.

*So you went to a seat with CRA, Conzinc Rio Tinto. You were at CRA between 1968 and 1972 and then returned to the Bar? Why?*

**Dr. Opas:** Well . . . I was never home. I had 17 overseas trips in one year and never got the leave I was entitled to because I was in charge of the legal affairs for 133 companies . . . I wasn't getting paid enough and I thought things had died down a bit by then. I thought well, I'll go back to the Bar and see if I can pick up the threads.

*At the age of 56 — that is in 1973 — you were appointed Chairman of the Environment Protection Appeals Board?*

**Dr. Opas:** Yes. I believe Tony Murray, who was Solicitor-General, and who prosecuted in the *Ryan case* felt sorry for me, and he offered me this appointment almost as soon as I got to the Bar really. Not long after. I said I'd accept it provided I could do it half time, so we fixed cases for March before the Board, and then I could practise in April and so on. Alternate months I sat on the Board. He agreed with that and that's where we went.

*During your time on the Environment Protection Appeals Board until 1976 you were involved in a number of pretty interesting and significant cases at the time?*

**Dr. Opas:** . . . It was the first time we'd had an Environment Protection Act which made big business clean up their act. They'd been happily polluting for 50 years or so and they didn't see any reason why they had to acquire new technology at great expense when the old plant was still working. So we had to get the message over.

*You went from the Environment Protection Appeals Board to the Town Planning Appeals Tribunal in 1976. Did you enjoy those years?*

**Dr. Opas:** I enjoyed the companionship of Kevin Holland and Ron Gould particularly, who sat with me. We had to have a three-member tribunal. I don't believe we ever had a cross word and I don't think we ever had a dissent, and we heard a lot of appeals and it was a wonderful working combination. But they were a very hard-working team.

*I understand you didn't give them time to dissent, you used to give the decisions as soon as the last witness had stopped speaking.*

**Dr. Opas:** That's not quite right. We knew which way we were thinking. When you work together up closely you do know. I would pass a slip across the table. If I had two ticks for a permit or two crosses for no permit — there was no point in my voting, and I saw my role as a lawyer with two specialists. They were deciding the case, and I never felt strongly enough to dissent from them. If I had two ticks I put it into words, and I had always worked on the basis that the quicker you can tell people their position the better they appreciate it . . . I was more concerned with getting certainty into the process and giving the result on hand . . . I left at the beginning of 1980. I took on the role of Chief Executive Officer at Doncaster and Templestowe, and I stayed there for 20 months and then came back as Chief Chairman of the Planning Appeals Board . . . I stayed on [after the Planning Appeals Board merged with the Administrative Appeals Tribunal] because I was appointed initially, and that's the only reason I took that appointment and left Doncaster. I was appointed with the rank, status and precedence which included pay, of a puisne Judge of the Supreme Court, until I attained 72. And therefore, that appointment continued and there was the anomalous situation that I was deputy to a County Court Judge at the time when I was being paid more than he was, which was quite ridiculous.

*So the last 15 years or so of your employed life as a lawyer were in the local government town planning area.*

**Dr. Opas:** Yes, although in '89 when I became officially senile, I was given an opportunity to be a senior consultant with Mallesons, and I stayed there for five-and-a-half years. I was then head-hunted where I am now, as a senior consultant at Arnold Thomas and Becker. I go in — in both jobs I went in when I felt like it — about three days a week.

*Over the course of your time, who have been the great barristers that you have encountered?*

**Dr. Opas:** I would say head and shoulders as a jury advocate would be Eugene Gorman. Not far behind would be Rob Monahan, and Tom Doyle. On the civil side, Bill Coppel was very impressive. He rather talked down to the Judges as though he knew more than they did, and he might have been right, but one of the most underrated men was Lou Voumard. Everyone acknowledged that he was a fine legal mind, and the fact he was never made a Supreme Court Judge, or even a High Court Judge amazes people who knew him. He would have been an ornament to the Bench. He was a great all-round lawyer.

*What about Judges?*

**Dr. Opas:** I think one thing about Judges, they've got no right to be rude to people

who can't answer back. And the rude ones stand out easily: Sir James McFarlane, Russell Martin. They seemed to take a delight in being rude to people. When Bill Coppel was on the Bench, the reason he wasn't permanently appointed was he was so rude to people. But he confined his rudeness to senior people, not juniors. Among the best Judges, I put those who listen. Sir Charles Lowe I admire greatly. I thought he was a wonderful Judge. He decided the case in front of him and although I've got no doubt the way his mind worked, it was what's the fair thing in this case. "All right, I'm not going to let law get in the way of a just decision." He was a model Judge in my experience. I enjoyed appearing before him. Tom Smith, you never knew what he was thinking because it was like talking to the wall. He didn't answer you. Among those I'd put in the worst category would probably be Jimmy Moore in the County Court. He was universally disliked because he was so pompous. Indeed, he was one that a couple of us refused to appear before. We've had some wonderful Judges, and Ben Dunne, when he was elevated from the County Court to the Supreme Court, I remember him saying to me, "The hardest thing as a Judge is to shut up and listen, because if you shoot your mouth off before you've heard all the evidence you'll be sorry you did. At the end of the case your views are different and you've got to eat humble pie by retracting what you said earlier." He said, "You can shut up and listen and be informed." And I always tried to apply that when I was on the Bench myself. I tried not to give away any feelings I might have had, because I often underwent 180-degree turn from start to finish in my thinking.

*What about the good practitioners in the planning or local government area before the tribunals?*
**Dr. Opas:** Strangely enough, I would put some of the best of them not as the lawyers, but as the planners. I felt very often we were getting non-partisan presentations from senior planning officers at council level, putting both sides. And I've never known a case in the many I heard of a town planner who didn't tell you the whole story. I've known many barristers who — naturally they are partisan — who put one side and completely ignore the other, and sometimes that prevents you being fully informed. I am glad in the way that the cases are presented, that there is always the responsible authority putting a view, and they do tell you the history of the site, and one of them is here — two of them are here (at the AAT) that I remember so well appearing before me — Jane Monk and Tony Liston. I never had any reason to query anything they told me. I knew I'd got the full story. They didn't always win and they didn't expect always to win, because quite often a town planner has to put a view they don't agree with because the council has overruled them . . . I think in a situation like this, which in many ways is a layman's court, you get more assistance from the people who don't have legal qualifications, because lawyers obfuscate something that might be quite simple. They overlay the facts with legal sophistry and . . . it's the way they're trained. It's the reason they're brought into the act. If it is merely a matter of fact you don't need lawyers. Lawyers certainly make it easier in the presentation in an orderly fashion, and that's the great advantage of the logical thinking of lawyers. They present the case logically, usually in chronological order. They do, however, if they've got a very difficult case, tend to overlay it with legal decisions, which very often have nothing whatever to do with the case in hand. They are used by analogy, and they've picked out of context some statements by Judges in another case in a different circumstance, and try to apply it to this. It doesn't work that way.

*Do you think it might be a consciousness of the Appeal Courts?*
**Dr. Opas:** Definitely. I can't help feeling that some of the decisions given at the AAT are looking over their shoulder to see what the Appeal Court is going to say.

*Have you ever run a case to lose it?*
**Dr. Opas:** No.

*What about the* McCarter case *through Mildura?*
**Dr. Opas:** I ran that case to win it ultimately, and that was a prelude, because I knew very well the Crown wouldn't appeal if we got off.

*In the days of Privy Council appeals and High Court appeals where the loser had a choice, did you ever run a case to lose it in the Supreme Court?*
**Dr. Opas:** No. No, I've never run a crook race in my life. Never, and I wouldn't. No, I don't invent my client's case, as you know. We just take it as it comes, and sometimes you're on a loser. But I've thought of the poor unfortunate lawyer who is going to represent the accused down at Hobart. Somebody's going to do it. Every man is entitled to be defended and that's the basis on which we put ourselves on the roster at the Bar Council.

## Correspondence

# Favourite Legal Anecdote

Dear Eds,

I enclose "The Compleat Answer" from an anthology edited by William Prosser, *The Judicial Humorist*, Little, Brown & Co. (1952) and sadly out of print for many years now.

You will note the editor's footnote to the name of the case: "Although these pleadings were actually filed and are a matter of public record, for obvious reasons the names of the persons involved have been changed. The case remained on the calendar for over a year without trial. Plaintiff's action, and defendant's cross-action were then dismissed, with costs paid by plaintiff".

You will further note that these pleadings make reference to "Spanish athletics", an activity not noted in Burnside's most recent "A Bit About Words" column: *100 Vic BN 51* (Autumn, 1997).

You will even further note that Burnside did not include in his most recent column that great old Australian stand-by "naughty". This word has a long and honourable pedigree with Shakespeare using the term "naughty house" for a brothel in *Measure for Measure*. My favourite example of its use was when it appeared at the breakfast table of English gentlemen in the form of a letter to the editor of the *Times Literary Supplement* (12 October 1962): "Would you please whisper in the ear of the young lady who reviewed *The Stuart Case* in your issue of 10 August that 'to have naughty' . . . is throughout the South Seas the polite and strict analogue of 'to have sexual intercourse'."

Regards,
Briefless

*[The Compleat Answer is reproduced at page 49).*

# Canada and Quebec

Federal Court Judge and former *Bar News* editor, Justice Peter Heerey, recently spent long service leave at McGill University in Montreal, Canada.

IN a recent article in an Australian newspaper, a Canadian academic now teaching at ANU wrote that there are no two countries on Earth so alike as Australia and Canada. As Meagher J.A. might say, I disagree. Profoundly. In other English-speaking countries of which I have any experience, New Zealand, England and Ireland, everyday life seems somehow familiar. But Canada is a North American country. The accent (of English speakers) is to Australian ears indistinguishable from that of United States citizens. Education, sport, politics, the legal profession and many other aspects of life are organised along American lines. Essentially Canada is what is left of British North America after the Revolution.

The history of Australia since European settlement is both more symmetrical and less exciting than Canada's. At six different spots on the Australian littoral, a British ship dropped anchor, a boat rowed ashore and the British flag was hoisted. In due course there followed settlers, in some instances convict as well as free, but always an English-speaking mix of English and Scottish Protestants and Irish Catholics.

Canada by contrast is a creation of the two founding nations, Britain and France. Her history is replete with wars, invasions and rebellions. The defeat of General Montcalm by General Wolfe on the Plains of Abraham at Quebec City in 1759 is still referred to as The Conquest, with all the implications such a term has, at least from the point of view of the conquered. The present Premier of Quebec, Lucien Bouchard, leader of the separatist Parti Québécois, was recently taxed with the possibility of partition; that is, if Quebec separated from Canada, parts of Quebec, especially the aboriginal lands to the north, should secede from Quebec. After all, it was put, if Canada is not sacred, why should Quebec be? To which Bouchard replied, "But Canada is not a real country." There was much outrage at this, and Bouchard beat a hasty retreat. But the sentiment certainly exists, especially in Quebec.

Canada is of course a federation like Australia, but it is surprising how much their constitutions differ; both in how they

*McGill University Law Faculty, Montreal.*

were written and how they have operated in practice. The *British North America Act 1867* (hereafter, the BNA Act) was heavily influenced by a desire to avoid the chaos which excessive emphasis on States' rights had so recently produced in the American Civil War. Australia's federation, by contrast, occurred a third of a century later, and in a country far removed from the Civil War. The leading draftsmen of the Constitution, Sir Samuel Griffith of Queensland and Andrew Inglis Clark of Tasmania, were deeply versed in American Constitutional Law.

Structurally the Australian Constitution follows the US model very closely, the main differences of course being the adoption in Australia of a Westminster system of parliamentary government and the absence of a Bill of Rights. On paper, the Canadian Constitution (the BNA Act was re-named the Constitution Act at the time of repatriation in 1982) looks distinctly more centralist. The very name "Province", as distinct from the Australian and US "State", suggests a lower level of power and prestige relative to the central government. In Canada, Provincial Supreme Court judges and Lieutenant Governors (the equivalent of Australian State Governors) are appointed by the Federal Government. The salaries of those judges are paid by the Federal Government, although other costs of court administration are the responsibility of the Province. The Federal Government in Canada has the power to disallow Provincial legislation. Members of the Canadian Senate are not elected, but are appointed by the Federal Government of the day with tenure for life. There is not an equal number of senators from each of the Provinces, which vary much more in population than the Australian States. The population of the largest, Ontario, is something like 100 times that of Prince Edward Island.

But in practice the balance of power has shifted towards the Provinces, in contrast with what has happened in Australia. Up until 1949, an appeal lay to the Privy Council from the Supreme Court of Canada. The BNA Act never had an equivalent to s. 74 of the Australian Constitution restricting appeals in inter se matters. An eminent Australian judge once said that English judges do not really understand federalism. Whether that be true or not, the decisions of the Privy Council produced a result markedly different to the Australian experience. For example, the federal external affairs power was held to be limited to matters otherwise within federal power.[1] There is no equivalent to the decisions of the High Court which give the Australian Federal Government power to make tied grants to the States, even in areas over which the Federal Parliament has no legislative power[2] or directly spend money in such areas.[3] There is no Canadian equivalent to the Australian corporations power.[4] Most importantly, there is no equivalent to the *Engineers case*.[5]

**In 1982 the Trudeau Government secured the passing of legislation by the UK Parliament which repatriated the Constitution to Canada. There were intense negotiations prior to this. At the last moment the Quebec Government of René Lévesque refused to sign the package.**

Although sectarian tension was often a feature of Australian life and politics, Australian colonial borders did not run along religious or linguistic lines — an historical circumstance insufficiently acknowledged in most assessments of Australian federation and nationhood. There was therefore not the perceived need in Australia to entrench minority religious and linguistic rights in different parts of the country. Nor was there any part of Australia governed by a separate legal system, like Quebec's civil code. Perhaps partly for these reasons, there has not been the view of the Australian Constitution as a federal compact between the colonial entities that there has been in Canada, with her very different history. On this point the text of the respective constitutions is quite explicit. The BNA Act commences with the recital that "The Provinces of Canada [at this stage Quebec and Ontario were united under that name], Nova Scotia and New Brunswick, have expressed their desire to be federally united into one dominion under the Crown . . ." The Australian equivalent is: "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 . . ."

This popular basis of the Australian Constitution was given practical content by its being drafted at Constitutional Conventions in the 1890s and adopted by referendum before passing through the Imperial Parliament. The Australian Constitution has always contained an internal machinery for amendment by referendum by popular vote.[6] There was no equivalent in the BNA Act. Thus any amendment involved negotiations between the Federal and Provincial governments in order to hammer out a deal which could be presented to the British Government for passing through the UK Parliament. The legal constraints (if any) on this process were considered by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*.[7] The Court held that the consent of the Provinces to proposed amendments was not required "as a matter of law", but that a "substantial degree" of Provincial consent was required "as a matter of convention". Subsequently in *Re Quebec Veto Reference*[8] the Court ruled that the conventional rule of a "substantial degree" of consent did not require the consent of Quebec.

In 1982 the Trudeau Government secured the passing of legislation by the UK Parliament which repatriated the Constitution to Canada. There were intense negotiations prior to this. At the last moment the Quebec Government of René Lévesque refused to sign the package. But Trudeau had the consent of the other nine Provinces and went off to London anyway. This episode became known as the Night of the Long Knives. Depending on whom you talk to, Quebec was either stabbed in the back, or had its bluff called. The history of this, and subsequent failed attempts by the Federal Government and the Provinces to re-negotiate the Constitution and designate Quebec as a "Distinct Society", including the Meech Lake and Charlottetown Accords, are too lengthy to relate here, even if I understand them properly, which I doubt. In any event, the official position of the present Quebec Government is that it does not recognise the 1982 Constitution.

Quebec contains about a quarter of Canada's population of 30 million. Some 80 per cent of Quebecers are Francophone, that is to say, in terms unusually elegant for a statute, their language first learned and still remembered is French. Another 10 per cent are Anglophone and a further 10 per cent what are called Allaphone, that is to say they speak a language other than English or French. About 35 per cent are bilingual in English and French, but the great bulk of those are in Montreal, a city with a population slightly less than Melbourne's.

Quebec society changed dramatically, almost overnight, in the Quiet Revolution of 1960. Prior to that, life was dominated by

*The author on Lac du Castor, Montreal. Torvill and Dean are under no threat.*

the Catholic Church, and a particularly conservative, Ultramontane version of the Church. Large families of ten, 15 or more children were the norm. Now Quebec is said to have the lowest birthrate in the Western world. Today the use by married women of their maiden name is not merely optional, it is mandatory.

Under the old dispensation, commerce and industry were left to the Anglo-Scottish establishment who controlled such institutions as the Canadian Pacific Railway and the Bank of Montreal (and McGill University). Quebec did not have an Education Department until 1963. Public education up to then was solely a function of the churches. Even today, basic control rests with Catholic and Protestant School Boards in each school district. The religious basis of education was enshrined in the BNA Act and remains unchanged in the repatriated Constitution. Schools are also classified linguistically, so there are Catholic French schools and Catholic English schools, Protestant English schools and Protestant French schools.

There were, to use the title of a famous Canadian novel which has become something of a cliché, Two Solitudes. I met a woman who is the Chair of the Canadian Human Rights Commission. Now in her mid-fifties, she grew up in comfortable middle class circumstances in Montreal, her father being a successful dentist. She never met anyone who spoke English until she was 18.

There was without doubt discrimination against Francophones. Sometimes people attempting to deal with a bank or government department were told to "speak white", that is, English. But the hardliners in Parti Québécois circles are not satisfied merely that such things do not happen nowadays. There has to be repentance, penance and contrition by the Anglos; the old religious instincts are not far below the often aggressively secular surface of modern Quebec.

There are language laws, enforced by the Office de la Langue Française, which prohibit or severely restrict the use of language other than French in commercial signs (again, this is a subject with a complicated legal and political history). There are some exceptions, including words that are registered trade marks. At the Parti Québécois conference last year one speaker launched the following tirade (in French of course):

> Every day with hundreds of thousands of Montrealers, I'm humiliated and insulted daily in what's left of the second largest French speaking city in the world, scarred and disfigured by all the Second Cup [a chain of coffee shops], Liquor Store Cabaret, Walmart, Club Price and Winners signs and others. I feel like an exile in my own city, an outcast in my own land.

This received, according to the Toronto *Globe* and *Mail*, "thunderous applause". To my observation, after five months in Montreal, it is paranoid twaddle. The language that one overwhelmingly hears and sees in shops, restaurants, the Metro etc. is French. This is a French town, sans doute.

By way of a warm-up to the party conference, the Quebec Minister for Language and Culture (an Orwellian title if ever there was one) announced that all government documents and services of the Quebec Provincial Government had to be in French only. Government officials would have to get special permission from superiors before addressing any meeting in another language. All this was necessary, the Minister said, to halt the spread of "rampant institutional bilingualism".

As forensic psychiatrists would say, the prognosis is uncertain. The 1995 referendum conducted by the Quebec Government resulted in a win for the No vote (i.e. against separation) by less than one per cent. A similar referendum in 1980 had been won 60–40. Two weeks before the 1995 referendum, opinion polls and the received wisdom all indicated a similar result. However Lucien Bouchard then took over the campaign and turned it around with a display of charisma of truly Messianic proportions. Opinion polls taken since the referendum however do not show any very significant weakening of Separatist support, and this notwithstanding the fact that the Provincial Government is making substantial cuts in spending to achieve a budget surplus.

The political reality is that there is a hard core of Separatists, say about 30 per cent, who just want to be separate and don't particularly care what deal, if any, can be reached with the rest of Canada. There is another group, say 15–30 per cent who are so-called "Soft Nationalists". They rather like the idea of sovereignty, but want some kind of special association with Canada. Or they think that threatening to vote, or actually voting, for separation might extract more concessions from the Federal Government. The strategy of the Separatists has been to try and win the votes of a sufficient number of Soft Nationalists. Hence campaign promises that Canadian passports could be retained, Canadian currency used, and a huge slab of Quebec public debt picked up by the Federal Government. The opposition Liberal Party in Quebec, which controlled the official No campaign,[9] saw its own political interests as not being served by antagonising Soft Nationalists. Its general approach was to say that, of course Quebec could be separate if it really wanted to, but it would be nicer to remain with Canada. The Federal Government adopted much the same approach. Behind all this, like the unclothed emperor, was the uncomfortable fact that a unilateral declaration of independence by Quebec would be almost certainly illegal. A local maverick called Guy Bertrand obtained a declaration from a Judge of the Quebec Superior Court to that effect a few weeks before the vote.[10] It suited both official committees, and much of the media, to ignore this.

Since the 1995 referendum the Federal Government has launched so-called Plan B, which is designed to make explicit the actual consequences of separation. As part of this strategy, the government has brought a reference to the Supreme Court of Canada asking for a ruling as to whether Unilateral Declaration of Independence would be lawful under domestic and international law. The case should be heard later this year. The Quebec Government has refused to participate, claiming that sovereignty is not justiciable. The issues are canvassed by Professor Jeremy Webber of McGill University in his article "The Legality of a Unilateral Declaration of Independence under Canadian Law".[11]

The uncertainty created by the Separatist issue has been very damaging to Montreal. Up until about 1970 it was the premier city of Canada. One indication of the economic decline since then is the fact that Toronto now has 70 per cent of Canadian Stock Exchange business. Montreal has 15 per cent and the rest is shared between Vancouver and Calgary. Commercial office vacancies in Montreal are running at about 30 per cent.

It is striking how political discourse in everyday life centres around this issue. In Australia one might say casually that "Jim votes Labor" or "Sue is a Liberal". In Quebec you would say someone is a Federalist or a Separatist. ("Federalist" is used in the North American sense of someone who supports the central government, as opposed to the Australian, or States' rights, sense.)[12] But it is an issue that goes so deep that good friends of different persuasions would simply not discuss it.

Montreal is a city of style and spirit. The people I met, Francophone as well as Anglophone, were extremely hospitable. By no means are all Francophones Separatists — were this otherwise the referenda would have passed easily. The great Federalist of modern times was Pierre Elliott Trudeau, himself a French Canadian of Montreal, or "pure laine" as the saying goes. In February last year he wrote in the *Montreal Gazette* words which express an eloquent vision of Canada:[13]

> . . . I have always opposed the notions of special status and distinct society. With the Quiet Revolution, Quebec became an adult and its inhabitants have no need of favors or privileges to face life's challenges and to take their rightful place within Canada and in the world at large.
>
> They should not look for their "identity" and their "distinctness" in the constitution but rather in their confidence in themselves and in the full exercise of their rights as citizens equal to all other citizens of Canada.

I do not doubt for one instant that they would be capable of making Quebec an independent country. But I have always believed that they have the stature to face a more difficult and nobler challenge — that of participating in the construction of a Canadian nation founded on democratic pluralism, institutional bilingualism and the sense of sharing.

In the era of the global village, the very notion of sovereignty is becoming obsolete, and it is to protect what is left of it that large-scale amalgamations are being formed.

But Canada already occupies half a continent. To weaken it by dividing it would be a historic blunder of infinite proportion. We must not rend the fabric of this still-young country, we must give it the chance to grow and to prosper.

I can only say Amen to that.

NOTES:

1. *Attorney-General (Canada)* v. *Attorney-General (Ontario)* [1937] AC 326. The opposite is the case in Australia: *Commonwealth* v. *Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.
2. *Victoria* v. *The Commonwealth (Federal Roads Aid Case)* (1926) 38 CLR 399.
3. *Victoria* v. *The Commonwealth (Australian Assistance Plan Case)* (1975) 134 CLR 338.
4. *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
5. (1920) 28 CLR 129. Certificate under s. 74 refused (1921) 29 CLR 406.
6. s. 128.
7. [1981] 1 SCR 753. See also Professor Peter Hogg (1982) 60 *Can Bar Rev* 307.
8. [1982] 2 SCR 793.
9. Quebec legislation severely restricted campaign expenditure not authorised by the official Yes and No Committees.
10. *Bertrand* v. *Attorney General (Quebec)* (1995) 127 DLR (4th) 408.
11. (1997) 42 *McGill Law Journal* 28.
12. See e.g. letter in the *Australian*, 16 September 1997 from Mr. John Stone referring to the Samuel Griffith Society as a body taking "a federalist, as opposed to centralist, standpoint".
13. *Montreal Gazette*, 17 February 1996, republished in *Against the Current* (McLelland & Stewart Inc, Toronto, 1996).

# The Law and the Internet — the future is now

## Everyone is talking about the Internet (well almost)

"One who does not live in the Future today will live in the Past tomorrow."

Peter Elyard

HIGH technology has finally come to chambers and counsellors. We have all heard about the Internet but now a select group of barristers and solicitors are doing something more than talk. They now know it is not just for children, or for surfing either! Some are already using the enormous wealth of freely available legal information found in sites like AustLII and Foundation Law. Others are searching and finding highly relevant legal sources from Canada, USA, Britain, New Zealand and even South Africa. Tracing documents and testimonies of experts to government bodies is just a keystroke away. Others are using the Internet to check out restaurant reviews or just read the daily papers from anywhere in the world. Some are even "watching" the football live while working back on the weekend!

In the past we relied on newspapers, journals and texts to keep our knowledge base current. Recent developments have led to subscription services and digests of information being mailed on a regular basis. This was costly and slow and relied upon us being organised and having a good filing system! Using out-of-date information can result in inappropriate advice to clients who can then seek retribution. Or being openly chastised by a judge! We are increasingly being asked to process more and more information in order to keep abreast in our areas of expertise. The solution would be to be able to search for up-to-date relevant information in your particular area of practice, quickly and easily and find what you want when you need it.

That is what the Internet is about:

- communication — with your colleagues, both locally and overseas;
- access to a wealth of resources which you never dreamed possible — art and music collections, graphics, software documents, research advice as well as lies, damned lies and statistics;
- collaboration, between individuals and international projects.

*Internet consultant David Zyngier makes a point to client Peter O'Callaghan Q.C.*

"The level of *technophobia* shown by our political and business leaders towards the on-line revolution would be humiliating for their counterparts in the US. We have the infrastructure but not the will to exploit the electronic economy."[1]

Law is an information-based profession. Free access to information is a cornerstone of our democratic process. Yet lawyers have always paid dearly for materials that are often in the public domain. Now much of this information is available in cyberspace for the cost of a local phone call. This will inevitably challenge the traditional ways in which legal material and information is collected and processed.[2]

The Internet's ability to store, process, shape, change and transmit multimedia information at virtually no cost is rapidly removing many of the barriers of the physical economy and rewriting many of the rules of commerce.[3] Are lawyers prepared to take up the challenge?

The Internet can provide you with free and immediate access to:

- primary legal materials including legislation and decisions of courts and tribunals;
- cases of the High Court since 1947;
- weekly judgment summaries;
- the most recent House of Lords judgments within two hours of handing down instead of waiting two months for the printed copy (and paying for it);
- Victorian and Federal Hansard on a searchable basis;
- British, US Federal and State legislation;
- University law libraries world wide;
- hundreds of daily newspapers, magazines and journals;

- international legal links and research materials.

The Internet is only useful when it provides exactly what we want when we want it. It offers two very basic mechanisms essential for lawyers to practise effectively — access to information and the ability to communicate.

## INFORMATION

But like an enormous, infinite messy collection of materials, books, research papers, news cuttings, pamphlets and ephemera, the information superhighway needs careful navigation in order to gain access through the chaos.

Internet resources come from a wide and diverse range of sources — individuals, groups, organisations, commercial enterprises and in a wide variety of types and formats. Anyone can publish anything — and they do! The Internet caters for one of our basic human needs — to communicate and share information with others.

But beware! Just because it comes from cyberspace doesn't mean it's more reliable. In fact the opposite can be true.

## COMMUNICATION

Communication on the Internet can be individual, group conferencing, or discussion groups for those interested in common subjects or help for those with similar concerns. One of the most significant Internet uses for legal professionals is e-mail (electronic mail). This enables you to almost instantly correspond anywhere in the world for the cost of a local call! You can send large documents to clients and other professionals quickly and securely.

The Internet is changing the way we do things, it is truly a revolution that like it or not, is here to stay. It will also change our work practices. Although the Internet is still in its development stage it is quite clear that the massive amount of information that is readily and freely available will change how legal professionals communicate with clients and with each other, how they present information and how they obtain information.

Justice Vince Bruce wrote in *The Australian Lawyer* recently: "Technology is going to change the practice and administration of the law more than any of us can perceive . . . The changes will be so fundamental that they will affect who survives in practice."[4]

In his article he quotes the President of the American Bar Association, Roberta Cooper Ramo who wrote:

> As we count down the months before the next century, those of us who have not embraced technology as part of our actual lives (as opposed to our secretaries' lives) have only a short time to change our ways . . . if you are not completely computer literate, now is the time to start.[5]

**Through the use of the resources freely available on the Internet solicitors and barristers have the potential to save thousands of dollars annually in library and research costs.**

A recent news item[6] featured a *Cyber-Solicitor* Brendan Walsh. He is cutting his clients' legal costs by up to 30 per cent by running a virtual office. He works from his clients' offices with a laptop with CD ROM, and a mobile phone that gives him immediate access to the Internet. "Almost all the literature I need is on the Net via AustLII. The days when you had to buy your own library are gone . . . the practice of law must change in response to technology and clients' demands for accountability and value for money."

## HOW IS THE INTERNET IMPORTANT FOR LEGAL PROFESSIONALS?

The Internet's potential is best understood through its most commonly used tools or applications. Lawyers should be using e-mail and information searching and retrieval as part of their core practice, together with the full range of multi media and on-line applications that are now available on CD ROM.

Through the use of the resources freely available on the Internet solicitors and barristers have the potential to save thousands of dollars annually in library and research costs. The escalating costs of hard copy subscriptions and maintenance range from $5000 to $100,000. By using the resources of the Internet sole practitioners such as barristers, suburban and country lawyers are able to match the economies of scale of the largest established city legal firms.

## USING THE INTERNET EFFECTIVELY — SOME TIPS

"The worth of any information in the final instance, must be determined by the user."[7] Here are some tips:

- improve the speed and capacity of your equipment to assist in locating and accessing information;
- use a variety of different search tools;
- search with a specific goal — don't wander;
- bookmark as you go;
- be flexible — lawyers are trained as specialist information retrievers — entrenched methods can hamper the full and successful exploration of the world of knowledge;
- in order to fully utilise the Internet's power improve your knowledge of how your computer system operates;
- often, material on the Internet only points to where the information can be found — the actual information is not on the Internet.

## YOU DON'T HAVE TO BE COMPUTER LITERATE TO USE THE INTERNET — BUT IT HELPS

If we are to become part of the clever country then lawyers must be prepared to reject the superficial understanding that seems to be the norm among chief executives and professionals in the boardrooms across Australia in many business and industry sectors.[8]

## HOW DO YOU ACCESS THE NET?

You need access to a modern computer with grunt, a telephone line, a modem to connect the computer to the telephone, some free software (an Internet Browser) and a subscription to an Internet Service Provider (costing from as little as $300 per annum).

David Zyngier

*Specialised individual training in the use of this amazing resource is now available for lawyers at a time that suits them. David Zyngier is already well known around the Victorian Bar Chambers working with many Queens' Counsel and barristers. He is a senior education consultant and trainer with SANDZ Partners who know the importance of information and research in the law. He can be contacted on (03) 9885 6544.*

NOTES:

1. Plunkett, S. *Business Review Weekly* 24 February 1997 p.36
2. Ackland, Richard *Australian Financial Review* 27 October 1995 p.44.
3. Plunkett *op.cit* p.40.
4. Bruce, Justice Vince *The Australian Lawyer* March 1997 p.18.
5. *ibid.*
6. *The Computer Australian* 13 May.
7. Steele, Marion. *Online Currents* Vol. 11, No. 2 March 1996.
8. Plunket *op.cit* p.37.

# Fossilised words

THE English language is constantly changing. Words are imported or invented; words come into fashion and fall from favour. Ideas and circumstances change, leaving some words with no useful work to do. When that happens, the stranded word generally fades into obscurity, with only the lexicographer's *obs.* or *arch.* as an epitaph.

The number of dead and dying words is incalculable. But sometimes an obsolete word survives in an isolated idiom or proverbial usage, like a fossil in the cliff-face. This is curious, because it shows that we retain some memory of the word's meaning, and have some use for it, yet we confine its use to a single, specific context. For example, *betide* is never seen except in the proverbial *woe betide.* To *betide* is to *happen* or *befall.*

Another example is *kith*, used only in the idiomatic *kith and kin.* The OED defines it as meaning:

1. Knowledge, acquaintance with something; knowledge communicated, information.
2. Knowledge how to behave; rules of etiquette.
3. The country or place that is known or familiar; one's native land, home; hence country, region, quarter.
4. The persons who are known or familiar, taken collectively; one's friends, fellow-countrymen, or neighbours; acquaintance; in later use sometimes confused with *kin.*

In its principal meaning of *knowledge of how to behave*, it has the same origins and meaning as the equally obsolete *couth*, which surives only in the negative form *uncouth.*

*Hue and cry* is often used and often misused as well. *Hue* comes from an Old French word which means *outcry* or *hunting-cry.* The last use of it recorded by the OED is in a magazine article dated 1779: "*As soon as M. Lally appeared, a hue was set up by the whole assembly, hisses, pointing, threats and every abusive name.*" It is etymologically unrelated to *hue* in reference to colour or complexion, which derives from Old German.

The expression *hue and cry* is interesting in another way, as an example of pairs of words which are commonly used together, but which bear substantially identical meanings. Other examples are *let or hindrance*, *will and testament*, *cease and desist*, *null and void*, and so on and so forth. Where such pairs are found in a legal context, it is often the case that one of the pair is Anglo-Saxon, and the other is Norman French. The duplication was, in earlier times, an aid to understanding and a safeguard against the possibility that the nuances of the words in their native languages may not have been identical. The modern, relaxed, approach to pleadings makes the repetition unnecessary, but some old habits die hard.

Another example of this form of duplication is *part and parcel.* It uses *parcel* in a sense no longer current: *a constituent or component part, something included in the whole.* So, in *Taylor's case* (1676) 1 Vent 293; 86 ER 189, which established blasphemy to be a common law offence in England, the Court held that Christianity was "*parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law*".

*Brand new* is one of very few surviving uses of *brand* meaning *fire.* The same meaning survives in the *branding iron* and, surprisingly, in *brandy.* They all come from the old Germanic *brand* meaning *fire.* In modern German, *gebrannt* means *burned.* In four of his plays, Shakespeare uses the expression *fire-new* where we would say *brand new.* For example, King Lear: "*Despite thy victor sword and fire-new fortune, Thy valour and thy heart — thou art a traitor*; . . ."

Brandy was originally called *brandwine* or *brandewine*, or *brandywine.* It meant simply wine which had been treated with fire (i.e., distilled). *Brandywine* left its mark not only on innumerable livers, but also on American geography: it gave its name to three frontier towns and a creek in America (see, for example, *Mark Twain's Life on the Mississippi*, 1883), and to a square-rigged American frigate (see Richard Henry Dana's *Two Years before the Mast*, 1840).

*Lo and behold* is still in current use (although a bit dated), but it is made up of two archaic ingredients. For practical purposes, *lo* and *behold* are never heard separately now, although they are preserved in well-known passages in the Bible and Shakespeare. Although the second edition of the OED gives, as its most recent illustration of *behold*, a quotation from 1860, Upton Sinclair used it many times in *Jungle* (1906), and James Joyce used it in *Portrait of the Artist as a Young Man* (1916).

*Bide your time* is advice often given, in particular by older people (who understand *bide* only faintly) to younger people, who understand neither the verb nor the sentiment, but get the message. The verb *bide* has a range of meanings, all related and all obolete. The central idea is *remain*, *await* or *endure.* In its last meaning (*endure, put up with, submit to*) it is more commonly seen as *abide*, and is familiar to lawyers from the common form of the undertaking as to damages proffered by a party seeking an injunction.

*At first blush* uses a familiar word, but plainly not in its familiar meaning. Generally, *blush* is used as meaning "*a reddening of the face caused by shame, modesty or other emotion*". But several centuries before Shakespeare teased that meaning from it, it meant *a glance, blink or look* (1340); and by 1620 *an appearance or resemblance.* Although Shakespeare used it a number of times unmistakably intending its new meaning, several of his uses of it are ambiguous, and would make sense if *glance* was understood: for example, *Henry V* (1599): "*KING HENRY. We hope to make the sender blush at it.*"

But compare: *Henry VI* (Part 1) (1592): "*SOMERSET. No, Plantagenet, 'Tis not for fear but anger that thy cheeks Blush for pure shame to counterfeit our roses, And yet thy tongue will not confess thy error.*"; and *All's Well That Ends Well* (1602) "*Upon his many protestations to marry me when his wife was dead, I blush to say it, he won me.*"

*Whys and wherefores* is more proverbial than colloquial, and its use often betrays a failed attempt at literary distinction. The failure is more striking when it appears that the writer is not aware that the expression is a pleonasm: the words mean the same thing.

Shakespeare's most often quoted (and perhaps misunderstood) use of it is in *Romeo and Juliet* (1595) "*JULIET. O Romeo, Romeo! wherefore art thou Romeo? Deny thy father and refuse thy name! Or, if thou wilt not, be but*

*sworn my love, And I'll no longer be a Capulet.*" From this, it seems, some assume *wherefore* means *where*. *Wherefore* simply means *for what reason, for what purpose*, in short, *why*. Shakespeare used it often. It did not go out of common use until the late 18th century.

By early in the 19th century, recorded use of *wherefore* suggests uncertainty about its meaning. Although Charles Dickens uses it in its proper meaning, he puts it in the mouth of his characters with a vague or mistaken sense, for example in *Oliver Twist* (1838): "*'Because, my pretty cross-examiner,' replied the doctor: 'because, viewed with their eyes, there are many ugly points about it; he can only prove the parts that look ill, and none of those that look well. Confound the fellows, they will have the why and the wherefore.'*"

*Meat and drink* preserves the original meaning of *meat* as *food*. The OED records that usage as late as 1902. The same meaning is also preserved in *mincemeat*, the sweet mash of dried fruits used in Christmas pies (mince pies). Until early this century, *green-meat* was grass or green vegetables given to horses, and *white-meat* was anything made with milk. We still refer unself consciously to confectionary or cakes as *sweetmeats*. And when it is said that *one man's meat is another man's poison*, the meaning is plainer, and the proverb makes more sense, when *meat* is understood as *food*.

Starting these articles about language is usually difficult, and often delayed. Ending them is even more difficult, but necessary. So, with no attempt to relate it to what has gone before, I note the curious word *premises*, which lawyers and logicians use so often. Normal people speak of *the premises* meaning the house or other building which concerns them. Logicians speak of *the premises* (or *premisses*) meaning the starting propositions of a syllogism. Lawyers, wanting to summarise all which went before, without having to repeat it, say *in the premises . . .*

They are all the same word, with the same original meaning. *Premises* are previous statements or propositions from which a stated conclusion follows. A formal conveyance of real estate began with a recitation of the parties and a description of the property and the vendor's title. The lawyers referred to those details later in the deed as *the premises* (as logicians would). The layman, naturally, took that as a reference to the most important of the premises, namely, the property conveyed.

Julian Burnside

# Statutory interpretation

## Examination question for *Commercial Law I* candidates at RMIT University

IN 1986 the Federal Parliament amended the Commonwealth *Trade Practices Act* 1974 by passing the *Trade Practices Revision Act* 1986 (No. 17 of 1986). Section 35 of the 1986 Act added a new Section 65U to the Trade Practices Act. The new Section 65U came into operation on the 1 July 1986 and reads:

> s.65U At the expiration of two years after the day on which this Division comes into operation, this Division shall cease to have effect in respect of goods which are foods and drinks intended for human consumption.

At a later date (1988), the Federal Parliament further amended the Trade Practices Act by passing the *Trade Practices Amendment Act* 1988 (No. 20 of 1988). Section 4 of the 1988 Act repealed Section 65U effective 1 July 1988.

Questions:

(a) Of what effect was s.65U PRIOR to 1 July 1986?
(b) Of what effect was s.65U BETWEEN 1 July 1986 and 1 July 1988?
(c) Of what effect was s.65U AFTER 1 July 1988?
(d) Was it a valuable utilization of taxpayers' funds for the Federal Parliament to enact both the *Trade Practices Revision Act* 1986 and the *Trade Practices Amendment Act* 1988?
(e) Were the members of Parliament who passed the 1986 and 1988 Acts intoxicated and/or under the influence of prohibited mind-altering chemical substances when they
  (i) passed the 1986 Act;
  (ii) passed the 1988 Act;
  (iii) passed the 1986 and 1988 Acts?
(f) Should the Parliamentary Members' Bar be closed when Parliament is sitting?
(g) Was it that the members had consumed too much foods and drinks?

Your answers should include your reasons and reference to the relevant case law and statutes.

(5 + 5 + 5 + 10 + 15+ 5 + 5 = 50 marks)

## Not the Essoign

# Verbatim

## Contacting deceased

Part of the Memorandum to counsel in a recent brief:

"Since your last advice there has been no contact with the deceased . . ."

(We've all seen suburban practitioners sidelining in accounting, consulting and real estate, but clairvoyancy?)

(I guess this must be a 'Medium'-sized practice.) HO HO.

## Master class

Coram: Master Evans
3 June 1997

Maclean referring the Master to an affidavit:

**Maclean:** It's on page 4, Master.
**Master:** Where is page 4?
**Maclean:** (helpfully) It's the page after page 3 . . .

## Calypso court

**Reader:** This involves the import of bananas from an island in the Caribbean . . .
**Burnside Q.C.** (acting Judge in reader's course)**:** Do I have jurisdiction over the Caribbean? If I do, I think I should have a view."

## Raw prawn

From a mediation (parties and counsel to remain anonymous):

"I really feel sorry for him. I think his mother's just using him as a prawn . . ."

## Hallmarks all round

**Miss Lieder:** May I say, Your Worship, it's one of the most difficult cases. I can only put it this way. It takes Mr. Weinberg time to work it out. Now, for me, that's always the hallmark. If it takes Mr. Weinberg time, it's got to be something . . .
**Her Worship:** Well, if it's a hallmark for you, Miss Lieder, I'll accept it as a hallmark for me.

## Milking it

Meanwhile in the County Court in Melbourne, minutes after a jury went out to consider their verdict they buzzed to come back. Counsel and Judge were in the middle of a discussion as to whether the jury should be redirected. The buzzing was relentless. The tipstaff, in a quandary, opened the door and the jury filed in and took their seats. The question of redirection remained unresolved. The following conversation ensued.

**Judge:** Have you got a question?
**Foreman:** No.
**Judge:** Do you have a verdict?
**Foreman:** No.
**Judge:** What do you want?
**Foreman:** Some milk.

## Boxing match

*Alessio & Ors* v. *Robert Jolly & Anors*
(the Pyramid cases)
Coram: Justice Byrne
February 1997

**His Honour:** What do you say needs to be done, as you understand the position of the State Government parties? They need to go through boxes 1 to 14.
**Derham:** Which they have done.
**His Honour:** To determine whether public interest, or some other privilege or the like is maintainable. And box 15 likewise?
**Derham:** Box 15, they have gone through.
**Fajgenbaum:** We have not
**His Honour:** Just a moment.
**Derham:** An officer of the Department of Premier and Cabinet has gone through it. As we understand it they have already inspected all of boxes 1 to 14, and what we wait for is a list of the documents they say we shouldn't look at.
**His Honour:** Right, thank you.

Mr. Fajgenbaum, what do you say about this? First of all these documents have been available for a long time, relatively speaking. So, let's deal with boxes 1 to 14 . . .
**Fajgenbaum:** Your Honour, as to box 15, might I simply make the observation that it was not looked at by anyone instructing me, it was looked at by an officer of the Department of Premier and Cabinet for the purpose of assisting the Attorney in gaining the independent advice from we now know Mr. Merralls which has resulted in the Attorney not deciding to take any further steps, as I just indicated to Your Honour.

Mr. Justin Oliver, who was the officer and the solicitor of the Department of Premier and Cabinet who inspected the documents, inspected them for the purpose of giving more ample instructions to Mr. Merralls. I understand that he didn't make a list of documents which were subject to legal professional privilege or public interest immunity, but he merely observed that there appeared to be documents in that category, and he so informed Miss French that, "You ought to go and have a look at them for that purpose as well". So the premise upon which my learned friend was making his submission about box 15 was just fundamentally flawed.

As to the first 14 boxes Your Honour, unlike the private wealth of Phillips Fox and those who are instructing it, Your Honour, we live in an area of public squalor, we are not as well resourced . . .
**His Honour:** Mr. Fajgenbaum, I am not interested in a political diatribe.
**Fajgenbaum:** My learned friend . . .
**His Honour:** I presume that such resources as the parties wish to bring to bear have been brought to bear.
**Fajgenbaum:** Such resources . . .
**His Honour:** And I see no parsimony on the part of the major parties in this case, your parties included.
**Fajgenbaum:** Such resources as we wish to bring to bear and were able to bring to bear were brought to the task of the inspection of the first 14 boxes, Your Honour.

## Discriminatory tale

### Human Rights and Equal Opportunity Commission

Sir R. Wilson, President
Ms. A. Kohl, Commissioner
5 March 1997
Dr. Scutt for Applicant
Hammond for first Respondent
Shelton for second Respondent

**Hammond:** Mr. President, I don't mind my learned friend and her instructor conversing, it's obviously necessary to get instructions, but perhaps they could be asked to [speak] a little softer.
**Scutt:** It's actually got to do with height, we've just realised. When you've got two short people at the Bar table, as women generally are, it actually makes a difference in terms of any . . .
**Kohl:** We have no objection if you want to sit around that side so that you're closer.
**Scutt:** That's what we'll do, yes.
**Hammond:** Yes, I had noticed that this [Bar] table discriminated against short women.

## Sacred and profane

On returning from Court, I received a message at my switchboard:

"We don't have the document. Try the PROFANITY office of the Supreme Court."

(Great — is there a Master of Profanities? What about a Divinity office?)

## Present and correct

Jim Nicolaou sworn and examined:

**Mr. Clarke:** Sir, is your full name Jim Nicolaou? . . .Correct.

Is Jim an Anglicised version of Dimitriou? . . . That's correct.

Is your name spelt N-i-c-o-l-a-o-u? . . . Correct.

## His and her Honour

*R.* v. *Demarco*
Coram: Balmford J.
15 May 1996

B. Kayser addressing jury:

. . . Demarco, you might well think, but as His Honour said — as Her Honour, I am sorry. Sorry to be . . .

**Her Honour:** It happens all the time, Mr. Kayser.

**Kayser:** I hope Your Honour takes it as a compliment.

**Her Honour:** Well done.

## Explaining to the client

### Melbourne Magistrates' Court

On an application under the Customs Act. Early August.

**Coburn M:** (responding to submission) I don't believe I have power to award costs as this application is made to me in my capacity as a Magistrate rather than to "the Court" . . .

**Kennedy:** Well how do I explain to my client that I walked into the building with "Magistrates Court" written on it, came up the Magistrates' Court lifts, walked into a courtroom which is apparently in the Magistrates' Court building, surrounded by people who are apparently employed by the Magistrates' Court and my learned friend tells me we are not in the Magistrates Court? Her submission is that we are not actually here!

**Coburn M:** I sympathise with you. Good luck explaining it to your client.

## Brainless practioner?

Judge Jerry Buchmeyer of the US District Court for the Northern District of Texas writes a monthly article for the *Texas Bar Journal*. Often, he cites unusual exchanges between lawyers and witnesses, pulled from depositions and trial transcripts. Here's a classic:

**Lawyer:** So, Doctor, you determined that a gunshot wound was the cause of death of the patient?

**Doctor:** That's correct.

**Lawyer:** Did you examine the patient when he came to the emergency room?

**Doctor:** No, I performed the autopsy.

**Lawyer:** OK, were you aware of his vital signs while he was at the hospital?

**Doctor:** He came into the emergency room in shock and died in the emergency room a short time after arriving.

**Lawyer:** Did you pronounce him dead at that time?

**Doctor:** No, I am the pathologist who performed the autopsy. I was not involved with the patient initially.

**Lawyer:** Well, are you even sure, then, that he died in the emergency room?

**Doctor:** That is what the records indicate.

**Lawyer:** But if you weren't there, how could you have pronounced him dead, having not seen or physically examined the patient at that time?

**Doctor:** The autopsy showed massive haemorrhage into the chest, and that was the cause of death.

**Lawyer:** I understand that, but you were not actually present to examine the patient and pronounce him dead, isn't that right?

**Doctor:** No, sir, I did not see the patient or actually pronounce him dead, but I did perform an autopsy and right now his brain is in a jar over at the county morgue. As for the rest of the patient, for all I know, he could be out practising law somewhere.

## A novus actus?

### Supreme Court of Victoria

Coram: McDonald J.

**His Honour:** That is where he took premature retirement?

**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] and Mr. Justice McHugh, Your Honour, at page 22, says: "It does not seem to me to matter in this case . . . (reads) . . . in all of the circumstances."

## Isoluble mediation

### County Court Directions Court

5 August 1997

Counsel making application for directions in a case relating to an accident involving a horse on a race track . . .

**Keon-Cohen J:** What about mediation?

**Counsel:** Unfortunately, this case has proved to be the same as the name of the horse — "Insoluble".

## State of undress

Record of interview of fisherman who escaped from an attempted arrest by fisheries officers in Gippsland.

**Hutton:** So what happened then? What clothing were you wearing?

**Ploderer:** I only had shorts on.

**Hutton:** No shoes, no shirt?

**Ploderer:** No shoes, no shirt. I crawled on my hands and knees for a while and there were some places where I couldn't walk. It was just too thick and I followed that river for the whole day Monday. The whole day Monday. I walked along the edge of that river and it got very thick and I came to a rapid with a crossing and I seen a road after following the river for a few hours. I thought if I walked along that road I knew that road went to Wingan Road and I thought if I stick with this river I've got fresh water. I need fresh water to drink. Anything could happen on one of those roads. Not realising how dangerous that river really was. That whole situation. So I ended up walking along them rapids. I passed the crossing there and kept going past the rapids ended and there was more river, a wide river continuing on for mountains and mountains and mountains.

As I got further away from those rapids, I was further away from that road that I knew. I knew that road was civilisation. I went up to that river and kept following that river. I thought the highway was at the end of that river. The river on Monday afternoon started to fork off in several different ways and then I swam a couple of kilometres and walked through dirty water and swam. I got out of the water after swimming, crawling along the edge of the bank to keep going along towards the highway, and the bush got so thick that I could not even walk or go near the bush so I had to get back in the water and keep swimming

in the water for several hours. I mean I swam for 20 minutes, and then I'd stop, have a rest, and keep breast-stroking up that river. And then on Monday night as it was getting dark I was getting a lot more scared and I actually thought I was going to die by 8.00 p.m. Monday night.

So I curled up in ferns, thick ferns for several minutes and slept in the ferns and tried to sleep. I tried to start a fire with two pieces of wood by rubbing them together. I tried that for several hours on and off during the night so that I could be rescued. And in the morning at first light I thought to myself, "If I keep continuing along this river I really could die and if anything happened to me here no-one is ever going to find me here". And then I seen a spotter plane. I waved and waved to him but he didn't see me; he was so high up. I really wanted to get out of that river. I got bitten by a spider on the way home and I started to panic then.

I ripped it off my neck and chucked it in the water and seen it was a fairly big spider with a white stripe down along its back. That freaked me out a bit more This was Tuesday morning at around 9.00 a.m. That freaked me out more and I had tears rushing down my face on and off all day thinking, "Am I going to die?". And I was sitting in some beach there drinking a bit of water feeling my neck to see if there was any lumps there and then I thought to myself that I just have to keep going. So I just kept going. I felt a bit shaken up and then I seen another snake, a big brown snake, then I sort of dodged that and then I found a rainforest bit which wasn't too thick so I followed that and walked down the river back down it. I walked back for about 1 km and then I swam again for ages, for ages, I kept swimming. I swam for two-and-a half hours on and off, breast-stroke, walking through those reeds again. Hoping when are these rapids going to come up?

Then I got to the second set of rapids and I got up there, drunk more water, then sort of skipped across the rocks to get back quicker and seen another snake reared up at me on those rocks. I think it was a black snake and it reared up at me and I just kept running across the rocks and just kept stomping across those rocks and actually crawling around very hard sections and walking through more water. More river came. You couldn't walk anymore you had to get in the river. I walked and swam and this continued until (I had a watch on then) hours, walking and more swimming after that first set of rapids. That would have been around lunchtime when I got to the second set of rapids which is where the flying fox goes over the rapids. I seen a road up there, that water tank and that was a big relief to see that road there. To know that I had got back to that road. I thought that this was civilisation So I grabbed some freshwater mussels. I must have grabbed at least ten. Didn't have any clothing on at this time. I soaked the shorts that I had in water and followed that brown boundary track and walked along it.

It was very hot so I couldn't keep walking. My feet were burning so I stopped in the shade. I couldn't stop for more than several minutes because I was burning up. When I stopped walking I was burning up to the max. Burning my whole body so I kept walking, kept walking, kept walking. And every hour I drank the juices out of one of those mussels.

And I walked and walked and walked, it must have been 3.30 p.m. or 4.00 p.m. when I came out on the Wingan Road; the main one. Followed it right; to the highway. I didn't get to the highway but I knew it went to the highway and followed it for several kilometres. At one stage stopping, finding a sandy damp-looking patch of sand, so I laid there for almost an hour. I was pretty dizzy and, um, late in the afternoon, I'm not sure what time, a yellow van was approaching me as I was walking along the road. I sort of waved to the car in relief. I had put my shorts on at that time. I waved to the van and said, "Would you please help me? I need water." The guy in the front seat of the van then jumped out, looked at me and said "What happened to you?"

"I ran scared into the bush down in that campground. I've been in the bush for days. Please take me somewhere, please help me." I drank about two litres of water straight away. They drove me out. They gave me a lift out all the way to a friend's house. Robyn's. All the way to Kiah.

## No flaming profits

### Supreme Court of Victoria

*Joint Nominees Pty Ltd* v. *Mathew Fraser Newton*
12 September 1997
Denton for Plaintiff
Cawthorn for Defendant

Denton, acting for the insured in an insurance claim where the insurance company was claiming arson by the plaintiff:
". . . In other words Your Honour we were making ends meet. We weren't setting the world on . . . I withdraw that. We were making ends meet . . . just a small pun . . ."

# How to Lose a Contested Matter without really trying

1. Insist on asking the client if they committed the offence with which they are charged. The minute the poor bastard honestly answers your question you are unable to permit him to give false evidence or to permit such to be called on his behalf, effectively punishing the poor sod for his honesty. Generally speaking, the public couldn't give a stuff about legal ethics . . .
2. Never attempt to contact police or prosecuting counsel in an endeavour to resolve the matter. This sign of weakness is ultimately fatal to a successful protraction of the matter.
3. Always accuse the opposition of participation in a criminal conspiracy to incriminate an otherwise innocent man or woman. Such a decision will automatically place the tribunal on the defensive where it will become putty in your hands.
4. Avoid any research or reference to the common law. Arcane concepts such as "aiding and abetting" can be dealt with when they arise by extensive reference to the " Six Carpenters' case" or the like until the tribunal surrenders.
5. Dress in a manner indicative of your modernity and independence and which asserts both a fashion statement and a vigorous indifference to the Bench's concerns and attitudes. Denim is to be preferred on most occasions. Bright colours are guaranteed to attract attention.
6. Under no circumstances maintain any undertakings given prior to trial. Reliance upon the same by the prosecution can be shown to be due to lack of preparation and will attract severe censure by the tribunal.
7. In the case of migrant people, insist upon leading all evidence and asking all questions through an interpreter. This is guaranteed to quadruple the length of hearing and to reflect adversely upon the inference drawn as to the honesty of your client's instructions.
8. Under no circumstances should any formal admissions of fact be made or even an informal concession re same contemplated. To do so will only be construed as forensic weakness by both the tribunal and your opponent.
9. Never address the Bench by any title other than "Yeah". If some form of salutation is required, select the lowest form of jurisdiction applicable to your State or Territory. This clearly indicates that you, at least, are aware that the tribunal's appointment was without merit, and will make it apprehensive of publicly clashing with so well-informed an advocate.
10. Do not fall into the trap of listening to the Bench or displaying respect to its opinions. It has not had the advantage of being instructed by your client, and is clearly therefore incapable of understanding the true issues in the case.
11. Wherever possible call alibi evidence from close and amnesic family members, particularly in the case of unopposed adjournment applications.
12. Under no circumstances is a Bench to be addressed respectfully. The independence of counsel is to be preserved at all costs.
13. Voir dire should be held whenever possible to demonstrate to both Court and opponent that your vigilance is unceasing.
14. At all times issue "Freedom of Information Act" applications and cross summonses, since this demonstration of fixed purpose cannot but impress the tribunal with the consistent merit of your client's cause.
15. Never seek particulars of an offence until the morning of the hearing and only when the matter has in fact been called on. This will prevent any attempt at self-serving responses by the prosecution.
16. If briefing, remember at all times to select counsel who have already publicly and repeatedly clashed with the tribunal in question, preferably those who are unable to read, or if literate, comprehend, simple chronological concepts.
17. Always insist upon a view of a crime scene, even if pleading guilty.
18. Under no circumstances permit brief psychological assessments or reports to be used. Those with apparent attention to detail and sentence construction should be eschewed in favour of the more traditional word-processed variety which are favoured by the courts.
19. The judicious usage of "In Court" identification parades is to be encouraged at all times.
20. Do not be misled into giving accurate estimates as to the time necessary for the completion of a hearing. This is the court's responsibility, and you are not to blame for its administrative incompetence.
21. Never apologise. The Appeal Court will ultimately agree with you.
22. Taking pro forma appeal papers to court will save a great deal of time and impress clients with your obvious command of a given situation.
23. Do not hesitate to take notes, but avoid future embarrassment over factual issues by ensuing wherever possible that they do not relate to the matter at hand.
24. To build tension for the ultimate appearance, try to be outside the court precincts until the matter is called for the final time.
25. Remember to introduce social justice concerns into criminal pleas and appearances wherever possible. It is your duty to call for change in any law which you perceive to be inadequate.
26. Encourage affected family members to voice dissatisfaction with the sentencing process during the hearing itself. This ensures the tribunal's full attention.
27. Always seek separate hearings. If less than one charge exists, suggest alternatives to the prosecution to remedy this deficiency.
28. Do not hesitate to test a witness's credit by arcane means. Scrying and divination are equally good, as is weighing against a Church bible.
29. Remember that the prohibition against attack on credit can be easily avoided by a legally trained practitioner. Discretions to disallow questioning ought to be vigorously tested by the continued repetition of the question until the desired result is obtained.
30. Public expressions of discontent are among counsel's most valuable armoury . . .

Max Perry

# The stress-free Lawyer's Gown, à la Cardin

PARIS — French lawyers enjoy power and prestige — they are always addressed as "maître", or master— and, off stage, wardrobes as spiffy as their fees allow. But in the courtroom they are obliged to wear black robes that are basically unchanged since Napoleonic decree.

Their hemlines tend to pouch at the back because of a train tucked up inside the robe and attached to a strap at the left armpit; the robe is closed by a long and fiddly row of buttons, the wide sleeves bordered by a deep black satin cuff precariously held in place by four buttons. At the shoulder and the back there is fine organ-pipe pleating. Length is usually mid-calf.

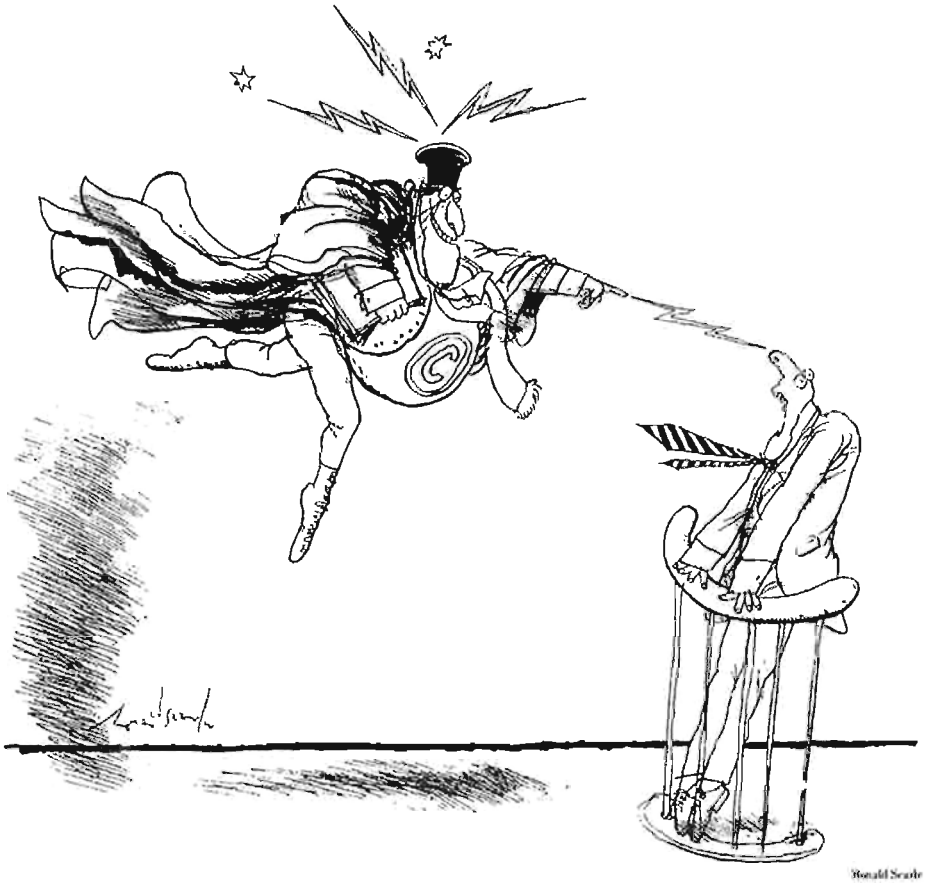
The outfit is accessorised by a pleated white fichu and, over the left shoulder, what is called the *epitoge,* a vestigial shawl tipped in ermine (nowadays rabbit fur) in the provinces but furless in Paris. On their heads lawyers can — but rarely do these days — wear a stifftoque with a black velvet border and flat black pompon.

It is an outfit that can have a certain allure and even a practical use when a sweeping wave of the arm — the sleeves are 60 centimetres (24 inches) wide at the cuff — adds to the drama of a summation with what is known in the trade as *les effets de manche.*

But there are no longer housekeepers at the Palais de Justice, or central courts, to launder fichus or sew on buttons, and lawyers rushing from one court to another tend to roll up their robes and end up looking frowsy before the judge. Worst of all, they sometimes lose their dignity by falling up or downstairs when their heels catch in their hidden trains, or find themselves, because of their deep cuffs, impaled on doorknobs.

These are some of the complaints heard by Elisabeth Gasche, head of the house of Bosc, founded in 1845, and the leading supplier of legal and academic costumes with a shop just opposite the Palais de Justice and ten seamstresses upstairs.

Gasche promptly addressed herself to Pierre Cardin, the entrepreneurial couturier who has even lent his name to chocolate boxes, and Cardin has come up with the first new gown to be admitted to the Bar in more than 150 years.



Boldly, Cardin has replaced the buttons by snaphooks and has eliminated the train and loose satin cuffs. He uses wool crepe, lighter than the wool used in Bosc's top-of-the-market Prestige model. "His is much more elegant and lighter," says Gasche. The silhouette is impeccable in perfection and elegance, her press handout says.

But instead of black the Cardin robe is blue. The effect, with its vertical satin bands along the snaphooks, is not unlike a TV evangelist's robe. But, Gasche adds in haste, the model hanging in the shop is but a prototype. "Couturiers are there to be extreme. When it goes on sale it will be totally correct. Black always has a sheen of another colour, usually pink or gray. This will be black with a blue sheen, *un bleu corbeau* [crow blue]," she says.

The real selling point of the new model is invisible. Within the fabric are filaments which, it is claimed, reduce the stress of courtroom appearances. "They are metal particles that permit us to discharge the static electricity that we create when we are anxious," Gasche says. Presumably, the same material can be used for judges' robes. Plaintiffs will have to take care of themselves.

French robes definitely follow their own briefs. It is hard to imagine James Stewart wearing an epitoge in a courtroom scene or Charles Laughton needing anti-stress filaments sewn in his wig. In a history of costumes and the law, Jacques Boedels, an international corporate lawyer, includes a preface by the distinguished lawyer and academician Jean-Denis Bredin who says that French robes maintain and protect the distance of justice and signify the importance and complication of hierarchies.

Anyone who has attended French trials

knows this to be so. The decor of the courtroom may be ornately majestic and full of hortatory allegory but the atmosphere seems strangely informal, in fact collegial: a clubby meeting of *les gens de robe* in which the plaintiff or accused is merely an outsider, a civilian.

If lawyers' robes until Cardin were more or less identical, the details signifying judges' ranks are dizzying, from the number of gold stripes on their toques to the absence or presence of lace in their fichus to the colour of their silk belts (always worn with the buckle slightly off-centre), to the words used for colours. Yellow is always called jonquil, red scarlet, mauve is amaranth. The outfit of the Chief Judge of the Cour de Cassation, or supreme court, is grandest of all, with traces, it is said, of Napoleon Louis XIV and the high priests of Jerusalem.

The house of Bosc makes these and, in addition, robes for magistrates from West Africa to Brazil and even English barristers' gowns. Its narrow stairway is lined with colourful academic hoods.

It is a wide-ranging business, full of possibilities as the number of lawyers grows exponentially, but it lacks the planned obsolescence so appealing to modern retailing. Some lawyers pass their robes on to their sons and even a new one usually lasts ten years. There is also a lawyer's superstition, actively discouraged by the house of Bosc, that after the third robe a lawyer will not live to buy a fourth.

Cardin's gown, "La Robe d'Avocat Haute Couture," as Bosc calls it, might increase trade but it could also, one would think, have a dangerous effect on courtroom cameraderie if some lawyers stand out by looking different from their peers, stress-free and couturely elegant. "A lawyer in a Prestige gown already looks different from a lawyer in a polyester gown," is Gasche's reply. "It's up to each person to decide what sort of allure he wants. Even in a uniform, personality shows through."

So far, she says, the Cardin version, with its slightly flared hemline, appeals most to women lawyers. It will go on sale in September for 5000 francs ($815) — the Prestige model costs 6200 francs— and when asked if she has had any orders Gasche replies that a lot of people have shown interest. "Everyone finds it handsome and elegant, and people like change." The new robe, she likes to proclaim, is not just for the year 2000 but for the year 3000.

At least one lawyer, an American practising in France named John Fredenberger, is philosophical about the Cardin costume. "After all, it could have been by Jean Paul Gaultier," he said.

Mary Blume



# The compleat answer

## In the District Court, McLennan County, Texas
## 54th Judicial District

*John Doe, et ux.* v. *Missouri–Kansas–Texas Railroad Company of Texas* — No. 18338. Answer.

[The petition of the plaintiffs alleged that Mrs. Doe[1] was invited by an employee of the defendant, Richard Roe, to climb up into the defendant's signal tower to look at its mechanism and operation; that she did so, and while sitting in a chair in the signal tower came in contact with the tower's electrical current, as a result of which she received a severe shock and was seriously injured. The answer filed on behalf of the defendant was as follows:]

TO THE HONORABLE JUDGE OF SAID COURT:

NOW comes the defendant, Missouri–Kansas–Texas Railroad Company of Texas, and with leave of the Court first had and obtained, files this its first Amended Original Answer and Cross Action herein, and for such shows to the Court as follows:

I. Defendant demurs generally to the allegations in plaintiff's petition contained and says the same are not sufficient in law to constitute a cause of action against it, and of this it prays judgment of the Court.

II. For further answer, if necessary, this defendant denies all and singular the allegations in said petition contained, and demands strict proof thereof.

III. Answering further, if need there be, this defendant railroad company would reveal to the Court that in truth and in fact the plaintiff, Mrs. Jane Doe, for several nights prior to the occasion of which she now complains had strolled by the signal tower in question and on each occasion persistently propositioned this defendant's employee at said tower, one Richard Roe, to engage with her in an ancient and popular pastime.

That the said Richard Roe is an old and trusted employee, a man of over sixty winters, with snow in his hair but with summer in his heart; that the faint odor of Hoyt's perfume touched his delicate nostrils, and the full red painted lips of this modern young Aphrodite brought back youthful dreams to his aging head. Although the season was fall time, the sap began to rise in his erotic soul as in romantic springtimes of yore. It was on the unlucky night of Friday the 13th of September, A.D. 1934, that the said Richard Roe finally succumbed to plaintiff's feminine allurements, the price being one dollar, paid in advance.

That in all truthfulness the only mechanical contrivance or unique lever about the said tower in which the plaintiff expressed any interest whatsoever was that which was hung on the person of the said Richard Roe.

That this defendant railroad company had not equipped its said signal tower for such passionate purposes and had, in fact, instructed its said employee to admit no

1. Although these pleadings were actually filed and are a matter of public record, for obvious reasons the name of the persons involved have been changed. The case remained on the calendar for over a year without trial. Plaintiff's action, and defendant's cross-action were then dismissed, with costs paid by plaintiff.

visitors thereto, but that, unknown to this defendant, the said Richard Roe permitted the plaintiff to come into the crowded quarters of said tower to indulge with him in an indoor session of Spanish athletics; that while she reclined upon a cushioned chair and unfolded her female charms to his approach, her bare knee did touch an open electric switch upon the wall of said tower, thereby creating an electrical contact quite different from the contact for which she was prepared; that either from shocked surprise at the seemingly remarkable amative powers of the said Richard Roe or for other reasons unknown to this defendant, the said plaintiff sank to the floor of said tower in an apparent swoon, leaving the said Richard Roe unrewarded and bewildered, with raiment disarranged, and struggling desperately to operate his signals for a fast train which he discovered at that moment approaching unexpectedly upon the defendant's tracks.

That as to this defendant, the transaction in question was ultra vires and completely outside the scope of employment of the said Richard Roe, and clearly without benefit to this defendant corporation, except for the publicity that might possibly attend this proof to the world of the exemplary manner in which the Katy Railroad cares for and preserves the virility of its aging employees.

That if it should be held, however, that the said Richard Roe was on the occasion in question acting for this defendant railroad company, which is, as the Court has often heard plaintiff's counsel charge, a heartless and bloodless corporation, a poor creature of the statute without pride of ancestry or hope of posterity, and physically incapable of becoming enraptured in the ethereal paroxysms of love, then and in that event only, this defendant pleads that the plaintiff was guilty of contributory negligence in the following respects:

That the said Richard Roe urged the plaintiff to remove herself from the cushioned chair to the floor of the tower in order that his engagement might be fulfilled in the good old American way, but that the plaintiff proclaimed her proficiency and maintained her ability to handle the entire situation from her position in the chair, and that she remained in said chair contrary to Roe's urgent solicitations and entreaties and received the electric shock as a direct and proximate result of her insistence upon departing from well recognized precedent; that plaintiff was negligent in failing to pursue her activities horizontally from the floor in the time-honored, accepted and orthodox style, and that her failure to do so proximately contributed to cause her injuries, if any.

That should it be held that the said Richard Roe was acting for this defendant railroad corporation and that in some manner of judicial reasoning unknown to it this defendant should be held to have enjoyed vicariously the benefits anticipated by the said Richard Roe from his relations with the plaintiff, then and in that event this defendant shows that there has been a complete failure of consideration in that there was no contact as agreed.

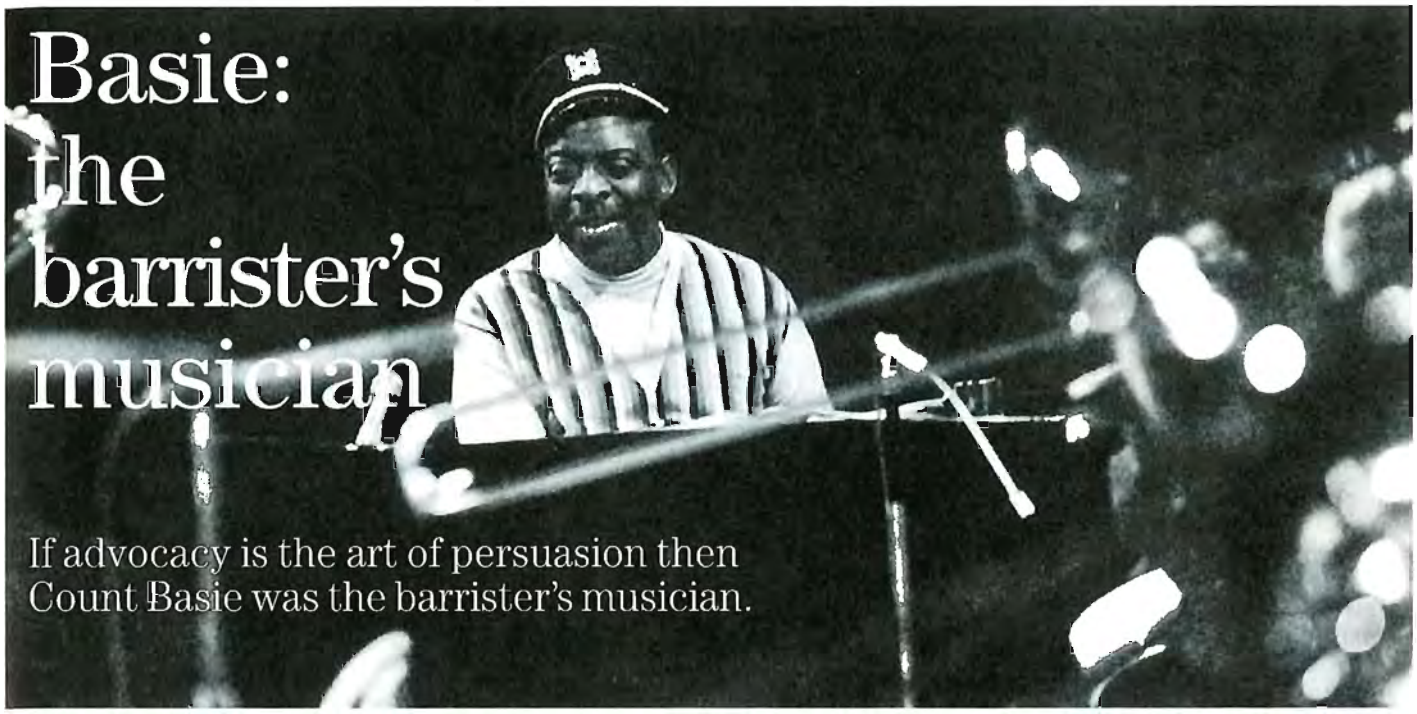
That in any event, it is a matter of judicial knowledge that the business in which plaintiff was engaged entails certain ordinary risks, one of the least of which is the risk of being shocked, and in this connection it is shown that the plaintiff held herself out as an expert in her art, while the said Richard Roe was to any observant eye a man fresh from the soil and reared to the manners of the pioneer countryside, a man entirely untrained to innovations of perpendicular postures and therefore completely unable to anticipate plaintiff's new-fangled hip and knee movements from a cushioned chair, or to warn plaintiff of the probable consequences thereof, and that plaintiff assumed the risk of her injuries, if any.

IV. And now, becoming actor herein only in the event the Court should hold that the said Richard Roe represented this defendant corporation in the transaction in question, which will never be admitted, this defendant shows as against plaintiff that its agent Richard Roe did pay to the said plaintiff one devalued dollar of United States currency and received no value therefor as agreed by plaintiff, and that said dollar has never been returned to its owner, and that under all the facts hereinbefore alleged, it is entitled to recover said sum of money.

WHEREFORE, these premises considered, this defendant railroad company prays that plaintiff take nothing in this suit, as did the said Richard Roe take nothing from plaintiff, and that in the alternative alleged it recover from plaintiff the sum of one dollar, and all costs of suit herein, and that its virtue be in all things vindicated, and that it be further relieved of all possible insinuations against its chastity that may arise as the result of this lawsuit, and for such other and further relief as it may merit.

Naman, Howell & Brooks,
Attorneys for Defendant,
Missouri–Kansas–Texas Railroad Co.
of Texas.

# Basie: the barrister's musician



If advocacy is the art of persuasion then Count Basie was the barrister's musician.

JUST as the barrister must develop a keen ear, an exquisite sense of timing and a passion for precision and exactitude so did Count Basie (1904–1984) acquire a touch that was unique among jazz pianists.

It was light and extremely precise. To a jazz pianist notes are like words to the advocate and Basie's choice was near perfect. Succinct and compact statements are the hallmarks of Basie's style.

The skilled trial lawyer considers and anticipates the effect that words will have on the people destined to hear those words. So did Basie have the ability to hear everything he played before he played it.

Basie conceives an idea, places it in tonal perspective, translates it into actual notes for his piano and plays it all in a split second.

Silence in the right place at the right time is a powerful weapon in the hands of the experienced barrister. When Basie soloed he artfully used silence to pace his lines. The sound of piano playing usually set the mood and tempo for each piece. Then sometimes the entire selection went by without the audience hearing more from Basie than a few "plink plink" interjections.

Interjections in advocacy are a skill of their own. In Basie's interjections, jazz piano had the lightness, bounce, syncopation, and flexibility of what became known as comping. Basie's comping is light, very sharp and lively. Listen to Basie's classic "Taxi War Dance" and focus on the piano accompaniment.

No matter how hectic things become the skilled advocate must externally appear calm and in control.

Although Count Basie led one of the most swinging big bands in jazz history when compared with all others from the swing era, Basie's never seemed out of breath nor the least bit frantic.

The great barristers survive setbacks and create long worthy careers. Basie led his big band almost continuously from 1937 until his death.

Noteworthy advocates are generous in the time they allocate to train their young readers. Every edition of the Basie band had at least two players who made important contributions to jazz history.

Great barristers are great team leaders. Basie created rhythm sections that were noted for achieving a balance among the sounds of its members. The parts were so smoothly integrated that one listener was inspired to compare the effect to riding on ball bearings.

The gifted advocate allows the words to speak for themselves creating balance and resonance.

Basie's musicians seldom appeared to dominate. Guitar, base and drums were all carefully controlled to avoid disturbing the evenness and balance of sound.

Great barristers become role models for younger lawyers. Basie's music influenced generations of ambitious musicians who continue to pay homage to his extraordinary style.

Great advocates create precedents. Basie's recordings are among the most significant in jazz history.

The great persuaders have no need to shout. For 30 years, the Basie band had the distinction of being almost the only big band that swung while playing softly.

Experienced advocates alternate the volume of their delivery to keep attention.

Basie's music during the 1950s and 1960s capitalised on the band's skill with dynamic contrasts: by very loud passages which rise and fall in volume so gradually that one wonders how it is possible. The band maintained precision and balance at a variety of performances. Moreover, the band did this without sounding mechanical.

So do the experienced advocates remain fresh and supple in delivery.

Finally, great barristers pride themselves on the simplicity of their arguments.

Count Basie always placed more emphasis on simplicity and swing feeling than on complexity and colourful sounds.

Simple catchy riffs were the rule, even when sophisticated composers and arrangers were writing for his band.

Whatever way you look at it, Basie is the "barrister's musician".

Aaron A. Eidelson

# James Isles' winning entry in Winter *Bar News* competition

THE recent new addition to Madam Tussaud's Waxworks, a lifelike replica of a leading commercial silk Jack FAJGENBAUM in casual clothes, has been stolen.

A pretty girl masquerading as a slightly overweight pretty girl was seen leaving the wax-works with the replica clasped to her side. She appeared to be beaming at the moment of this grotesque crime, in an effort to conceal its monstrous nature. Police are not discounting the possibility of this crime having been committed by people being associated with the real FAJGENBAUM.

Following the recent appointments of Merkel, Finkelstein, Goldberg, Chernov and Gillard, the senior ranks of the Commercial Bar have been decimated. This has given rise to enormous demand for FAJGENBAUM. It is believed that the wax replica, when properly robed, could be seated in Court during the opening and closing addresses, examination of witnesses by opposing Counsel, etc., thereby allowing the ubiquitous FAJGENBAUM to fill this unprecedented and as yet unsatisfied demand. Enquiries are still continuing.

Anyone seeing this replica is requested to immediately contact the Bar Ethics Committee, the Police, their RPA or Jan Wade.

James J. Isles

Fajgenbaum stolen

## Runners up

### First photograph treasured

Dear Daddy,

You have no idea how excited I was to meet you and I will treasure this first photograph I have of us together all my life. Look, it was only natural you would be stunned. I tried to look my very best — I had my hair done specially and bought a new dress just for you.

You know how we talked about me being brought up in the orphanage and not having a mother or father — well you shouldn't feel guilty at all — I mean how could you ever know I was even born, given you didn't know my mother's name or what happened. When I finally tracked my mother down, she explained it all, eventually: how she had got into the wrong car at the Coburg drive-in, liked the look of you and, you know, you were pretty young then. Just as well she kept the registration number of your old car — she kept it just in case she ditched her boyfriend - that's how I found you, you know. The police were very nice and helped a lot, and what with your unusual name, after that it was easy.

I just can't believe my father is a — what did you call it — Q.C. or something. I bet you can't believe you've got a daughter.

Oh — I should've told you — I don't think it's a good idea you should meet my mother.

Love,
Cindy

Bill Martin

### Respected Silk takes on his last work experience student

"No, no, you've got it all wrong," she told the preliminary hearing into the sexual harassment suit. "That's not what happened."

She dropped her head into her hands and wept. Then she looked up at the panel members from beneath her wet lashes. "I'd never have asked him to take me on for work experience if I'd known it was going to turn out like this."

"But how could you have been so naïve? Surely you've had enough experience of the world to know how alcohol can affect even the most mature adults?"

"Yes, yes, I know," she cried, "but he was so nice to me; explaining how to use the fax machine, showing me his wig and then asking me to join him for a drink after work. I think I just misunderstood his intentions."

"Well I'm sorry miss," said the most senior member of the panel, "but we will be finding in favour of the Silk. What happened to you is entirely your own fault and we suggest that you are more careful next time you choose to sexually harass an innocent and respected member of the Bar."

Howard Friedman

### "I only came, for, for, a view. True."

Lachlan Watts

### Determinable interest?

"Her reaction took me completely by surprise," said counsel. "I simply mentioned to my client that any real action might require her first to establish determinable interest."

His explanation was accepted by the Ethics Committee.

Andrew R. Traves

# Gabriel Cannon receives Montblanc prizes for her winning Autumn *Bar News* competition entry

*Gabriele Cannon with her Montblanc pen and notebook at Pen City.*

Enter the Spring *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 photographs.
- provide a short (and apocryphal) explanation as to the circumstances in the two photographs to the right.

The entrant who provides what the editors believe to be the most entertaining caption and explanation will receive a Montblanc Ballpoint Pen, and Mont Blanc Leather Notebook, supplied by Pen City, having a combined retail value of $365.


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 East by 17 November 1997.*

# "Unfortunately, the Sydney Barristers played to their ability, and we played to ours"

## Cricket v. New South Wales Bar Association

THE Annual Match against the Sydney Bar for the Sub-Standard Trophy was played on 5 April 1997 at the University of Sydney. The match did not go according to plan, at least, not our plan. Unfortunately, the Sydney barristers played to their ability, and we played to ours. A notable exception was Middleton (Ross), taking two wickets and making 50. Honourable mentions to Connor, who bowled tidily, and Forrest (Joe), who batted well. Other scores of batsmen and bowlers' analyses will be provided on a confidential basis upon receipt of a written application enclosing $100 security bond, which will be forfeited upon disclosure of any of the said scores or analyses. Fortunately, there was a first-grade rugby match taking place on the adjacent oval, Sydney University winning narrowly against a determined Newcastle in an entertaining match in the pre-season competition. Crooke Q.C., of the Queensland Bar, very kindly kept wickets for us and did so with his usual proficiency. The Bar congratulates Collins Q.C. and his colleagues for their resounding win, and looks forward to the 1998 fixture on our side of the country, at which (hopefully) we shall take it up to them more than somewhat. The Bar thanks King S.C. for his considerable effort in arranging the match, and the very enjoyable dinner held thereafter. Representing this Bar were Connor, Donald, Forrest (Joe), Gillard (E.W.) Q.C., Mathews, Middleton (W.R.), Shatin Q.C., and Trigar. Thanks to Paul Hayes (soon to join this Bar) and David Coates (a conscript) for their endeavours on our behalf.

Andrew Donald

## Business opportunity

**STRICTLY CONFIDENTIAL**

Dr. Bala Shagari M.O.N.
Contract Review Panel
Federal Secretariat,
Tel/Fax: 234-90-407828
Lagos–Nigeria
18 March 1997

**REQUEST FOR URGENT BUSINESS RELATIONSHIP**

First I must solicit your strictest confidence in this transaction. This is by virtue of its nature as being utterly confidential and 'top secret'. You have been recommended by an associate who assured me in confidence of your ability and reliability to prosecute a transaction of great magnitude involving a pending business transaction requiring maximum confidence.

We are top officials of the Federal Government Contract Review Panel who are interested in importation of goods into our country with funds which are presently trapped in Nigeria. In order to commence this business we solicit your assistance to enable us transfer into your account the said trapped funds.

Concisely, the source of this fund is as follows: During the last Interim Regime here in Nigeria the Government Officials set up companies and awarded themselves contracts which were grossly over-invoiced in various ministries. The present Military Government set up a Contract Review Panel and we have identified a lot of inflated contract funds which are presently floating in the Central Bank of Nigeria ready for payment. However by virtue of our position as civil servants and members of this panel and the fact that the contract was executed by a foreign firm, we cannot acquire this money in our names. I have therefore been delegated as a matter of trust by my colleagues of the panel to look for an overseas partner into whose account we would transfer the sum of US$21,320,000.00 **(Twenty One Million Three Hundred and Twenty Thousand U.S. Dollars).** Due to the nature of this transaction, we are rather constrained in our choice of a foreign partner, hence we are writing you this letter. We have agreed to share the money thus:

1. 20% for the Account owner (you)
2. 70% for us (The officials)
3. 10% to be used in settling taxation and all local and foreign expenses.

It is from the 70% that we wish to commence the importation business. Please note that this transaction is 100% safe and we hope to commence the transfer latest seven (7) banking days from the date of the receipt of the following information by Tel/Fax: 234-90-407828: your Banker's name, company's name, address, Account number, and fax number. The above information will enable us to write letters of claim and job description respectively. This way we will use your company's name to apply for payment and re-award the contract in your company's name. We are looking forward to doing this business with you and solicit your confidentiality in this transaction. Please acknowledge the receipt of this letter using the above tel/fax numbers. I will bring you into the complete picture of this pending project when I have heard from you.

Yours faithfully
Dr. Bala Shagari M.O.N.

Please kindly quote this reference number (BSG 7514) in your reply.

# Company Charges (2nd edn)

**By William James Gough**
**Butterworths, 1996**
**pp. i–lxii, 11–146**

THE first edition of this book was published in 1978. Since that time there have been considerable changes in the law, notably the passing of the Corporations Law. For such a complex subject the book is reader friendly. The book includes relevant material up to August 1995.

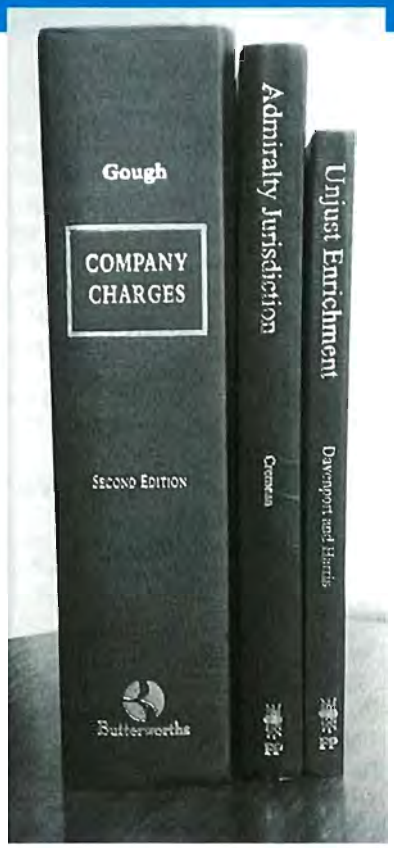
The author divides his subject into seven parts. Those parts include the nature and crystallisation of the floating charge, registration and the need for compliance. With regard to the latter, Dr. Gough examines in detail title retention arrangements. He deals with the Romalpa clause at length. What always proves to be difficult is whether the seller can call upon the buyer at account for the proceeds in the event that the product is onsold. The courts have proved reluctant to find a fiduciary relationship sufficient to provide the basis for an accounting.

In separate chapters Dr. Gough deals with the consequence of failing to register. He not only compares the provisions between the Corporations Law and the Code, but also he considers the law pre-code. A technique that he uses throughout his book is to provide select examples from decided cases. This adds to the scholarship of the work, by providing the reader with a useful series of examples where the courts have applied the general principles. His reference to authority is not confined to Australian and English decisions. Where appropriate he has referred to decisions from, as an example, the Singapore courts.

This is a very thorough book and deals with every facet of the law relating to company charges. The section on priorities is of particular importance in the day-to-day enforcement of charges in competition with the rights of other creditors and liquidators. It is important to have these problems discussed and the author treats as a separate issue a subordination of a debt and an informal moratorium that may be arranged between creditors.

As may be appreciated, I believe that this book is an important addition to a commercial library. Because of the breadth of the book, it provides an important analysis of principles of law which are not solely limited to charges.

John V. Kaufman




# A Fool for a Client

**By David Kessler**
**Hodder & Stoughton, London, 1997**
**242 pages**
**Price: $39.95 (hard back)**

AN Englishman, not a lawyer, writes an American legal thriller aspiring, perhaps, to join the ranks of John Grisham and Scot Turow — but then, Grisham and Turow are both American and lawyers.

Why do young Americans aspire to a legal career? In this novel, while waiting for the return of the jury's verdict the defendant and her court-appointed lawyer discuss why he, first in his class at Harvard Law and thereafter clerk to the Chief Justice of the US, is practising criminal law for the New York legal aid office. Why? A short cut to the top: take a low-paying job with legal aid, plea-bargain for the muggers and rapists while waiting for a case just like that which is the subject of Kessler's novel to come along — a high-publicity case with at least *some* chance of winning . . . milk the case for all it is worth, then cash in on the publicity to open his own office and watch the clients (and their money) pour in.

Why are legal thrillers hot at the moment? Why does everyone wish to join the ranks of Grisham and Turow? Apparently the ambition of every young lawyer graduate in the US today is to inject him or herself into a high-profile case that hijacks the media and to win it (even lose it) write a book about it afterwards (or have a ghost writer do it) — a fiction book with a legal background. Sell the movie rights, churn out a whole string of books, selling the movie rights, do the lecture circuit and appear on the talk shows, and live in a 50-room mansion or duplex penthouse, and maybe even go into politics.

Like Grisham, Turow and Dershowitz; like Kessler. I haven't read Dershowitz's legal novel but I rank this one with Turow and perhaps Grisham's *Runaway Jury* (certainly not the prior Grishams which are all alike and rather weak).

I cannot comment on US criminal law and procedure but the novel's treatment does not appear to be outrageously or obviously false and the author acknowledges the assistance and advice of three US lawyers including one advising on New York criminal procedure. The author's sense of recent US history is awry — perhaps a consequence of Britain not participating in the Vietnam War but I cannot swallow the heroine's father suffering grievous injuries in the battlefield after witnessing the fall of Saigon in 1975. There were no battles involving the US military after the fall of Saigon. There were no battles after the fall of Saigon.

It's a good read but why? It has a delicious Machiavellian twist (à la Turow). Where does it fall down? Its cast of beautiful people. The client, a 23-year-old med student is perfect — in brains, beauty and brilliance — she takes on a wizened criminal trial judge, an experienced criminal prosecutor and even her own lawyer and leaves them bewildered in her wake. Her court-appointed lawyer — the hotshot first from Harvard Law and one-time clerk to the C.J. of the US Supreme Court and an African-American who worked his way through Harvard by way of menial restaurant jobs. This stands him in good stead as he is now a gourmet cook (essential for the seduction of the heroine or was he the seductee?). I don't believe in Horatio Alger because I don't believe in Mother Goose. But hey! If John Grisham can build a fortune on impossibly beautiful people why not David Kessler. Not only does this gorgeous babe (the 23-year-old med student) show the judge, the prosecutor and her lawyer how to practise law, she's a dab hand at the psychology of jury selection.

The yarn is that the gorgeous babe is charged with the poisoning murder of an

Irish nationalist terrorist living in New York who has avoided extradition back to England to face banking-murder charges, and at her trial, she asserts her constitutional right to represent herself — she has the readies but declines to hire a lawyer (boo! hiss!) and she refuses the offer of a court-appointed lawyer — pursuant to *Gideon* v. *Wainwright* 372 US 335 (1963). Nonetheless, our African-American Harvard Law hotshot is appointed by the Court as a "stand-by counsel" pursuant to *Faretta* v. *California* 422 US 806 (1975) where Blackman J. noted that "[i]f there is any truth to the old proverb that 'one who is his own lawyer, has a fool for a client,' the Court . . . now bestows a constitutional right on one to make a fool of himself". Hence the novel's title.

By-plays to the plot make reference to the *modus operandi* of the IRA and other nationalist groups and there is a delicious incident wherein the heroine is the victim of a mugger while jogging in Central Park that is reminiscent of the cold-blooded manner in which the young nurse Jenny (Garp's mother) deals with a masher in the darkened movie theatre in John Irving's *The World According to Garp*. I suppose deep down many of us enjoy the vicarious pleasure provided by the "subway vigilante" Bernard Goetz or the fictitious Hollywood role played by Charles Bronson in *Death Wish*.

The splinter nationalist group from which the heroine's victim came wishes to avenge his death. The mainstream IRA, wishing to retain American financial support, must ensure that no Irish nationalist violence spreads to the US and consequently there is an assassin seeking to do the heroine in and another from the IRA who must fail the assassin. Thus, it is imperative that both attend at the heroine's murder trial. But the trial is a well-attended media circus. How to ensure a seat? Both of them "paid more than a thousand dollars to buy their tickets on the black market from ticket touts. The touts had effectively offered money to people who weren't interested in the trial to persuade them to enter the lottery for tickets with the promise that those who won tickets would be offered even more money to part with them. It was ironic that a criminal trial should have given rise to such corruption on the very doorstep of the Halls of Justice, and typical of New York City that nothing was done about it".

I dunno whether it constitutes good literature but it is a good read. Is it good value? Forty bucks for 240 pages of the author's imagination seems a bit stiff; certainly when compared to $30 for the 500 pages Jon Harr's *A Civil Action* (previously reviewed in these pages). How does one assess the hire rate for a labourer giving us the product of his imagination against the other whose story was already there yet required extensive legwork to unearth it? I leave that question to the reader.

Briefless

## Unjust Enrichment

**By P. Davenport and C. Harris**
**The Federation Press, 1997**
**pp. i–x, 1–132**
**Bibliography 133–137**
**Index 138–142**

THE doctrine of unjust enrichment and its modern application was given a significant impetuous by the High Court's decision in *Pavey & Matthews Pty Ltd* v. *Paul* (1987) 162 CLR 221. Indeed it could be argued that *Pavey* and the subsequent High Court decision in *David Securities Pty Ltd* v. *Commonwealth Bank* (1992) 175 CLR 353 have established the true place of the law of unjust enrichment as a unifying principle which underpins (or supersedes) a number of discrete causes of action and doctrines such as indebitatus assumpsit, quantum meruit and quasi or implied contract.

As the authors point out the doctrine of unjust enrichment already has a significant body of case law establishing clear principles upon which a claim for unjust enrichment can be made. Consequently the doctrine cannot be seen as a mere idiosyncratic mechanism for providing a claimant with what is "fair" or as an excuse to adjust (in an ad hoc way) a bargain made between parties.

Thus, it is necessary for a claim based on unjust enrichment to demonstrate:

1. That one party has received a benefit;
2. That benefit has been derived at another's expense;
3. That it would be unjust to allow the first party to retain the benefit; and
4. That there are no bars to such a claim, such a valid and enforceable contract that would override the first party's rights to recover on account of the benefit given to the other party.

Each of these requirements is discussed in Chapter 5 and the further problem of "Valuing the Enrichment" is discussed in Chapter 6.

For those involved in the construction industry, albeit with a technical bent toward legal matters, the work will be of great interest. Chapters 7, 9, 12 and 13 are particularly relevant, dealing with "Restitution and the Building Industry", "Termination by Repudiation", "Work outside the Scope of the Contract" and "Sub-contractors" respectively. Further, over time it is reasonable to believe that the doctrine of unjust enrichment will spread itself through many other branches of the law. For instance, in *State Bank of New South Wales* v. *Federal Commissioner of Taxation* (1996) 62 FCR 371, the Federal Court accepted that delay in payment of moneys may constitute an unjust enrichment and that as a general principle, where it is necessary to do justice between the parties, interest may be ordered to be paid by way of monetary restitution.

This work is a pocket guide to this newly evolving branch of the law. For the practitioner the work is invaluable and is enhanced by the chapter providing various suggestions as to the form pleadings may take in relation both to bringing and defending unjust enrichment claims.

This work, although small in size and specialist in application, is a worthwhile addition to the professional library for all those involved in commercial law. Certainly those in the construction industry are at the forefront of the legal development of the doctrine of unjust enrichment, although an understanding of the doctrine of unjust enrichment and its potential applications will be indispensable to a wide range of business and legal situations.

P.W. Lithgow

## Admiralty Jurisdiction: Law and practice in Australia

**By Dr. Damien J. Cremean**
**The Federation Press, 1997**
**pp.(i)–(xxvi), 1–238 hard cover**

IT is approaching the ten-year anniversary of the commencement of the Australian statutory Admiralty regime. While much of Australian Maritime Law is based upon English law, and is perhaps still controlled by the English Protection and Indemnity Clubs, Australian circumstances have begun, and will continue, to develop a distinct reference to the Asia–Pacific region.

*The Admiralty Act 1988* (Cth) was first annotated by Hetherington in 1989. Dr.

Cremean's book is by no means a simple annotation but is a thorough text dealing with all aspects of the Admiralty Act. His work continues the fine tradition of learned legal writing from members of the Victorian Bar.

The book commences with the useful introduction and potted history of Admiralty jurisdiction in this country. The Australian court system and particular issues of jurisdiction are dealt with in detail. Important decisions on jurisdiction and the interpretation of the Act such as the *Owners of the Ship "Shin Kobe Maru"* v. *Empire Shipping Company Inc.* (1994) 181 CLR 404 and *Port of Geelong Authority* v. *The Ship "Bass Reefer"* (1992) 109 ALR 505 are dealt with in some detail.

Chapter 3 of the text is an encyclopaedic analysis of admiralty claims dealt with by reference to the provisions of section 4 of the Admiralty Act. To practitioners in the area of Maritime Law, the substance of this text is invaluable. Dr. Cremean has compiled an impressive array of authorities to illustrate, describe and support each category of claim and each type of dispute which might arise under, or in connection with, the Admiralty jurisdiction.

In his Preface, Dr. Cremean states that the law is as available to him on the 1 May, 1997. Indeed, Dr. Cremean has included all of the most recent and important cases in this area of the law. For example, the book discusses and explains the most recent (and controversial) arrest and sale cases. See *Marinis Ship Suppliers Pty Ltd* v. *The Ship "Ionian Mariner"* (unreported Federal Court of Australia, Ryan J., 5 September 1995), *Morlines Maritime Agency Ltd* v. *The Ship "Skulptor Vuchetich" and Others* (1996) 136 ALR 206, *Patrick Stevedores No. 2 Pty. Ltd.* v. *M.V. Skulptor Konenkov and Others* (1996) 136 ALR 211 and *Den Norske Bank (Luxembourg) S.A.* v. *The Ship "Martha II"* (unreported Federal Court of Australia, Sheppard J., 6 March 1996).

The book is most useful for current practitioners, not only in the area of Maritime Law, but in general commercial practice as well. Over 60 pages of the book are devoted to the detailed consideration of practice and procedure, including illustrations taken from case law in various jurisdictions. The book also includes useful precedents covering not only cargo claims but also mortgage, collision, salvage and other areas.

In order to ensure the book is a "one stop shop" in relation to the maritime field, it includes the full text of the Admiralty Act 1988 and the Admiralty Rules.

*Admiralty Jurisdiction: Law and Practice in Australia* is highly recommended as an expert and authoritative text in the field of Admiralty law.

S.R. Horgan

# Conference Update

**11–17 January 1998:** Cortina D'Ampezzo, Italy, Europe Pacific Law Conference. Contact: Karen Prior. Tel: (07) 3839 6233, Fax: (07) 3358 4196. PO Box 843, New Farm, Qld 4005, e-mail: helix@thehub.com.au

**28 June–3 July 1998:** Lake Como, Italy, Europe Asia Legal Conference. Contact: Karen Prior. Tel: (07) 3839 6233, Fax: (07) 3358 4196. PO Box 843, New Farm, Qld 4005, e-mail: helix@thehub.com.au

**9–15 August 1998:** Mt. Hotham, Victoria, The Eye & The Law — A Medico-legal Conference. Contact: Karen Prior. Tel: (07) 3839 6233, Fax: (07) 3358 4196. PO Box 843, New Farm, Qld 4005, e-mail: helix@thehub.com.au

**9–16 January 1999:** Cortina D'Ampezzo, Italy, Europe Pacific Law Conference. Contact: Karen Prior. Tel: (07) 3839 6233, Fax: (07) 3358 4196. PO Box 843, New Farm, Qld 4005, e-mail: helix@thehub.com.au

# It's a beauty, gal, no worries, it's just a defendant we need

IT was in the vast and sunlit reaches of the Jordan hinterland,
That the man had first approached me with his wild and wanton plan.
"It's a beauty, Gal, no worries, it's just a defendant that we need."
I've been doing these forever in the quest to get a feed.

It's got the lot this one and some drama for the Court,
Loss of eyes, and grog, and cops to make you snort.
Happened up in Wallace Country where pain and thirst abounds.
Fella took a pasting after consuming a hundred rounds.
On to his homeward track a stony wall had found its way,
Although much distance from the track a hundred years had it stayed.

The fog it was, the demon fog which caused the misunderstanding.
The demon grog, the demon grog was never in contemplating.
Sue the fog, sue the fog was the constant refrain,
But the lawyers were wary, where's the policy they'd claim.

But for Jordan this produced especial disdain,
"Just up and at 'em Gal, I know my domain."

And then the day did approach for Judicial resolution,
And nothing was going for fog-like pollution.
And the cracks had arrived to deliver the sword,
For Dickie and Jensie were hot with the horde.
"It's a beauty, Gal, no worries, but it's a defendant you need",
I'll bet you on this one you won't get a feed.

But the redoubtable Jordan remained unfazed till the time,
When the Learned Trial Judge recited the line.
"It's a beauty, no worries, it's just a defendant you need."
But a jury we had and witnesses we called,
From the gaols and the pubs till all was forestalled.
And although Dickie was tricky and Jensie was cool,
They were no match for Jordan the man who walks tall.
When the jury filed back its history now to read,
That a defendant you had, and a feed, sir, indeed.

Peter J. Galbally

# Leo now at Ludlows

Gentlemen barristers have a new hairdressing service available in nearby King Street. Leo Di Valentino, a barber with a considerable following from his former snipping grounds in the eastern end of the city, is now established in the west or 'big end' of town at Ludlows, the menswear shop at 146 King Street, with barber's salon at the rear.

Starting at the Southern Cross, and then his own premises, both in Exhibition Street, Leo's large, loyal clientele has included the state political leaders, Messrs Bolte, Rylah, and Hamer on a long-term term basis; Mr. Billy McMahon, when federal treasurer ("one time, he didn't have any money to pay"); Mr. Rupert Murdoch, heading up a large Herald and Weekly Times contingent; visiting sportsmen including the golfers Lee Trevino and Gary Player; and hundreds of ordinary punters who vouch (in their own words) for Leo's native Italian sculpturing abilities, and agreeable personality.

Ludlows salon, a short walk from all Chambers, is well-equipped to make the most of Leo's talents and experience, and boasts an old-fashioned Belmont barber's chair equipped with luxurious headrest for shaves and beard trims, and includes a basin with grab handle for shampoos. The service includes the use of Trumpers renowned West End toiletries.


*"Look up Leo at Ludlows"*